Human Rights Protection in Global Politics

Responsibilities of States and Non-State Actors

Edited by **Kurt Mills** and **David Jason Karp**

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Foreword

This is a valuable collection both because of the freshness of the topic and because of the broad interdisciplinary approach adopted by the editors and authors. Their contributions range from the conceptual to the practical, from insights about the nature of responsibility and of rights themselves to the relative merits of various policy alternatives for fulfilling and advancing them. Both my academic and practitioner sides benefitted from this timely and useful volume.

In policy circles, it has become commonplace to attest to the critical role played by non-state actors and, particularly, civil society both in developing and in implementing international norms. Representatives of governments and international institutions alike feel compelled to praise the contributions of their civil society partners and to underscore how much time and attention they devote to building those collaborations. Political motivations aside, those attestations reflect the degree to which various kinds of public–private partnerships have become integral to the ways in which public policy is formed and delivered, as well as monitored and assessed. Yet, despite the widespread acknowledgment of the place of non-state actors in international and domestic affairs, whether as spoilers, advocates, healers or service providers, the serious study of the dynamics and implications of these complex and changing relationships lags far behind the rhetoric.

This is true even in the study of human rights and of the responsibility to protect (R2P), areas in which both the creation of the norms and the pursuit of them as public policy priorities flow largely from the impetus of transnational civil society. A core query in this volume – who is responsible for the implementation of human rights and R2P principles? – is one that haunted my five-year tenure as the United Nations' Special Adviser for the Responsibility to Protect (2008–2012). In every situation that we addressed, the role of non-state actors – for good or ill – was prominent, sometimes even decisive. We depended on our NGO partners for helping to build and sustain political support with the Member States, as well as to help to explain the Secretary-General's implementation strategy to the media, the academic and think tank communities, and to public stakeholders around the world. In societies at risk of mass atrocity crimes, rallying and working with local civil society was often essential to successful prevention of such crimes or of their

incitement. On the other hand, in places where civil society was underdeveloped or suppressed, the chances of heading off such crimes or of preventing their reoccurrence were far less promising. In my experience, this was the most critical or one of the most critical factors in determining the record of success and failure in implementing R2P principles in specific situations.

It is perhaps ironic, therefore, that the three paragraphs (138–140) of the Outcome Document of the 2005 World Summit containing the historic international commitment to the responsibility to protect make no mention of non-state actors or civil society.[1] Given that this was the consensus declaration of one of the largest gatherings of heads of state and government, however, makes this statist oversight less surprising. To my reading, the references to the 'international community' in paragraphs 138 and 139 were intended to encompass civil society as well as governments and international institutions. All of the reports and statements that I crafted for the Secretary-General made this assumption and the Member States never objected. Some delegations, however, did raise questions about the appropriate place of civil society groups in assessing whether such crimes had been committed and in deciding how governments and intergovernmental organizations ought to respond.

I made a bigger leap of faith, however, in proposing to the Secretary-General that he assert that non-state armed groups that control territory, as well as national authorities, have the responsibility to protect populations by preventing the four specified crimes and their incitement.[2] It seemed to me evident that some of the worst atrocities had been and were being committed by armed groups, whether in Sierra Leone, Kenya, the Democratic Republic of the Congo (DRC), or Somalia, among others. Yet the initial R2P paradigm, as laid out brilliantly in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), focused solely on the scenario of repressive governments committing atrocities against innocent civilians.[3] The 2005 Outcome Document followed that path, saying nothing about cases in which governments did not control all of their territory and armed groups were committing horrendous atrocity crimes, such as mass rapes and gender-based violence. Nothing was said, as well, about mass atrocities committed by terrorists, which was particularly ironic given that the ICISS report was released at the time of the 9/11 attacks. My assumption, which fortunately proved correct, was that Member States would not object to a reformulation that recognized that they were not always on the wrong side of such acts. In practice, we later had to address several situations, such as in Kyrgyzstan, Mali, South Sudan, and the

Central African Republic (CAR), in which non-state actors had committed mass atrocities. As the one-sided violence in Syria morphed into a civil war, the opposition began to attract elements that committed atrocity crimes, even though the situation initially fit the classic R2P mold of excessive violence by the government against the civilian population.

One of the rewards of reading this volume was to see the extent to which many of the questions it addresses from an academic perspective paralleled the challenges and dilemmas we confronted in trying to implement the responsibility to protect in practice. The authors, as we did as practitioners, struggle conceptually with how to fit non-state actors into formulations and norms first developed solely with states and governments in mind. As several of them point out, in the larger spectrum of human rights, the responsibilities of governments and non-state actors are distinct. Both have obligations, but those of governments are more specific and demanding. That would be expected both because protection from abuse by governmental authorities was the prime motivation for the development of human rights conventions and because they were largely codified in the years before scholarly and official attention turned to the abuses committed by non-state actors. R2P principles have emerged more recently, as noted above, and lack the full expression in international legal documents that other human rights protections have enjoyed.

Some of the authors also address the bureaucratically and politically sensitive issue of the relationship between R2P and the larger human rights enterprise. It seemed to me, at least, that mass atrocity crimes occupy the most extreme end of the human rights spectrum. The persistence and, especially, the worsening of other human rights abuses, may be a precursor to the commission of mass atrocity crimes down the line. But this has not always been the case, as there is not always a direct correlation between human rights performance and a society's proclivity to mass atrocities.[4] There may be country situations, for instance, where repressive regimes are chronic human rights abusers but their dominance of society is so complete as to produce a certain degree of stability, at least over the short run.[5] It is sometimes said that the best predictor of genocide is past genocide. This assertion may not be entirely accurate, but experience tells me that a history of mass atrocity may be as good or even a better indicator of the risk of a reoccurrence than are current human rights conditions.

The raft of tools, procedures, machinery, and expertise developed over the years to advance human rights can be, and has been, enormously helpful to the prevention of R2P crimes. The Office of the

High Commissioner of Human Rights (OHCHR) and other human rights machinery proved to be the most consistent partners in our efforts to implement responsibility to protect principles when I had that responsibility at the United Nations. Yet it was also important to have a relatively autonomous voice in the UN hierarchy for the prevention of mass atrocities, because the set of questions and concerns that come with an R2P perspective is distinctive. It entails looking at crises through a unique lens, one that benefits from but is distinct from that of human rights or humanitarian affairs.

Some of the typologies raised in this book in a human rights context do not fit an R2P context quite so aptly. The traditional human rights duties of respect, protect, and fulfill, for instance, seem out of place in the heavily preventive lexicon of the responsibility to protect, as the heads of state and government in 2005 pledged to protect populations by preventing the four crimes and their incitement. In terms of human rights obligations, one chapter stresses the importance of the intentions of the actors. Under the 2005 Outcome Document, on the other hand, the international community is to respond in a 'timely and decisive manner' when national authorities 'are manifestly failing to protect' populations from the four crimes, regardless of their intentions or capacities. The critical point is how populations are faring, not how hard governments are trying. An intriguing and recurring theme in the book is its effort to view responsibilities through prospective and retrospective lens. To some extent, R2P's dual emphasis on prevention and accountability would fit this typology, but it leaves out the equally critical stress in R2P doctrine on active and, if necessary, coercive measures to protect populations in a 'timely and decisive manner'. Also, in practice I found that there is a grey area in which one is trying to find ways to stem ongoing violence even while seeking to prevent its escalation. Moreover, preventive efforts – particularly operational ones – are selective and targeted responses to certain worrisome developments.

Chapter 1 by Karp and Mills, on the other hand, very helpfully raises the Hippocratic 'do no harm' standard as both a 'prospective duty of office' and a 'retrospective standard of practice' (p. 8). There could be no better advice to anyone about to undertake responsibilities related to prevention and protection, whether in a governmental, intergovernmental, or independent capacity. Another chapter underscores the utility of sustaining R2P arguments and principles, not simply voicing them in passing. This is sound advice whether one is engaged in norm building or in addressing a specific crisis. Now that almost all – if not

all – Member States have come around to accepting R2P in principle, the danger of lip service disguising itself as policy commitment is all too real.

At various points, the editors and authors raise the seminal question of who qualifies as a 'non-state actor'. Like the matter of who populates the 'international community', this is more than a theoretical or conceptual query. Presumably, actors share at least two characteristics: they have agency and they make a difference. They are, in essence, the stakeholders for R2P principles. From the outset, it seemed to me that it would be wrong either to think that only states had R2P responsibilities, as noted above, or that they should be seen as opaque collective entities. Such a perspective would tend to minimize individual responsibility, something which international law has long recognized as central to establishing accountability. I was pleased that Secretary-General Ban agreed to include individual responsibility as an important plank of his implementation strategy.[6] Individuals, of course, may act in state, interstate, or non-state capacities.[7] They are, we should not forget, the ultimate actors and decision-makers when it comes to preventing or committing mass atrocity crimes. In many ways, the research, concepts and findings presented in this volume will help to remind us of this simple truth: people commit atrocity crimes and they can stop them.

Professor Edward C. Luck
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New York
12 July 2014

Notes

1. By consensus, the General Assembly adopted the Summit Outcome in resolution 60/1. The Security Council reaffirmed the provisions of paragraphs 138 and 139 in paragraph 4 of its resolution 1674 (2006) and it has frequently cited the responsibility to protect in subsequent resolutions concerning both thematic issues and specific situations. According to paragraph 138, 'the international community should, as appropriate, encourage and help States to exercise this responsibility [to prevent genocide, war crimes, ethnic cleansing, and crimes against humanity, including their incitement] and support the United Nations in establishing an early warning capability'. Paragraph 139 asserts, among other things, that 'the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations' from these four crimes.

2. The need to protect populations from such crimes by non-state actors as well as by states has been a frequent and consistent theme of Secretary-General Ban's statements and reports on R2P. See, for instance, paragraphs 40–42 of Report of the Secretary-General, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009, pp. 18–19.
3. Report of the International Commission on Intervention and State Sovereignty*, The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).
4. Where human rights are respected, mass atrocity crimes are unlikely to occur. That does not mean, however, that in societies with relatively poor human rights performance, mass atrocities are likely to be committed. Other factors also appear to matter, though more study and analysis are needed.
5. Totalitarian regimes, such as in the Democratic People's Republic of Korea (DPRK), however, face few checks on their capacity to carry out such mass crimes, as the 2014 report of the Commission of Inquiry documented in painful detail. United Nations, General Assembly, Human Rights Council, Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, A/HRC/25/63, 7 February 2014.
6. See, for instance, paragraph 27 of Ibid., p. 14.
7. For a more in-depth discussion of what we call the Individual Responsibility to Protect, see Edward C. Luck and Dana Zaret Luck, "The Individual Responsibility to Protect," in *Reconstructing Atrocity Prevention*, Sheri Rosenberg, Tibi Galis and Alex Zucker, eds. (Cambridge University Press, 2015).

Preface

This book began its life as a selection of papers from a conference entitled 'Protecting Human Rights: Duties and Responsibilities of States and Non-State Actors'. This conference was hosted by the Glasgow Human Rights Network (convened by Kurt Mills) at the University of Glasgow, held in June 2012, and was sponsored by the human rights sections of the International Studies Association, American Political Science Association and International Political Science Association. That conference received more than 200 paper submissions, with 60 papers presented. We invited several of the authors – whose papers we thought already fit together particularly well – to present second drafts at an International Studies Association (ISA) Catalytic Research Workshop of the same name, held in San Francisco in April 2013, after the editors won a competitive process to hold that workshop. This 'pre-ISA' workshop, at which Toni Erskine was an incredibly helpful discussant (thank you!), had three main objectives: to encourage authors to reflect on the links between their own chapter and the book project as a whole (including the development of synergies with the other chapters); to improve the stand-alone quality of each chapter through peer feedback and editorial review; and to clarify the arguments of the book as a whole. The result of this three-round process of collaboration and revision is a book that benefits greatly from authors having closely read and commented on each other's work. The process also has fused the various pieces of work into a project that is coherent while simultaneously allowing debate between different points of view. Above all, we wish to thank the authors for their dedication, enthusiasm, and professionalism, which made editing this book an incredibly enjoyable and uniquely smooth process.

Kurt Mills
David Jason Karp

Contributors

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Kurt Mills is Senior Lecturer in International Human Rights at the University of Glasgow. He previously taught at the American University in Cairo, Mount Holyoke College, James Madison University and Gettysburg College, and served as the Assistant Director of the Five College Program in Peace and World Security Studies at Hampshire College. He is also the founder and Convenor of the Glasgow Human Rights Network. His work addresses questions related to humanitarianism, international criminal justice and the responsibility to protect, with a regional focus on sub-Saharan African. He is the author of *Human Rights in the Emerging Global Order: A New Sovereignty?* and numerous articles appearing in, among other places, *Human Rights Quarterly, Journal of Human Rights, International Journal of Human Rights, Global Governance, Global Responsibility to Protect, Civil Wars, Peace Review, Global Society, and International Politics*. He is the founder and two-time Chair of the International Studies Association Human Rights section and Vice-President of the International Studies Association.

David Jason Karp is Lecturer in International Relations at the University of Sussex. He was previously Lecturer in Politics at the University of Glasgow, and Teaching Fellow in International Relations at SOAS, University of London. His single-author book, *Responsibility for Human Rights: Transnational Corporations in Imperfect States* (Cambridge University Press, 2014), provides an analysis of the reasons why it might be appropriate to assign responsibility for human rights to any state or non-state actor, using transnational corporations as the major example for the argument. His work has appeared in peer-reviewed journals such as *Contemporary Political Theory*, the first issue of *International Theory*, and the *Review of International Studies*. He is co-editor of the *Journal of International Relations and Development* from 2012 to 2015.

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Tim Dunne is Executive Dean of the Faculty of Humanities and Social Sciences at the University of Queensland. He is also Professor of International Relations in the School of Political Science and International Studies. Previously he was Director of Research at the Asia Pacific Centre for the Responsibility to Protect. He has written and edited ten books, including *Terror in our Time* (with Ken Booth) published by Routledge in 2012. His most recent book is the 2013 co-edited collection (with Trine Flockhart) on *Liberal World Orders* published by Oxford University Press in association with the British Academy.

Michael Galchinsky is a Professor of English at Georgia State University, who writes about both international human rights law and human rights literature. On the law side, he is the author of *Jews and Human Rights: Dancing at Three Weddings* (Rowman and Littlefield, 2008), and articles on the law regarding the Israeli settlements, the global war on terrorism, and genocide prevention. His current project,

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Part I
Responsibility and Human Rights

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1

Introduction: Human Rights Responsibilities of States and Non-State Actors

David Jason Karp and Kurt Mills

The 2005 World Summit recognized the responsibility to protect. In one sense, this might be considered a normative revolution: a sign that the international human rights regime has reached a middle stage in a 'lifecycle' that has the potential to end in states' internalization of the obligations of human rights protection (Finnemore and Sikkink 1998). In another sense, however, this was just a re-statement and consolidation of a long list of human rights responsibilities states have already taken on. These have been applied inconsistently, even hypocritically, over the last 65 years, as the modern human rights regime has developed (Krasner 1999). Looking beyond the text of the World Summit resolution itself and into its meaning and implications for theory and practice, we can ask: what is the best way to explain and understand these developments?

The main theoretical frameworks that have been used to answer this question so far in political science and international relations (IR) have been largely state-centered. They draw from rationalist and constructivist explanatory accounts of why rules are created and how states can be expected to act in response to them in conditions of anarchy. Questions about the actual nature and content of the responsibility to protect human rights have been largely taken for granted: as straightforwardly agreed in international law, or as instantiated in contemporary diplomatic discourse and practice, or as representing obvious philosophical or religious principles and treated as exogenous to the main scholarly analysis. As a result, most of the cutting-edge work on the nature of the responsibilities that are linked to human rights has come from other fields, such as international law (Meron 2006; Steiner et al.

2007; Langford et al. 2013), philosophy (Rawls 1999; Beitz 2009), or sociopolitical history (Lauren 2003; Hunt 2007). IR scholars are increasingly interested in examining the interrelationship between empirical and normative research (Price 2008; Snidal and Reus-Smit 2008; Snidal and Wendt 2009). This process is only just beginning to occur with regard to the responsibilities and duties associated with international human rights. This book seeks to fill a gap in knowledge on the human rights responsibilities of various global actors, and of the special nature of human rights 'protection' alongside a broader range of human rights responsibility. It accomplishes this, in part, by incorporating contributions of authors who work in multiple disciplines in the social sciences and humanities, rather than only those who would self-identify as specialists in disciplinary IR. Rather than being tied to a narrow, positivist understanding of IR as a sub-field of empirical political science, this book defines the field to which it contributes as including perspectives from history, law, politics, philosophy and sociology, but one that is still unified by taking the international and global realms as the main objects of study. Part I of this book, which includes this introduction as well as a chapter by Mitoma and Bystrom, sets the stage for this attempt – in part by exploring the conceptual nature (as opposed to purely legal or practice-based nature) of human rights responsibility – which the rest of the book then follows up on by looking at particular global actors, issues and/or cases.

Part II of this book constitutes a challenge to the inherently positivist idea that human rights outcomes and violations need to be 'observed,' or at least observable, in order to begin to have a coherent discussion of responsibility and accountability (see, e.g., Sikkink 2008). Several of this book's chapters, but most prominently Bódig's, explain and engage with the 'respect–protect–fulfill' tripartite division of human rights duties that, since the 1980s, now underpins so much of international-legal human rights practice (Eide et al. 1984; Shue 1996). According to this tripartite division, 'respecting' human rights is defined in terms of a responsibility not to deprive individuals of (access to) their human rights; for example, refraining from torture or from disallowing freedom of conscience. 'Protecting' human rights is defined in terms of a specific responsibility, usually thought of as falling on governments, to ensure that third parties do not deprive individuals of (access to) their human rights; for example, having an effective and responsible police force and justice system. 'Fulfilling' human rights is defined in terms of further specific responsibilities to provide individuals with (access to) their human rights; for example, providing for health and education

services that cover all residents; providing food, water and shelter in the aftermath of a disaster.

A focus on observable violations as the main basis for determining human rights responsibility and accountability would mean that this responsibility is importantly retrospective: a human rights 'violation' happens, and then one looks after the fact at the chain of events and non-events that caused it in order to determine who is responsible. This can be contrasted, however, with prospective, *ex ante* duties that states have to individuals, 'regarding acts that must be performed, or forbearances that must be observed' (Erskine 2014: 117), irrespective of whether any harm is caused. Whelan's chapter engages with an explicitly prospective account of the duties – going beyond just human rights duties – that states have to people. Conversely, Gibney looks mainly at the retrospective determination of human rights responsibility. His chapter analyses judicial mechanisms that, by their very nature, can only hold states to account after there are facts available upon which judgments can be taken. However, his argument shows why, even from the angle of retrospective responsibility, a simplistic 'violations approach' is still deficient. By positing that there can be different degrees of human rights responsibility, based on factors *other than* solely observable harms that have been caused, his chapter rounds off the book's contribution to discussions about the complex nature of states' human rights responsibilities, especially as compared to how the latter are typically understood in contemporary international-legal and policy discourse.

As compared to the issue of state duties, even less attention in IR scholarship has been focused on the growing number of responsibilities accruing to non-state actors, particularly private actors. This is true despite the attention that this topic has already garnered in international law (Alston 2005; Clapham 2006), philosophy (O'Neill 2001; Pogge 2007) and international political practice (DeWinter 2003; Ruggie 2013). There is a range of institutional moral agents in international relations, beyond just states and those composed of states (Erskine 2003). This theoretical point has immense practical relevance. By focusing mainly or even solely on states' human rights duties, IR has by now fallen behind legal practitioners, activists and some states, who for the past ten years have accelerated the development of transnational and extra-territorial accountability for alleged human rights abuses committed by non-state actors (Teitel 2005; Karp 2009). IR scholars have a unique set of questions to ask about these developments. Legal and public-policy academics ask *how* effective regulation

does and can happen. Philosophers ask *which* moral duties to protect human rights would a range of actors have and how to distribute them. An IR perspective can, first, set recent developments in the context of today's actual world of states, quasi-states, international organizations and international nongovernmental organizations. There is already relevant (though contested) knowledge about the kind of world that we live in today, and about the kinds of actors and institutions that exist within it. This can be used to challenge both legal and philosophical assumptions about the human rights duties of non-state actors. Second, an IR perspective can empirically and critically investigate the kind of 'appropriate action' that activists are trying to prescribe; it can assess the potential consequences and implications of putting policy ideas regarding both state and non-state human rights responsibilities into practice.

Part III of this book responds to these gaps in some of the following ways. A chapter by Aaronson and Higham introduces and evaluates the United Nations Guiding Principles on Business and Human Rights (Ruggie 2011) in light of what the chapter's authors view as governments' failure to regulate non-state actors. Karp's chapter offers a different perspective, which looks at non-state actors as potential human rights protectors, in part by situating both these Guiding Principles and also the World Summit-recognized Responsibility to Protect policy framework (R2P) against a conceptual account of the nature of duties of human rights protection. González Correa's chapter critiques the currently proposed allocation of duties to businesses from yet a different angle: on the basis of a particular interactional understanding, which she views as incomplete, of the 'impacts' that private actors have on human rights victims. A chapter by Macbean and Nesossi interrogates the responsibilities of lawyers as particular kinds of non-state actors in China's authoritarian and great-power context. Finally, Matelski's chapter looks at education as a particular kind of human right for which both state and non-state actors (both domestic and international) may have responsibility in Myanmar's specific domestic context.

Part IV of the book looks explicitly at the World Summit-recognized 'Responsibility to Protect,' from the angle of the duties and responsibilities that are associated with that framework in theory, in policy and in practice. While there is a significant international relations literature in this area (Weiss 2007; Evans 2008; Bellamy 2009; Pattison 2010), much of it is focused on one aspect of the responsibility to protect – for the most part military intervention. With a few exceptions (Ferris

2011), this literature frequently does not look at broader responsibilities, especially in the humanitarian realm. Yet, all of these international declarations and norm-making activities raise as many questions as they answer about the willingness of relevant actors to live up to their responsibilities, as well as potential conflicts between responsibilities. Mills identifies the military intervention aspect of the responsibility to protect as one part of a suite of responsibilities the international community has developed to address mass atrocities, which also includes international criminal justice and humanitarianism. Labonte looks at the role of humanitarianism in situations where both the host state and the international community manifestly fail to protect civilians. The chapter by Galchinsky addresses the issue of prevention, partly in order to correct the tendency of IR scholars to focus on intervention, which is only one element or 'pillar' of R2P. In a parallel but distinctive vein, Dunne and Gelber examine international argumentation about responsibilities of human rights protection as an independently important form of action.

Overall, the book moves beyond the constraints of the Responsibility to Protect policy framework in order to examine more comprehensively the human rights duties and responsibilities accruing to both state and non-state actors. Together, the book's chapters build the argument that the existing literature on the idea of the responsibility to protect human rights is deficient, because: (1) it under-theorizes 'responsibility' and its various facets; (2) it incorrectly views the justiciability of human rights standards and a parallel focus on 'violations' of human rights as central to the notion of responsibility; (3) it focuses on state actors to the exclusion of the non-state actors who might also bear duties to protect human rights in theory and in political practice; (4) it under-appreciates the distinctions between humanitarianism and human rights, and between atrocity prevention and human rights protection.

The book as a whole also explores the tension between the prospective and retrospective aspects of the responsibilities of human rights protection. The book should leave readers with the impression that these two facets are each important, but that it is nevertheless crucial not to conflate one with the other as if there were no difference. For example, Gibney's argument that there can be gradations in the degree of one's human rights responsibility based on the intentions (a rough equivalent of criminal law's *mens rea*) of the wrongdoer only fully makes sense when thinking retrospectively; often, the whole point of assigning *prospective* duties is to say to someone 'you're going to be responsible if anything happens,' regardless of intent to do wrong, and regardless of the particular circumstances of particular cases. Ultimately,

however, these prospective and retrospective aspects are not necessarily in tension. In other words, they do not necessarily represent radically different concepts of responsibility for human rights protection. As an analogy, think about the mantra 'do no harm' that is so central to doctors' Hippocratic Oath. This is both a prospective duty of office and a retrospective standard that can be used after the fact to judge poor practice. Similarly, the prospective and retrospective aspects of the responsibilities of human rights protection can be viewed as different but equally important facets of the same thing. Who is responsible (prospectively) affects whether they can legitimately be held responsible (retrospectively) for failures of human rights protection. Retrospective accountability can take into consideration failures to act preventively and proactively (prospectively), if and when one has responsibilities to do so, rather than only failures to react to problems after they have arisen.

This interactivity between the prospective and retrospective aspects of the responsibilities of human rights protection is established by the book as a whole, but it is also clear in several of the book's individual chapters. For example, the chapter by Macbean and Nesossi explores the interplay between the specific duties of the office of lawyers 'as lawyers' (prospective responsibility), and how they should advise their clients and/or take other public actions when faced with specific cases, contexts and circumstances (retrospective responsibility). A different kind of interplay is explored in Bódig's chapter, when he suggests that social ideas about whether (and which) 'violations' of human rights can be concretely proven retrospectively, may ultimately condition and constrain the kinds of prospective obligation that are politically feasible to assign.

Organization of the book

With this general introduction to the book's key themes in place, we now explain in greater detail how this book is organized, and outline the specific arguments that its chapters develop. The book's four parts first address the broad issue of what we mean by responsibility, and then go on to examine human rights responsibilities of various types of actors: state, non-state and supra-state. These parts have been adopted as a necessary organizational device, which (we believe) creates a nice flow from one chapter to the next, and gives the book coherence. That said, the material in each of the book's four parts is not entirely discrete. There could be grounds to put any particular chapter in more

than one part of the book. In fact, we believe that it is a significant strength of this book that many of its chapters explore and engage with the themes of the book as a whole, rather than narrowing the scope of the analysis to a particular one of the book's 'parts' or to a particular kind of global actor. The book analyzes how to situate responsibility for human rights and how such responsibility has been implemented in practice.

Responsibility and Human Rights

In their chapter entitled 'Humanitarianism and Responsibility in Discourse and Practice,' Glenn Mitoma and Kerry Bystrom note that there seems to be human rights and humanitarian responsibility everywhere: from a responsibility to protect people in Libya to a responsibility to provide humanitarian assistance in Haiti. The actors that seem to have acquired this responsibility are wide and varied, including states, international governmental organizations, nongovernmental organizations and even, it appears, international celebrities. They note the evolving understanding of sovereignty as responsibility. Through the lens of humanitarianism, they investigate different understandings of responsibility and note how 'responsibility' has come to dominate the humanitarian endeavor. In developing their understandings of humanitarian responsibility, they also make a distinction between the 'maximalist,' 'absolutist,' long-term human rights project, and the 'limited,' 'flexible,' 'immediate' practice of humanitarianism.

They posit and then disassemble four concepts of responsibility: causality and liability, bureaucracy and duty, power and philanthropy and a radical ethical obligation to others. Causality requires a retrospective empirical analysis of a situation and entails the deployment of data to identify how human suffering has been allowed to happen. Actors, such as the UN, then respond – or not, if adequate data is not available. Yet, humanitarian actors now also consider their role in potentially exacerbating suffering and thus are called upon to 'do no harm' by carefully reflecting upon their actions. They have thus taken on further causal responsibility. Not only do they respond when others cause suffering, but they also have humanitarian responsibilities, which might in fact cause suffering to remedy other suffering. States may also have this responsibility when, for example, they cause 'collateral damage' – sanctions or other actions intended to affect the behavior of a state may also lead to harming innocents. This type of responsibility is also there behind the fair-trade movement and other forms of ethical

consumerism. Bureaucratic responsibility locates responsibility prospectively in official mandates, where the focus becomes not justice but efficacy. The question is: 'how can my office/department/organization best carry out this mandate we have been given?' Mitoma and Bystrom claim that this responsibility is bureaucratically based rather than normatively based; though the push to create standards and accountability for humanitarian actors is also tied to normative self-perceptions of humanitarians. Once a duty is established, there is a normative basis for evaluating how well those duties have been carried out. A responsibility based on power combines a retrospective look at who is powerful with a prospective assignment of specific duties to whoever ends up meeting that description. It can provide a basis for duties of charity; for example, one's individual wealth creates a responsibility for one to use it to help the less well off. It also might lead powerful countries to use that power for good – although the same line of thinking arguably led to the colonial adventures of the 19th century and, indeed, the neocolonial interventions of the 21st. Imperialists typically thought of empire as involving responsibility (Easterly 2006). This gave way only very recently, in the middle of the 20th century, to the normative principle of sovereignty as equality, which accompanied the world's largest wave of decolonization. These are points that advocates of 'sovereignty as responsibility' should not forget, as they aim to introduce new changes into global structures of norms, partly in the form of new (or at least revamped) 'international' obligations. The final responsibility, unlike the more circumscribed versions described above, is unlimited. It is rooted in the idea that we are connected to others and have a duty to help them, and indeed potentially to put others above oneself. It requires not high-flying ideals, but a determination to do what is necessary in a particular situation to help the other. It means being pragmatic.

Mitoma and Bystrom finally examine some of the failings of the legalized, bureaucratized human rights regime, which has come to dominate international moral discourse. They argue that perhaps we need to think more about responsibilities than about rights. That is, instead of specifying more rights, perhaps we need to specify who has what responsibilities to ensure that rights are upheld (see also O'Neill 2000: Chapter 6; O'Neill 2001). This can be married to legalization to create political space for holding actors to account for their responsibilities. Overall, they argue, while the current conceptualization and implementation has many positive features, what is needed is a broader situating of responsibility to the world, which strives toward more global justice

rather than toward narrow, unilateral acts for a particular other. The chapter by Mitoma and Bystrom, together with the content of the current introductory chapter, constitutes Part I of this book.

States' Responsibilities: Beyond 'Violations' of Human Rights

The three chapters in Part II examine state responsibility for human rights from legal, institutional and philosophical perspectives. They seek to answer the question of which responsibilities states have, how these responsibilities have developed and how states might be held accountable. Each chapter addresses these questions in its own specific way.

Mátyás Bódig, in 'Doctrinal Innovation and State Obligations: The Patterns of Doctrinal Development in Jurisprudence of the UN Committee on Economic, Social and Cultural Rights,' looks at how understandings for state responsibility for economic, social and cultural rights have developed at the UN. In particular, he analyzes how the UN Committee on Economic, Social and Cultural Rights (CESCR) has attempted to conceptualize state responsibility in this area. He argues that the focus within the committee has been to create a framework whereby economic, social and cultural rights are justiciable: capable of being brought before, and ruled on, by a court. While it has been recognized for a long time that civil and political rights are justiciable – indeed there is a vast array of mechanisms within Europe and elsewhere for bringing such claims before a court – economic, social and cultural (ESC) rights have been more problematic and are not necessarily seen as justiciable. However, this is changing and the CESCR has addressed both domestic and international justiciability of ESC rights, although Bódig focuses on the latter. He argues that the work of the CESCR has exhibited what he calls a violationist bias. That is, it has focused on how to identify ESC rights violations and has tended to push the limits of what states have actually agreed to. It also ignores the fact that states are key partners in human rights monitoring.

Bódig introduces the idea of minimum core obligations – that states have at least a minimum obligation with regard to ESC rights – and notes that obligations conceptualized in this way would be justiciable. Yet, this raises the issue of progressive realization: states have an obligation to implement human rights to a greater and greater degree as they are able to do so. Does a minimum core undermine this obligation? Further, if we focus on the minimum core, then attention will be placed on developing, rather than developed, states. He turns to the development of the

idea of the tripartite division of 'respect,' 'protect,' and 'fulfill' responsibilities, as also introduced earlier in this chapter: the argument that states must respect human rights (that is, not violate them), protect individuals from human rights violations, and actively fulfill a human rights requirement (such as providing adequate food to individuals who lack it). Such conceptualization has been very important in CESCR reasoning, becoming 'the classical formulation of the multiplicity of human rights obligations.'

Whereas Bódig briefly considers state legitimacy, Daniel Whelan, in 'Indivisible Human Rights and the End(s) of the State,' more directly considers questions of state legitimacy and, more specifically, the 'ends' of the state. He rejects the minimum core obligations framework as too narrow and as not reflective of the full range of state human rights obligations. He discusses, and places within historical context, different approaches to establishing the indivisibility of human rights, noting that justiciability is at the core of debates over whether or not human rights are indivisible. He takes note of the violationist bias introduced by Bódig and argues that this approach can only address the first two of the respect–protect–fulfill obligations. Whelan then centers on his core argument, that, by reconceptualizing the ends of the state, we can tie the state to the third obligation: to fulfill. He argues that rather than the Lockean ideal of the state as the protector of human rights, one should see the state as having a much wider goal: that of 'securing autonomy, self-determination, and welfare.' If we accept this, then the state acquires greater obligations to fulfill ESC rights in order to create an environment that facilitates human self-determination and welfare, providing a historical look at developments in the 1940s, which would have pushed conceptualization of state obligations in this direction.

Mark Gibney considers a different approach to state responsibility for human rights in 'Beyond Individual Accountability: The Meaning of State Responsibility.' Gibney notes that there are two ways to determine accountability for human rights violations by states. The first, and most prominent, is individual accountability. That is, individuals are held accountable through courts, tribunals and other mechanisms for violations they have committed on behalf of states. The second, less developed way, and the focus of the chapter, is by holding the state itself accountable (see also Lang 2007). What this means in practice is not as straightforward as individual accountability. Gibney argues that the aim of assigning state responsibility should be to initiate a dialogue in the violating state such that the conditions that led to the violation in the first place are eliminated and further violations are prevented – in

the same way that individual international criminal responsibility is supposed to deter violations (although the evidence for such a deterrence effect is minimal at best). He notes that the way state responsibility has been assigned through courts such as the International Court of Justice does little to further this goal. The ICJ has not adequately applied the correct standards in cases such as *Bosnia vs. Serbia*. Instead, states are given a judgment, they pay a fine and move on, not altering or reflecting on their behavior. Courts such as the European Court of Human Rights, which rule on domestic conduct of members states, may become little more than claims courts, where every bad thing that happens to a person is labeled a human rights violation. Further, rather than initiating a national dialogue, again states may just ignore the implications of a ruling and may try to undermine or call into question the court itself, as is happening in the United Kingdom at the moment.

Responsibilities of Non-State Actors

Conceptualizations of human rights and responsibility for human rights have, until very recently, been very state-centric. Most academic and practical work has been focused on state violations and state responsibilities. Yet, recent years have seen a surge in discussions about which responsibilities non-state actors may have for human rights. Readers get a taste of this in the Mitoma and Bystrom chapter, but the five chapters in Part III of this book engage much more deeply with the question of non-state actor responsibility. The first three chapters look especially (though not in all cases exclusively) at businesses, while the last two examine further types of non-state actor responsibility.

Susan Aaronson and Ian Higham, in their chapter 'Putting the Blame on Governments: Why Firms and Governments Have Failed to Advance the Guiding Principles on Business and Human Rights,' adopt what is perhaps the most orthodox understanding of the nature of human rights 'protection' responsibilities of any of the book's chapters. They focus on duties of states to govern third-party (especially non-state) conduct with regard to human rights within their domestic sphere. This is indeed precisely what the doctrinal respect–protect–fulfill trichotomy investigated in Bódig's chapter has in mind. They argue, against a widespread view that the UN Guiding Principles (GPs) on Business and Human Rights have been a great success due to their endorsement by a range of states and large firms, that the GPs have in fact been a failure so far because commitment has not translated in any meaningful way into implementation and/or compliance. Although both states and business could certainly do more to improve human outcomes, this does

not mean that all parties are equally responsible for doing so (in general) or for implementing the GPs (in particular). Aaronson and Higham place the responsibility for more robust implementation of 'business and human rights' standards squarely on governments rather than on companies themselves. Interpreted in light of the respect–protect–fulfill framework, this can be read as an assertion that 'protection' duties are of particular significance in business and human rights practice. Ultimately, their chapter says forcefully that governments can and should do more to take their responsibilities of human rights protection, defined in this way, seriously.

David Jason Karp, in his chapter 'The Concept of Human Rights Protection and the UN Guiding Principles on Business and Human Rights,' continues the discussion of the UN Guiding Principles (Ruggie 2011). He provides an evaluation of their strengths and weaknesses that is focused particularly on how they can be situated within broader theoretical and practical conceptualizations of human rights 'protection' in the late 20th and early 21st centuries. He says that one can identify at least three different conceptions of human rights protection in contemporary human rights practice: one offered by the respect–protect–fulfill trichotomy, a second offered by the R2P and a third that finds a basis (though not a complete expression) in the UN Guiding Principles on Business and Human Rights. He problematizes rather than starts with the notion of 'protection' that is offered by the respect–protect–fulfill trichotomy. The alternative conception of human rights protection found in the R2P policy doctrine is radically different in many ways, particularly in terms of its focus on mass atrocities as providing the circumstances within which international protection obligations are activated. However, despite their differences, the trichotomy and the R2P share the view that 'protection' is a derivative rather than fundamental kind of responsibility for human rights. In other words, they each understand the duty to protect as a responsibility of certain actors (traditionally states) to ensure that other – 'fundamental' – human obligations are upheld. Karp argues that the responsibilities of human rights 'protection,' properly understood, are actually fundamental to contemporary human rights practice. They are neither derivative nor third-party oriented. They involve the systematization and institutionalization of individuals' secure access to the objects of human rights. The GPs provide an opportunity, which has come out of the world of political practice rather than out of abstract legal reasoning, to move beyond the definition of human rights 'protection' that is offered either by the respect–protect–fulfill trichotomy or by the R2P.

Despite this opportunity, which can be understood as a strength, Karp argues – taking a different line than the state-centric view about responsibility offered by Aaronson and Higham – that a key weakness of the GPs is their failure to look comprehensively at the circumstances in which non-state actors such as businesses may take on responsibilities of human rights protection. The latter are distinct from responsibilities not to harm human rights, which all agents uncontroversially have.

Flor González Correa, in 'Human Rights Ltd: An Alternative Approach to Assessing the Impact of Transnational Corporations on Human Rights,' focuses on the responsibility to 'respect' (defined in terms of 'do no harm') the human rights of individuals. This makes it distinct from the two chapters that precede it, both of which emphasize the 'protect' responsibilities of specific global actors with regard to business and human rights. However, she aims to insert structural and institutional factors, normally thought of as associated with 'protect' and/or 'fulfill' responsibilities, into 'respect' responsibilities themselves. She critiques the UN Guiding Principles (Ruggie 2011) and the conceptual framework upon which they are based (Ruggie 2008) on the grounds that the 'impact' of transnational corporations (TNCs) on individuals' human rights is not (*contra* the framework) exclusively or even best understood in terms of harm that agents cause directly to others. She argues that standard approaches, such as the interactional moral approach, which focus on unmediated agency and more direct impact on human rights, do not provide the whole picture when it comes to tracing the human rights impact of TNCs. These approaches do not recognize the way corporations actually operate, or the profound effects that they can have on people through their participation in and influence over what Pogge (2002) calls the 'global institutional order.' While the spheres of responsibility framework takes a somewhat more expansive view on distributing responsibility for harm, she asserts that we need to take an even broader view and examine through an institutional approach the role TNCs play in shaping or supporting a variety of global institutional structures that allow human rights abuses to occur. By taking this broader view, we can have a more complete picture of how responsibility for harm should be apportioned.

Nicola Macbean and Elisa Nesossi broaden the discussion of the human rights responsibilities of non-state actors in 'Living Up to Human Rights Responsibilities Through Action: Lawyers and Law Firms in the Chinese Authoritarian Context.' They redirect the focus toward individual lawyers and law firms as practitioners who have a particular

professional duty to uphold the rule of law. They ask two key questions: What are the responsibilities of lawyers and firms toward the promotion and protection of human rights? How should such non-state actors resolve the challenge of abiding by international human rights obligations when operating in an authoritarian country: in this case, China. Regarding the first question, they argue that lawyers and law firms are under a moral, social and professional obligation to promote and protect human rights independently of the context in which they operate. Yet, there is a latent tension between their commitment to justice and their role as gatekeepers of society's interests, the business nature of their profession, and their role as advocate for the interests of their clients. Macbean and Nesossi argue that unless lawyers and law firms are prepared to acknowledge and withstand the inherent tension between their stated values and the compromises they make when operating in authoritarian countries, they are unlikely to be able fully to meet their responsibilities to protect and promote human rights. They thus problematize the concept of human rights responsibilities among a specific group of non-state actors whose core values and professional duties include the protection of social justice and human rights. They recognize that unless the profession as a whole provides clear global guidance on individuals' and firms' responsibilities (especially in situations where human rights are routinely violated and where criticism of violations can endanger one's ability to practice) – and unless this guidance is followed routinely – individuals and firms will not speak out against violations and/or provide adequate support for human rights. They conclude that perhaps the call of the 'other,' as discussed by Mitoma and Bystrom in their chapter, could provide a basis for a sense of responsibility.

In her chapter, 'Fulfilling the Right to Education? Responsibilities of State and Non-state Actors in Myanmar's Education System,' Maaike Matelski raises a somewhat different set of questions, focusing on the interrelationship between state, non-state and international responsibilities with regard to the right to education. She notes that the state has a responsibility to provide education for its people. However, in Myanmar, although theoretically widely available, access to free high-quality education is very problematic. State-supported education suffers from continuing government neglect and hidden costs for parents, making state school education impossible for many. In global context, Myanmar is certainly not unique in this regard. As in many other developing countries, non-state actors in Myanmar – and in particular Buddhist monks – fill some of the void. This education is provided based

on internally generated understandings of responsibility toward others. In the case of the monks, a shared responsibility for other human beings derives from their religious beliefs. They and others provide a crucial service. However, there is also the possibility that non-state financed education, running parallel with state education, relieves the government of some of its *de facto* responsibility to provide such education (in the same way that a state's provision of humanitarian assistance can seem to relieve it of its obligations to care for its own people or for refugees). Such moral hazard is present in international efforts to support domestic education, and is compounded by the fact that some of those helped by international actors leave Myanmar, thus contributing to a brain drain. Thus, we see responsibilities not only to fulfill a right, but also to ensure that in fulfilling, new harm (in other words, failing to respect) is not done. Matelski's incorporation of both domestic and international actors provides a nice segue to the Part IV of the book, which focuses even more squarely on the international level.

The Responsibility to Protect

Part IV of this book, the final part, looks at the so-called responsibility to protect, which has reinvigorated discussion about international human rights responsibilities. The responsibility to protect, or 'R2P' as it has come to be known, developed out of the failures of the international community to respond adequately to genocide and other mass atrocities in the 1990s – in particular in Rwanda and the Balkans – as well as failures in Somalia and elsewhere. The associated academic and political discussions aimed to recast the concept and practice of sovereignty to include responsibilities to protect human rights, rather than allowing it to serve as a shield against criticism of a state's human rights record or against robust action to protect people in certain circumstances. The four chapters in this section each address different aspects of this topic.

Kurt Mills addresses the question 'What Responsibilities Does the International Community Have in Complex Humanitarian Crises and Mass Atrocity Situations?' The answer, according to Mills, is manifold and complex, but he identifies three core responses that the international community has developed to address the human rights aspects of such situations. These correspond to three responsibilities the international community has recognized. He begins with the responsibility to protect as envisioned by the International Commission on Intervention and State Sovereignty in 2001 and endorsed by the World Summit in

2005. He argues that while it has a number of different elements, including the responsibility to prevent atrocities and to rebuild societies after atrocities end, the core of the responsibility is the potential for other actors to use military force, in contravention of a state's wishes, to protect people who are in danger of genocide and other mass atrocities. The recognition of this responsibility, however partial and ambiguous, has played a significant role in recasting the relationship between sovereignty and human rights. A second responsibility he identifies is the responsibility to prosecute individuals for international crimes such as genocide and crimes against humanity. This responsibility has been institutionalized with the creation of the International Criminal Court. A third core responsibility the international community has recognized is what he calls the responsibility to palliate: to provide humanitarian assistance to those caught in the midst of conflict. While these three responses all address different elements of mass atrocities, they do not always sit comfortably together, and he explores the many ways that each might either support or undermine the implementation of the others.

Under the responsibility to protect concept, states have the primary responsibility to protect people within their borders. When they fail to do so – either by engaging in atrocities or by failing to stop atrocities – the international community, primarily through the UN Security Council, must consider a secondary responsibility to act to protect people at risk. However, as Melissa Labonte points out in her chapter 'Whose Responsibility to Protect? Grappling with Double Manifest Failure: R2P and the Civilian Protection Conundrum,' this is an imperfect duty: a discretionary responsibility to act that permits states a wide range of judgment about whether to do so, rather than an absolute expectation to act under certain well-defined conditions. As a result, it is likely that the international community either will not act, or otherwise will act in an inadequate and very inconsistent manner. She thus asks what happens in such situations of double manifest failure. The answer is that the burden of protection will fall onto the shoulders of actors who may have little capability actually to protect people: humanitarian organizations. They are embedded within a concept parallel to R2P, called protection of civilians (PoC). PoC is, theoretically, less political and may entail less robust measures. Many humanitarian organizations have embraced the PoC concept. The problem, though, is that they do not have the ability physically to protect people who are threatened by armed groups, and thus 'the civilian protection they can offer is a pale substitute by comparison' to robust military action by the Security Council – a point

echoed by Mills. Humanitarians thus need to think deeply about their strengths and weaknesses, and need to be pragmatic when they consider potential actions to help people caught in conflict.

Michael Galchinsky, in 'Prevention Cascade: The United States and the Diffusion of R2P,' turns his attention to preventing mass atrocities prospectively. This is in contrast to Mills and Labonte, who focus on retrospective responses to mass atrocity situations once they have begun. Galchinsky argues that prevention is a legal duty for states, rooted in the concept of *erga omnes* obligations: those 'owed to the international community as a whole.' To fulfill the prospective responsibility to prevent mass atrocities requires that states exercise their best efforts, regardless of whether such efforts are ultimately successful. Galchinsky analyzes the institutional form that is being established for these 'best efforts' practices. He discusses how the responsibility to prevent has evolved and diffused as a norm. He looks first at the UN, placing prevention within the multilateral R2P framework and tracing its institutionalization, in particular through the Office of the Special Adviser on the Prevention of Genocide, noting the Office's successes and also the limitations under which it works. He then turns to a consideration of the efforts by the United States, which has been at the forefront of institutionalizing prevention efforts domestically. He observes that this institutionalization has been parallel to, rather than in conjunction with, UN efforts. Rather than engaging multilaterally and supporting UN efforts, it has acted unilaterally and failed to put its efforts within multilateral legal and normative frameworks, thus reflecting an American exceptionalism and a wariness of multilateral engagement. By putting its efforts within a more multilateral framework, Galchinsky argues, the US might have more success in socializing other states to recognize their obligations.

Tim Dunne and Katharine Gelber, in 'Argumentation and the Responsibility to Protect: the Case of Libya,' address the issue of norms from a different perspective. Many of the authors in this book are talking, in one way or another, about norms: what they are, how they develop and their modes of implementation. Dunne and Gelber close the book by doing something different: they ask what kinds of support norms require to continue being viable in practice (a question that Bódig also raises about the doctrinal trichotomy). Specifically, they look at the decision to intervene in Libya in 2011 and how the intervention was framed using R2P language. They examine to what extent and how argumentation (as opposed to bargaining) was used in the run-up to the decision by the Security Council to use force. They argue that arguments supporting the legitimacy of R2P were prevalent in discourse surrounding

the decision to use force. The necessity of using force was explicitly framed in protection-of-civilian terms. This led to a unanimous decision to refer Libya to the International Criminal Court. The subsequent decision to allow the use of force was not unanimous, but protection of civilians held such sway that no member of the Security Council voted against the resolution. Some chose to abstain instead, thus allowing the resolution to pass. However, once the military action began, there was significant backlash, especially in the face of accusations that those states implementing the resolution went too far in their use of force against Libyan forces. Dunne and Gelber argue that this change in discourse occurred because the supporters of intervention failed to buttress the norm after the Security Council resolution was passed, thus ceding the rhetorical ground to opponents of the intervention. The clear message is that norms require constant nurturing, advocacy and political support – going well beyond any particular norm-based decision or ethical argument – to be effective and to be perceived as legitimate. This is a helpful and important message that is pertinent beyond this chapter, to the arguments of the book as a whole.

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2

Humanitarianism and Responsibility in Discourse and Practice

Glenn Mitoma and Kerry Bystrom

Introduction

On 17 March 2011, the United Nations Security Council (2011a) adopted a historic resolution authorizing the use of 'all necessary measures [...] to protect civilians' in Libya. Speaking on behalf of a government that had been among the most vocal advocates of military intervention, the French Foreign Minister Alain Juppé (United Nations Security Council 2011b) implored his fellow Council members: 'Every hour and day that goes by increasing the burden of responsibility on our shoulders. If we are careful not to act too late, the Security Council will have the distinction of having ensured in Libya law prevails over force, democracy over dictatorship and freedom over oppression.' Speaking a year later about another of the Arab Spring's bloodier conflicts, Jordanian Interior Minister Ghaleb Zu'bi (Neimat 2013) pledged not bombs but safe haven for the thousands pouring over the border from Syria. 'Jordan has a humanitarian [responsibility] to Syrian refugees and cannot turn its back on them.' That same year, the British-based nongovernmental organization Oxfam decried the failure to help victims of the latest Somali famine: 'There has been a catastrophic breakdown in the world's collective responsibility to act (Oxfam International 2011).' In 2010, after the Haitian earthquake, George Clooney, actor and

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organizer of the 'Hope for Haiti Now' telethon, told millions of viewers, 'We all have a lot of responsibility to look out for people that can't look out for themselves' (Viacom 2010). From the Mediterranean to the Caribbean, from states to international organizations to international celebrities, the imperatives of humanity are insistently expressed as an invitation to responsibility.

The connection between responsibility and humanitarianism is as old as humanitarianism itself,[1] but it has come into sharp focus since the recasting of 'humanitarian intervention' as the 'Responsibility to Protect' (R2P). Discussed elsewhere in this volume, this emergent norm has its origin in a seminal 2001 report by the International Commission on Intervention and State Sovereignty (ICISS) entitled *The Responsibility to Protect*. The concept of R2P outlined in the 2001 report both shifted the basis of sovereignty from control to protection, and transformed the language of humanitarian intervention from right to responsibility. The ICISS's work in many ways represented the culmination of efforts, led by Médecins Sans Frontières (MSF) founder and former French Foreign Minister Bernard Kouchner, to proclaim a 'right of intervention' in situations of acute humanitarian emergency. Kouchner's brand of militant humanitarianism, which gained prominence in the 1990s as so-called 'complex humanitarian emergencies' in Somalia, Bosnia, Haiti, Rwanda and Kosovo, drew the international community into a new range of actions (and inactions). In rearticulating this 'right' as a 'responsibility,' the imperative moved from an option to be exercised by individual states to an obligation to be fulfilled by the international community as a whole. Such a move was designed to integrate humanitarian intervention into the mandate of international organizations (most importantly, the United Nations), as well as to create space between contemporary interventions and the 19th-century history of humanitarian intervention inextricably entangled with imperialism (Bass 2008).

The relationship between humanitarianism and responsibility is of course broader than the questions around R2P debated in the Security Council and the often military actions it seems to demand of Member States of the UN and NATO. As the examples cited in the first paragraph make clear, the humanitarian universe covers a wide variety of non-state actors and international actions, the scope and nature of which have also been subject to intense debate. In discussions among aid workers, officials and scholars, the language of responsibility has become a pervasive discourse through which the competing conceptions of the humanitarian project are framed. Its 'ideological promiscuity' allows it to undergird very different visions of what humanitarianism should

mean and do (Wilson 2001: 5). For instance, whether or not they support the institutionalization of the R2P principles by the UN, some argue for a bright line of distinction between *that* responsibility and a strictly non-military humanitarian responsibility. Fabrice Weissman (2004: 3), Research Director for MSF's Centre de Réflexion sur l'Action et les Savoirs Humanitaires, notes that both governments and aid agencies are 'responsible for the confusion surrounding the humanitarian symbol today' when they allow military intervention to be pursued under the banner of humanitarian relief. Critical less of entanglement with military forces than with 'mission creep' toward ever more ambitious goals, David Rieff (2003: 286) locates responsibility in maintaining the distinction between humanitarianism and human rights. '[A] responsible relief worker,' Rieff says, knows the difference between 'the imperatives of human rights and humanitarianism,' with the former being 'maximalist,' 'absolutist' and long-term, and the latter being limited, flexible, and immediate.[2]

Invoked consistently by different actors pursuing different ends, 'responsibility' not only shapes the worldviews of humanitarians, but also enables and constrains their practices – and as such deserves a more sustained interrogation than it has heretofore received. This chapter takes up this task by outlining several different conceptual versions of responsibility circulating in humanitarian discourse and practice, paying particular attention to the way in which these different concepts define the humanitarian mandate. Doing so not only reveals deep divisions in current understandings of the humanitarian project, but also suggests the possibility of a more transformative future humanitarianism rooted in a call to make responsibility mutual and unlimited. This would be a humanitarianism more connected with international justice, not necessarily or not only in the sense of legalization but in the sense of the struggle to promote more just relations between states, groups, and individuals across the global landscape, and which should form the larger ethical context of relief measures. We look specifically at four concepts of responsibility: one concerned with causality and liability; one rooted in ideas of bureaucracy and duty; one that reflects power and philanthropy (and often contested as a form of neo-imperialism); and one based on a radical ethical obligation to others. This chapter also considers how this polyphonic discourse of humanitarian responsibility constitutes a departure from, and possible alternative to, the discourse of human rights. Rieff's effort to police the boundaries of humanitarianism along with the replacement of a 'right of intervention' with the 'responsibility to protect,' remind us of the

way in which rights and responsibilities, while interconnected, are distinct enough to warrant consideration as separate and possibly opposing organizing principles.

Responsibility, causality, and liability

Humanitarian responsibility is often understood in relationship to causality. Here, answering the question, 'What is the nature of humanitarian responsibility?' would require the empirical investigation, description, and prediction of the causes of human suffering. We can see this causal concept of responsibility at play in the classificatory practices of UN agencies regarding the 2011 Somalia famine. In their analysis of the factors contributing to this crisis, Daniel Maxwell and Merry Fitzpatrick (2012) conclude that 'no single factor was responsible for it,' but rather it was result of a confluence of proximate (drought, rising global food prices) and underlying causes (ongoing conflict, displacement, and economic stagnation). The vulnerability of the population to malnutrition and starvation was compounded by a 'clos[ing] down of humanitarian space' within Somalia over the previous three years as, on one side, *Al-Shabaab* began diverting aid in areas it controlled and, on the other, US law made donations that might provide 'material support' (even inadvertent) to 'terrorist' organizations a criminal offense. The UN's official declaration of famine in the region adhered to this kind of empirical logic. For the first time, the UN Office for the Coordination of Humanitarian Affairs made use of the Integrated Food Security Phase Classification (IPC), which provides a set of standards for 'classifying severity and causes for food insecurity situations' (United Nations News Centre 2011). By more accurately diagnosing the causes and nature of particular 'food insecurity situations,' which range from 'stressed' to 'catastrophe' – with the situation in Somalia having been downgraded from 'catastrophe' to 'emergency' in February 2012 – the hope is that a more effective and timely reaction will be facilitated (IPC Info 2012). UN declaration of a famine based on the IPC rubric proved relatively successful in drawing world attention toward the crisis and helping to surmount some of the 'complicating factors,' for instance US anti-terrorism policies that had prevented adequate response to the early warnings of groups like Oxfam.

Yet, reliance on such formal measures of causality and severity can also provide an alibi for *inaction*. The inability to demonstrate that a situation measures up to a real crisis (which in the case of the IPC famine criteria are: extreme food shortage for 20% of households, 30% acute

malnutrition rates, and starvation at a rate of two in 10,000 per day) may make it easier for decision-makers to avoid addressing the problem. This can be particularly problematic in situations where the relevant data is unavailable or slow to emerge – as in a failed state where endemic poverty, lack of infrastructure, and an ongoing civil war make for a relatively opaque field of inquiry. If responsibility is to be data driven, then a lack of data can only result in a lack of response.

This mode of establishing responsibility through the mapping of causal chains has been applied not only to the disasters to which humanitarianism responds, but also to the humanitarian enterprise itself. Scholars have noted that relief efforts often have 'collateral damage' of their own, exacerbating conflict and prolonging the very suffering they seek to alleviate. Nowhere was this more evident than in the aftermath of the Rwandan Genocide, when humanitarian aid to Hutu refugees in Zaire allowed the rump genocidal regime to continue organizing, facilitated targeting for cross-border raids by the victorious Tutsi-led Rwandan Patriotic Front, and ultimately helped to precipitate the collapse of the Mobutu government and the outbreak of bloody conflict in the Great Lakes Region (Lischer 2003).[3] Humanitarian aid alone was hardly responsible for 'Africa's World War,' but the post mortem on this and other humanitarian efforts has led Mary B. Anderson (1999) to conclude that humanitarians must adopt the Hippocratic Oath – Do No Harm – and that aid agencies must plan, implement, and monitor their efforts in order to minimize negative consequences and augment 'local capacities for peace.'

Anderson's call for a form of humanitarianism that is more scrupulous in attending to its consequences suggests the way in which responsibility is not only about a cause-and-effect description of events, but also about a normative proscription of behavior. Being responsible for negative effects means not only that an agent has caused them, but that the agent is obliged to remedy or redress them as well. This grounding of normative liability in causal relationships is deeply rooted in the history of humanitarianism as a broader social ethic. Indeed, the emergence of one of the first great humanitarian movements, abolitionism in Great Britain, relied in part on the emergence of a 'perceptual and cognitive style' that allowed English producers and consumers of sugar to 'see' their role in the immiseration of African slaves on West Indian plantations. Whether it was the way in which engaging in economic markets taught early Quaker capitalists to make and keep promises and closely attend to the remote consequences of their actions (Haskell 1985), or the way in which the introduction of slave-produced sugar into homes

and bodies of genteel Englishwomen produced a sense of intimate proximity between consumption and suffering (Sheller 2011), humanitarian responsibility was buoyed by the guilt felt by those who saw their own comforts as the cause of distant suffering for others.

The political uses of normative consequentialism are abundant and are based in competing empirical claims to adequately represent the causes of suffering. The development of rubrics such as the IPC food insecurity index aims at giving objective measures, and carries with it an implied imperative to act. Finding someone guilty of causing a problem makes the demand that they do something to remedy it all the more powerful. But behind such a demand is a presumption of potential agency, as it implies the ability to effect both negative *and* positive outcomes from distances of greater or lesser magnitude. This presumptive agency, rooted in consequentialist responsibility, affirms the efficacy of certain (usually Western consuming) actors more than (usually non-Western producing) others. We will return to the relationship between responsibility and power below, but here we note that emphasizing particular links in the causal chain in an effort to spur action may at times minimize other factors that eventuate limited outcomes and overstate the potency of any specific agent to determine or alter those outcomes.

Responsibility, bureaucracy, and duty

Besides causality and liability, humanitarian responsibility has also been described and determined bureaucratically, and as such is tied to efforts to professionalize and rationalize the humanitarian enterprise. Within the UN, this logic led to the creation of the Office for the Coordination of Humanitarian Affairs (OCHA) in 1991. General Assembly Resolution 46/182, which is the basis of OCHA's mandate, defines nine specific 'responsibilities' of the Office, including monitoring and providing information on emergencies, organizing needs-assessment missions and consolidated appeals for assistance, and facilitating the movement of agencies and the distribution of aid. These are, quite literally, the 'responsibilities of office' (Lucas 1993) that OCHA is obliged to fulfill not because it *caused* the emergencies it addresses, but because it has been vested with the legal and political authority to do so.

This is a form of bureaucratic responsibility, in the classical Weberian sense, that adheres not to any particular individual or group of people, but to a specific *location* within the hierarchical structure of a particular institution (Weber 1978).[4] Here, causality gives way to cartography in the assignment of responsibility, and the cardinal point is not justice

(i.e., making good on the moral liability of consequences) but efficacy. 'Bureaucracy,' writes Weber, 'is *the* means of transforming social action into rationally organized action' and, therefore, 'bureaucracy was and is a power instrument of the first order' (987). By assigning specific responsibilities to particular offices according to a rational division of labor, and staffing those offices according to a meritocratic assessment of technically qualified personnel, humanitarianism becomes a form of bureaucratic administration.

While the UN may be the epitome of bureaucratic responsibility, this same logic has permeated humanitarianism NGOs of all kinds and is manifest in the attempt to 'standardize' both relief activities and guiding principles (Barnett 2005). With regard to the former, this has meant systematically identifying needs, developing 'best practices,' and conducting rigorous retrospective analysis of relief operations. Examples include the Sphere Project, which has developed and promoted *The Sphere Handbook* as a comprehensive set of 'common principles and universal minimum standards for the delivery of quality humanitarian response (Sphere Project n.d.),' and the Active Learning Network for Accountability and Performance in Humanitarian Action (n.d.), which maintains an Evaluative Reports Database (ERD) designed to collect and share lessons-learned from humanitarian actions worldwide.

Alongside this standardization and accountability, a renewed concern with fundamental principles has served to define the particular role of humanitarian agencies. Most famous perhaps is the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief. Drafted in 1992 by a coalition of major humanitarian NGOs, including Oxfam and the International Federation of Red Cross and Red Crescent Societies, by October of 2012 the Code of Conduct had been adopted by some 512 organizations working around the world (International Federation of the Red Cross and Red Crescent Societies 2012). The principles elaborated in the code include neutrality, independence, and non-discrimination, as well as a commitment to accountability (to both recipients and donors) and ensuring aid is effective in both short and long term. As a voluntary standard, the Code of Conduct does not commit signatories to a set of formal legal obligations, but it does present the ideal role these humanitarian agencies imagine for themselves. While the language is aspirational and affirmative, the effect of the code is to delineate the bureaucratic responsibilities of humanitarianism as such in the larger international structure.

In many ways the Code of Conduct generalizes the guiding principles of one of the world's most prominent humanitarian NGOs, the

International Committee of the Red Cross (ICRC). Since the 1970s, the ICRC has achieved a high level of internal organization in both decision-making and implementation, and projects a public image of professionalism and competence. As a humanitarian actor, the ICRC occupies a unique position within the structure of International Humanitarian Law by virtue of its status under the Geneva Conventions. In these and other statutes, the ICRC is made responsible for monitoring and, in some cases providing, humanitarian assistance to prisoners of war and displaced civilians during armed conflicts. David P. Forsythe's work on the ICRC argues that both organizational acuity and scrupulous pursuit of clearly defined responsibilities have allowed the ICRC to be such an effective and durable humanitarian agency. While ICRC might not be the solution to all the world's problems, it is a useful instrument for addressing the particular problems assigned to it by itself and others.

Returning to the UN, recent efforts to operationalize the R2P principles have demonstrated the extent to which much of the power – and controversy – of the emergent norm derives not from the assertion that providing humanitarian protection is a responsibility of the international community as well as of local governments, but rather from the way in which the adoption and implementation of this norm would establish a legal and organization architecture with defined (and possibly enforceable) obligations for Member States and UN agencies. While the inclusion of the R2P principles in the 2005 World Summit Outcomes document signaled a broad consensus of UN members over the concept of a shared responsibility to protect civilian populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, the Secretary-General's follow-up report on implementation provoked a divisive debate over the way the new legal and organizational instruments may authorize or obstruct appropriate humanitarian responses (Gilligan 2013). What we would underscore here is that the responsibility that matters in this case is the way in which particular offices, agencies, and organizations are authorized and empowered to act in protection of vulnerable populations.

If the causal conception of responsibility can be correlated with a consequentialist ethic, the bureaucratic conception of responsibility finds its normative dimension in the principle of delegated duty. The creation of an office vested with particular responsibilities implies the assignment of a specific set of obligatory duties, the fulfillment of which constitutes grounds for normative appraisal. When, for instance, the Director of the Federal Emergency Management Administration Michael D. Brown was

forced to resign in the wake of hurricane Katrina, it was because he and his agency had failed to fulfill adequately their statutory responsibilities under the Stafford Act and National Response Plan. The Department of Homeland Security Office of Inspector General (2006: 18) on FEMA's disaster management activities concluded that there were 'severe deficiencies' in FEMA's fulfillment of its responsibility to coordinate the disaster relief efforts by federal, state, and volunteer organizations. The damning judgments of Brown were rooted not in an accusation that he had blown the Category-3 storm into the Gulf Coast, but that he was in the position authorized and empowered to respond to it.

However, while the clear organization of official duties meant that Brown could not avoid being held accountable for his failures, bureaucratic responsibility can also provide an alibi for avoiding obligations. On 21 February 2013, a statement from UN Secretary-General Ban Ki-moon (2013) declared a claim of compensation by the victims of the ongoing cholera epidemic in Haiti 'not receivable' by the UN. Despite the fact that an independent report commissioned by the UN (2013: 3–5) concluded that the strain of cholera that caused the outbreak was most likely introduced into Haiti as a result of poor sanitation at an encampment of UN Peacekeepers from Southeast Asia, the Office of the Secretary-General concluded that the UN could not be held legally or financially responsible by virtue of the 1946 Convention on the Privileges and Immunities of the United Nations.

Responsibility, power, and philanthropy

Duty may extend beyond what is prescribed by institutional organization, and as a moral imperative is associated not only with causality or bureaucracy, but also with virtue and power. Thus, our third dimension of humanitarian responsibility is assigned not according to who caused the suffering in question, or who has been designated by a legal or organizational structure to take action, but according to who has the capacity to respond. Such is the view of humanitarian responsibility laid out by Andrew Carnegie in his 1889 philanthropic manifesto, 'Wealth.' Uniquely possessed of the capacity of 'organizing benefactions' for the betterment of mankind, Carnegie argues, 'the man of Wealth' has the responsibility of 'becoming the mere agent and trustee of his poorer brethren, bringing to their service his superior wisdom, experience, and ability to administer, doing for them better than they would or could do for themselves.' Carnegie's vision of Gilded Age responsibility was rooted in an individualistic analytic that saw wealth as the result of a

superior individual potency – a power that should be deployed on behalf of the powerless, but certainly not shared with them.

More recently, Bill Gates has embarked on a philanthropic agenda almost as ambitious as Carnegie's, and although the former Microsoft Chairman is less stridently social Darwinist, his strategy of humanitarian giving reflects an equally strong faith in capitalist modes of agency. Speaking at a 'philanthropic summit' organized by the financial magazine *Forbes*, Gates described his model of giving as 'catalytic philanthropy,' which 'has the high-stakes feel of the private market' but in which the payoff is not for the 'investor' but for 'poor people or sick people or society generally.' For Gates, whose massive wealth was built less on the profits of Microsoft than on the exponential stock performance of his company, he and his friend Warren Buffet have a unique capacity – and therefore the responsibility – to 'harness market and political forces' by means of strategic investment (Lane 2012).

Even Carnegie and Gates concede, however, that the power of individual philanthropists is dwarfed by the capacities of governments to address the world's problems. Indeed, it was state power that Winston Churchill (1943) had in mind when he evoked, with typical succinctness, the correlation of power and responsibility. 'The price of greatness,' the British prime minister said, 'is responsibility.' Significantly, Churchill was speaking to an audience at Harvard University at the height of World War II, and the power and responsibility he had in mind was that of the United States. '[O]ne cannot rise to be in many ways the leading community in the civilized world,' he lectured the Americans, 'without being involved in its problems, without being convulsed by its agonies and inspired by its causes.' Whether he was acknowledging the degree to which the United States was supplanting Great Britain as the world's leading power or just pandering to his audience, Churchill's formulation of the obligations of power gives some indication of the extent to which this form of responsibility overlaps with the aristocratic *noblesse oblige* and the imperialist 'white man's burden.'

Many critics of humanitarianism, including Heike Härting (2008), Mahmood Mamdani (2008), Sherene Razack (2004), and Ayça Çubukçu (2013), have noted this troubling genealogy. While it is over-simplifying things to posit the existence of an unbroken continuity between the more overt imperialism of the 19th and early 20th centuries and contemporary humanitarian cosmopolitanism, the problems of mixed motives and selective outrage, along with the fact that the contemporary divide between intervener and intervened largely maps onto the previous one between colonizer and colonized, has made tenable accusations

that humanitarianism is a form of neo-imperialism. Neo-imperial modes of 'assisting' others can have the deleterious effects of re-entrenching racial and gender stereotypes in a way that constrains the agency of the 'victims' it aims to succor and ultimately upholding what Gayatri Chakrovarty Spivak (2004: 529) calls 'worldwide class apartheid.' It may be only when responsibility is thought otherwise that the distinctions between harmful and helpful modes of humanitarian action can come more fully into focus.

An 'other' responsibility

In her attempt to rethink responsibility in her Oxford Amnesty Lectures from 2001, Spivak juxtaposes Churchill's aphorism about greatness and responsibility with a non-hierarchical understanding of responsibility 'sensed before sense as a call of the other (536).' This formulation echoes the work of Emmanuel Levinas (1981), who has theorized this 'other' responsibility – and the final one we will explore – most thoroughly, and for whom the very condition of the self is an 'unlimited responsibility' for another. Levinas is well known as a phenomenologist and theologian of the 'Other,' and while his writings are not readily translated into any specific political position or humanitarian policy, his insistence that ethics precede both epistemology and ontology, and that these ethics be premised on the priority of others over oneself, opens up new ways of thinking about global relationships across radical differences. In the Levinasian sense, responsibility encompasses exactly that which *exceeds* bureaucratically determined duties, empirically established consequences, or quantifications of personal power. This responsibility is 'unconditional, undeclinable, and absolute' because this is what founds the subject as an agent capable of establishing conditions, declining obligations, and fixing boundaries. Agents are capable of making such decisions *only in response* to a prior call from another – the Other in Levinas terminology – for whom agents remain infinitely responsible.

As François Raffoul (2010) points out, Levinasian responsibility is the inverse of a causal responsibility that makes the agent responsible for his or her actions. Levinasian responsibility is rooted in the 'call of the Other,' and is manifest in a dialogue that addresses itself to the needs of the other, rather than the abilities and actions of the self. Médecins Sans Frontières recently published an extended mediation on its 40-year history that similarly acknowledges that it is not 'the ideals of humanitarian principles' but 'the grubby negotiations with varying parties' that allows MSF to do its work. A collection of essays describing MSF

projects from Sri Lanka to France alongside histories of the organization's attempts to define its particular mission, *Humanitarian Negotiations Revealed: The MSF Experience* depicts an organization that functions best only when its ambitions scale to the nature of the problem and its methods reflect a thoroughgoing pragmatism in which 'everything is open to negotiation' (Allié 2001).

In Somalia, this meant returning to a country of which MSF-France had pulled out in 1997 (after the assassination of one of its doctors), under the protection of armed guards even at the risk of exacerbating the violent conditions they were going there to alleviate (Neuman 2001). In Afghanistan, where the same cycle of killing, pull-out, and cautious return repeated itself on a compressed scale, MSF restarted operations there the same year that 38 aid workers were killed and another 147 taken hostage for varying lengths of time. Although they were hardly cavalier in exposing their staff to such danger, MSF in this instance determined that a complete *lack* of arms would provide a better defense against victimization. Only by convincing both sides of their neutrality and the value of the medical services they provided, and by making themselves so obviously vulnerable to the warring factions, was MSF able to operate with some effectiveness (Crombé 2001). Levinas (2000: 180–184) describes the condition of the subject as that of a 'hostage' to the Other, dependent for his/her very existence on the instantiating call of the Other. Without literalizing Levinas' metaphor, one could say that for many of these humanitarians, particularly the five MSF aid workers killed in June 2005, it is uncannily appropriate; if the forfeiture of their lives served as substitutes for the lives of those their medical work saved, the possibility of doing so rested on the original call to responsibility.

MSF is hardly comfortable with the constant compromises and risks that they must endure to do their work, and in their documents, the organization's members do not raise it to the level of a guiding principle. Indeed, former MSF President Rony Brauman (2007: 139), in articulating the current ethic of MSF, refers to 'the analytic function' that – supplanting the 'witnessing function,' or *témoignage*, foregrounded in the 1990s – looks much like the kind of causal form of responsibility embodied by Mary Anderson's 'Do No Harm.' Nevertheless, adherence to and demand for a constant appraisal and accounting of what MSF action has wrought is deployed in the service of the organization's larger understanding of its work as presented in *Humanitarian Negotiations Revealed*. Knowing what MSF has done and can do never seems to prevent the organization from embarking on operations that inevitably seem to *fail* in one way or another. The gap between what

MSF is capable of and what it aspires to do is perhaps the measure of its 'other' responsibility that, in the end, sustains its existence as an organization.

Humanitarian responsibility versus human rights

We have suggested that the struggle over the meaning of responsibility is a critical component of the larger struggle over the aims and future of the humanitarian enterprise. Part of the reason for this wider significance is the extent to which 'humanitarian responsibility' represents a challenge to 'human rights' as the organizing principle of international morality. As Wilson and Brown (2008: 8) have pointed out, humanitarianism and human rights are 'adjacent, overlapping concept[s]' that share a coincident, intersecting, and occasionally reinforcing historical trajectory from the 18th century to the present. They argue not only that humanitarianism and human rights emerged from similar philosophical traditions and cultural innovations, but also that they have often sought similar ends through similar mechanisms. They also suggest, however, important distinctions to be made between human rights and humanitarianism. These include the divergent emphasis on law and long-term institutional change in case of human rights and morality and short-term expedient relief in the case of humanitarianism. Among the most salient difference is the way in which the two fields imagine their subject. Proponents of human rights have often sought to distinguish their agenda from humanitarianism by noting that human rights politics posits 'self-directed individuals vigorously pursuing their claims, immunities, privileges, and immunities,' whereas humanitarian assistance 'disempower[s] individuals, and strip[s] them of agency (8).' By positing those exposed to injustice and suffering as agents with the capacity to make particular moral and/or legal demands, the human rights frame can avoid trapping these individuals in the passive identity of helpless victim in need of rescue and redemption.

Although we are sympathetic to this critique, we also suggest that a stronger case for the humanitarian project can be made when the distinction is drawn not only between humanitarianism and human rights but also between the call of responsibility and the assertion of rights. Recently, critics have called attention to the limitations of the human rights framework and, in particular, to the apparent paradox that the last 25 years of renewed focus on human rights in the international sphere has occurred simultaneously with a rise in the number of humans grossly deprived of their most basic rights. As Joseph R. Slaughter (2007: 2) puts it, 'ours is at once the Age of Human Rights and the

Age of Human Rights Abuse.' Thomas Pogge (2008) has been among the most vocal in pointing to the fact that, despite the veritable flood of declarations, conventions, and treaties proclaiming various fundamental human rights, the numbers tell a story of a massive lack of fulfillment where 830 million (13% of global population) are chronically undernourished. Pogge cites the 1996 declaration by the 186 governments that participated in the UN Food and Agriculture Organization's World Food Summit, declaring 'the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger' as typical of this pattern of declaring rights but then failing to ensure their observance. Subsequent 'clarification' by the United States revealed that this recognition of a right to food 'does not give rise to any international obligations' as such – no doubt a view shared by many affluent states. The understandable frustration with the seemingly invariable gap between the expectations created by such categorical statements and the reality of hungry millions has raised doubts about the efficacy and continued usefulness of the rights paradigm and led activist and scholar Andrew Kuper (2005: xxiii) to declare flatly: 'We must look for alternatives.'

For Kuper, an emphasis on 'responsibilities' instead of 'rights' provides such an alternative. While these two frames are not antithetical, advocates of responsibility believe that the limitations of the discourse of human rights can be addressed only by thinking 'outside of the usual boxes to which human rights discourse is confined' (xxii). In this, Kuper follows Onora O'Neill (2004: 258), who insists that 'we take the universalism of obligations [i.e., responsibilities] as seriously as we have often taken the universalism of rights.' Among other questions, such an approach would ask, 'who must do what for whom?,' and include within the circle of specification those actors – states, international organizations, multinational corporations, etc. – that are required to ensure universal enjoyment of those rights.

Over the past 70 years, human rights have been subject to a much greater degree of specification and institutionalization than humanitarian responsibility. This specification is among the advantages of the human rights framework. One way to redress this historical deficiency would be for new declarations, conventions, and treaties to elaborate not more specific rights but more specific duties, and to put the armature of international law to work in order to hold a wider range of actors accountable for their failures (Brown 2003). Building structures of responsibility into international law would mimic and extend one of the

most powerful aspects of the human rights approach – legalization – in order to 'bridge the gap' between principle and realization. Further, the importance of legalization for human rights politics extends beyond the structures of judicial enforcement. As Jack Donnelly (2006) has argued, legal instruments facilitate a variety of political practices through the creation of generalized norms and quasi-legal processes that influence how various actors create and implement policy. By declaring and codifying particular sets of rights, human rights laws allow those deprived of these rights to demand their protection not only through particular legal mechanisms but also through a range of social, political, or even cultural reforms. The human rights framework creates a political identity – the rights holder – that is at the very minimum discursively empowered to assert, to demand, and to negotiate the realization of their rights, and not only before courts of law.

Proponents of a responsibilities approach argue that the 'virtues of legalization' would be even more apparent when the emphasis is placed on responsibilities rather than rights because the negotiation and assignment of specific positive obligations can provide more leverage to prod powerful actors to act. Mahmood Monshipouri et al. (2003) suggest that progress toward more binding forms of international law in the field of corporate responsibility will come from NGO activities that 'endanger the corporations' brand name and profit margin' through 'public stigmatization.' Self-interest may drive more and more high-profile multinational corporations to adopt voluntary responsibilities, such as the Global Compact, but such self-regulation, they note, often produces little meaningful improvement in the lives of workers or the general welfare of local communities. Monshipouri et al. argue for the necessity of international regulation wherein specific corporate responsibilities are defined and adjudicated by an empowered 'cosmopolitan' court. While such a court does not exist and creating one is nowhere on the horizon, thinking in terms of the legalization of responsibilities, rather than rights, can create a political space where specific powerful actors can be targeted for specific remedies. Seen from this perspective, a focus on legalizing responsibility would seek to formalize humanitarian morality, by imitating and extending the human rights framework in an effort to fill in the gaps or the current system of international laws and norms.

From a different perspective, part of what recommends responsibility over rights is that it emphasizes moral or ethical, rather than legal, normativity and can serve to organize a broader range of practices in the service of humanitarian causes. Wilson and Brown contend that this

ethical orientation of humanitarianism is rooted in the fact that the impulse of humanitarian responsibility usually turns on an emotional response to suffering – often coded as empathy – rather than a reasoned consideration of the legal or human rights at issue and the possible remedies to pursue. Appeals to humanitarian responsibility have traditionally relied on narratives of suffering keyed to provoke emotional reactions, including sadness, sympathy, indignation and/or guilt. The practices that emerge from such empathetic encounters often privileged immediate relief over long-term reform, with sometimes questionable effects: 'Because a commitment to humanitarianism can frequently be fulfilled and rewarded more promptly in the here and now than can a commitment to human rights,' Wilson and Brown (2008: 12) note, 'humanitarianism more reliably delivers emotional rewards.'

Such 'emotional rewards' should not be confused with effective results for the victim. At the same time, the fact that popular narratives of suffering can and do shift public opinion and (on occasion) inspire political action should not be ignored. Further, and more importantly from our perspective, the morality of humanitarian responsibility need not be exclusively emotional, nor its methodology exclusively short term. Indeed, some advocates of emphasizing humanitarian responsibility seek not a relieved conscience but rather 'a new global political culture' in which 'human beings will assume responsibility for themselves, for the earth, and each other' (Brown 2003: 6). Such ambitions imply 'unrelenting, generations-long efforts,' and emphasize re-engineering the moral structures of global society around an ethic of responsibility rather than the imperative of rights. The InterAction Council, a group of former presidents and prime ministers, including Takeo Fukuda, Oscar Arias Sánchez, Jimmy Carter, and Mikhail Gorbachev, proposed a Universal Declaration of Human Responsibilities (1997) because 'the exclusive insistence on rights can lead to endless dispute and conflict' and further because, in addition to 'laws, prescriptions and conventions,' the world 'needs a global ethic.' Hans Küng (2005), the ecumenical Catholic theologian responsible for much of the Declaration's content, has said that it presents 'an ethical orientation of everyday life which is as comprehensive as it is fundamental.' This orientation would focus on others rather than the self and form the basis for a more engaged and integrated society.

We have suggested previously that, ideally, humanitarian responsibility should be fundamentally connected to a certain notion of international justice, one that seeks a kind of radical equality across highly differentiated global circumstances. Adapting many of the long-standing

communitarian and feminist critiques of liberalism, the argument for moral or ethical responsibility over legal rights proposes not just a different *path* to justice but that there might be a different *form* of justice, one concerned less with protecting autonomy and more with promoting solidarity. In her effort to reread feminist 'care ethics' critically as the starting point for rethinking normative theory in international relations, Fiona Robinson (1999: 63–64) argues that the hegemony of human rights discourse obscures the fact that 'goods such as economic and social security, the fulfillment of basic needs, and the cultural survival of groups' cannot be adequately addressed through the 'intrinsically' individualistic framework of rights. '[R]esponsibilities,' she writes, 'including very important ones such as those to future generations or to poor or distant strangers, must be addressed collectively through cooperation.' Doing so, and here Robinson echoes concerns raised by Michael Walzer (1984) about the dangers of an exclusive focus on rights, would help to overcome the antisocial consequences of a moral order premised on the notions that 'a person's negative liberty to pursue his own ends without interference is an important good, and that it is better to have more of it rather than less.' A world that thinks in terms of humanitarian responsibilities as well as human rights is a world that constitutes a global *community* in the richest sense of the word.

Conclusion

Until a more beloved community allows for a more effective politics of solidarity, it may be safest to conclude that the individualistic dangers of a human rights approach are outweighed by the pragmatic benefits of assertive practices, as well as countervailing institutions and laws, designed to constrain rather than persuade the powerful. Humanitarian responsibility often relies on moral suasion, whether through rational argument or sentimental appeal, to lead the powerful to recognize and fulfill their duties. To the extent that it aims to inform and persuade, the politics of humanitarian responsibility does not yet reflect the fact that most of those in power are not ignorant of their moral obligation to the fellow human beings. Rather, they are individuals placed in positions of power that function to enhance and concentrate power where it already exists. The effectiveness of human rights derives from the fact that it does not rely on a moral conversion of the powerful. As a discourse, human rights enables the articulation of claims that go beyond moral suasion and narratives of suffering to include self-assertion of actionable demands. As a set of institutions, human rights offer moral,

legal, and political structures better developed and more readily accessible than the ephemeral armature of unadopted norms and privately proposed universal declarations. As a range of practices, human rights organizes actions that include legal petition, social protest, and direct confrontation, not just sentimental appeal.

No doubt this is a critical advantage of the rights framework: Rights authorize a particular lived subjectivity that is legally empowered, that is politically activated, and that can struggle for something more. From Andrew Carnegie to Winston Churchill to George Clooney, responsibility, on the other hand, is all too often an ethic of the powerful, justifying – both in terms of legitimizing and (hopefully) making more just – their actions and confirming their humanity in their righteous concern for others. In this context, privileging responsibility can be a way for those in positions of power to re-conceptualize their relationship to the world in terms that allow them to acquire *moral* capital in exchange for (minimal concessions of) *economic* and *political* capital.

Nevertheless, while acknowledging these difficulties, we sustain that within responsibility reside important possibilities for the realization of a more just world. If responsibility – when conceptualized outside a traditional hierarchical model – points to different models of justice, then it may also point toward more just relations of difference. The assumptions of humanitarian responsibility are no less universal than those of human rights, but the structures and practices of responsibility, to the extent that they can be premised on responding to the unique needs and demands of another, are potentially more open and flexible. Beginning with the Executive Board of the American Anthropological Association's famous 'Statement on Human Rights' from 1947, critics have faulted the human rights project for its failure to accommodate differences in culture and history, imposing prefabricated laws and inflexible instruments regardless of whether they are 'appropriate' to the time and place. If, as such critics suggest, the human rights paradigm assumes that the problem is one of an insufficient homogeneity in the practices of justice, then a responsibility paradigm can show instead that the problem is one of a failure to listen closely to the suffering, circumstances, and *solutions* of others. To return once more to Spivak (2004): this postcolonial feminist theorist has argued for, and in some ways tried to model through her work in subaltern Indian education, a version of human rights activism directed toward, on the one hand, filling 'the radical responsibility-shaped hole' in Western ethical education and, on the other, connecting 'subordinate cultures of responsibility' to liberal democratic institutions by 'patient and sustained efforts to learn to learn

[sic] from below.' Such a practice, she suggests, is less imperialistic and ultimately more useful in our radically heterogeneous and economically divided world.

If Spivak is correct and a version of responsibility can be universal without homogenizing, then it is because it hinges not on an ontology of the object – the human as a particular kind of being with this specific set of rights – but rather on an ethics of the subject: Humanitarian responsibility is the responsibility of those who are called to respond to the humanity of all their fellow human beings. Such sentiments were present at the very beginning of the Age of Rights. Responding to a UNESCO circular soliciting the thoughts of various philosophers and thinkers around the world on the UN effort to draft the Universal Declaration of Human Rights, Mohandas Gandhi (1948) wrote a brief letter to Julian Huxley describing what he learned from his 'illiterate but wise mother' on the subject. '[A]ll rights to be described and preserved come from duty well done. The very right to live accrues to us only when we do the duty of citizenship of the world. [. . .] Every other right can be shown to be a usurpation hardly worth fighting for.' As a call to responsibility, Gandhi's is among the most strident, making the very right to life contingent on the fulfillment of a particular duty. It is worth recalling that unlike many contemporary humanitarians, Gandhi – who made his body, and the bodies of his followers, the critical battleground against British rule – regarded suffering and death as less intolerable than injustice. Even if few today share Gandhi's faith in or commitment to *satyagraha*, his insistence on connecting the international human rights project with a corresponding set of reciprocal, cosmopolitan obligations – 'the duty of citizenship to the world' – suggests how humanitarian responsibility may yet contribute to global care and justice. Configured as mutual commitment within a diverse but planetary polis rather than a unilateral act of benevolence between bounded communities, humanitarian responsibility can bracket humankind together by recognizing that the humanity of the self is affirmed most clearly through the protection and promotion of the human dignity of others.

Notes

1. See, for instance, Calhoun (2008).
2. 'Political humanitarians,' such as Thomas G. Weiss, by contrast identify responsibility with a form of humanitarianism that closely aligns itself with efforts to 'halt violence and ensure respect for human rights.' See Weiss (1999).

3. Rony Brauman (2007: 138–139) calls the Congo experience humanitarianism's 'main negative paradigm – [. . .] the template of what should be avoided at all costs.'
4. In 'Politics as a Vocation,' Weber famously develops the idea of an 'ethic of responsibility,' which he contrasts with the 'ethic of ultimate ends,' describe an attention to the specific effects of particular actions. This is not the kind of responsibility we have in mind here, which Weber himself, in his analysis of bureaucratic organization, termed 'duty.'

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Part II

States' Responsibilities: Beyond 'Violations' of Human Rights

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3

Doctrinal Innovation and State Obligations: The Patterns of Doctrinal Development in the Jurisprudence of the UN Committee on Economic, Social and Cultural Rights

Mátyás Bódig

Introduction

When we focus on accountability for human rights abuses, we are likely to follow the path of certain familiar associations. The key issue seems to be how obligations come to be institutionally associated with human rights norms: accountability invites an institutional (and thereby legal) perspective.[1] International human rights law looks like the primary framework for specifying exact human rights obligations – especially for State Parties.[2] And the most straightforward mechanism for setting specifically legal obligations is the creation of binding legal documents (e.g., by way of multilateral human rights treaties). In this chapter, I will stay focused on the institutional aspects of accountability but I shift the attention to an alternative to drafting treaties: breaking down the normative implications of recognized human rights by way of doctrinal reasoning. This mechanism relies on the normative competence of tribunals or human rights bodies in consolidating innovative ways of interpreting existing legal documents. I seek to contribute to understanding better this 'doctrinal route' of specifying human rights obligations.

My analysis will revolve around the doctrinal work of the UN Committee on Economic, Social and Cultural Rights (CESCR) – the treaty

body for the International Covenant on Economic, Social and Cultural Rights (ICESCR). This is an attractive vantage point because, due to some deficiencies of the ICESCR and the scarcity of domestic jurisprudence on economic and social rights (Alston 1987: 351–352), the CESCR had no other choice but resorting to developing obligation-related concepts by way of doctrinal innovation. Although there has been an encouraging accumulation of domestic jurisprudence recently (Landau 2012; Young 2012), the CESCR still has to act as a trailblazer for doctrinal development in the field. Since the late 1980s, the CESCR have developed a complex framework for specifying human rights obligations. My analysis will focus on the General Comments of the CESCR, putting Concluding Observations on State Reports on one side. General Comments have been better vehicles for building the doctrinal profile of the CESCR: they provide general and authoritative interpretations of the normative implications of the ICESCR. I will subject to more detailed analysis two of the doctrinal constructs that feature in CESCR General Comments: 'minimum core obligations' and the 'tripartite classification of State obligations.'

The ICESCR and the need for doctrinal innovation

Reshaping state obligations by way of doctrinal innovation is never without difficulties. It runs the risk of illegitimately extending the scope of treaty-based responsibilities. But it is sometimes justified, even necessary – especially when redrafting the relevant legal documents is not feasible. Sometimes, it is the only way to improve human rights protection. Even when justified, doctrinal innovation becomes a balancing act. One needs to get right the practical weight of the relevant rights (their ability to make a practical difference to people's lives) without openly flouting what the State Parties have agreed to by acceding to human rights treaties. In other words, one should be acutely aware of the ways human rights institutions are constrained by the construction of legality characteristic of public international law.

Resorting to doctrinal innovation is often problematic but it is not particularly difficult to justify when it comes to the ICESCR. The ICESCR (as a legal document) suffers from a number of important deficiencies. Without doctrinal innovation, it may never become a viable platform for setting practicable state obligations. Of the problems with the ICESCR, three deserve mention here. First, the Covenant's open 'redistributionism' (Craven 1998: 157–158) and its emphasis on trade union

activism reflect reliance on an outdated (and uncomfortably ideological) vision for the welfare state (Craven 1998: 138; Tomuschat 1985: 566). In important respects, the Covenant is a memorial to the aspirations of the labor movement in the first half of the 20th century (Palmer 2007: 8). Second, the drafters of the ICESCR have made some questionable choices, and the text came to offer an unfortunate mixture of a minimalist and a maximalist agenda for economic and social rights.[3] Third, in its Art 2(1), the Covenant addresses state obligations with a soft normative language (using phrases like 'undertakes to take steps,' 'to the maximum of its available resources,' 'with a view to achieving progressively the full realization') that has very uncertain legal implications.[4] It has been a worry from the beginning that the way the Covenant captures the nature of state obligations gives a free license to duty-bearers to postpone indefinitely any meaningful implementation.

Many would also argue that a further characteristic deficiency is that the ICESCR establishes a weak monitoring system (with periodic state reporting at its heart). But I do not agree. For reasons that will become clearer below, the monitoring system that revolves around developing constructive communication between State Parties and the treaty body is a potential strength of the Covenant. However, it is true that this 'dialogical model' of monitoring cannot live up to its potentials if the weaknesses I have highlighted are not addressed, and especially if there is a chronic lack of clarity about the specific obligations of State Parties.

Undoubtedly, doctrinal innovation can do something about the first challenge. It can tone down the ideological features of the ICESCR by 're-framing' its articles: detaching them from the imagery of the welfare state, and tying them closer to other human rights (i.e., putting emphasis on the interdependence and indivisibility of human rights[5]). It can also shape our understanding of the point of implementing economic and social rights – e.g., by elaborating on their linkages with problems of international development (CESCR 2001; 2008). However, doctrinal innovation (interpretative clarification anchored in innovative doctrinal constructs) can make more difference in terms of the second or the third challenge.

In this chapter, I mainly deal with the jurisprudence of CESCR in terms of the third challenge. I look into the efforts to translate the soft normative terms of the ICESCR into the language of clearer and more specific obligations. I think that much of the doctrinal contribution of the CESCR was motivated by a drive to set limits to the relativizing force of ICESCR Art 2(1). The Committee sought to show that, in the ICESCR, one can find a framework to hold State Parties accountable –

once state obligations under the Covenant are put on a more stable doctrinal footing. This is what led to developing a pretty idiosyncratic account of state obligations in the General Comments.

Justiciability and violationism

To gain some perspective on the doctrinal innovations of the CESCR, we need to appreciate the importance of the fact that, for a long time, the Committee has been working under the assumption that its doctrinal work is hindered by the monitoring regime originally established by the ICESCR. Much of its doctrinal work was explicitly directed at laying the groundwork for a reform of the monitoring regime. Even more importantly, CESCR jurisprudence consolidated around a particular reform agenda. The Committee has been pushing for a monitoring regime that attributes special significance to making economic and social rights justiciable (that is, making their implementation subject to independent judicial or quasi-judicial review). It has become a strategic objective to make room in the monitoring regime for a manifestation of justiciability: an individual complaints mechanism. The CESCR formulated a formal proposal for an Optional Protocol to the ICESCR as early as 1992, and four separate reports on the Protocol were drafted in 1996 (Craven 1998: 98).[6] From the beginning, the powers of the Human Rights Committee were envisaged very clearly as the model for better monitoring for the CESCR (Alston 1987: 345; Craven 1998: 56–57).

A few points of clarification on justiciability may be helpful here. First, the doctrinal ambitions of the CESCR presuppose a conceptual point about economic and social rights: correcting the common mistake of thinking that they are never justiciable. As is commonly known, many have come out against the justiciability of economic and social rights, and even called into question the status of them as genuine human rights on this basis (e.g., Cranston 1983; Shelton 1999: 2–3). The efforts of the CESCR are crucially dependent on a plausible answers to this conceptual challenge. Luckily for the CESCR, after decades of debates, the categorical rejection of the justiciability of economic and social rights looks increasingly implausible and anachronistic (Harrison 2007: 26; Shany 2007: 79, 102). It is mainly because justiciability has come to be seen as a broad and fluid concept (Scott, 1989, 839): it is difficult to accept that there is no room for forms of judicial or quasi-judicial review that fit the character of economic and social rights (Shany 2007: 78–79; Fredman 2010: 304–305) – even though they might require some innovative institutional design. It also matters a lot that one does not need

to claim that every aspect of each and every economic and social right is readily justiciable (Churchill and Khaliq 2007: 197–198). One can argue for 'partial justiciability' (Eide 2001: 25; van Bueren 1999: 65) – which may be gradually extended over time. The plausibility of more nuanced views on justiciability is borne out by the experiences of international fora (Baderin 2007; Palmer 2007: 49–103) and national courts (van Bueren 2002: 461–466; Churchill and Khaliq 2007: 198).[7]

Importantly, CESCR jurisprudence developed along the lines of these conceptual developments: it supports partial justiciability that may require some efforts to build a more hospitable institutional environment for economic and social rights. This has shifted the debates from old conceptual controversies to the more practical question of whether there is an institutional model that can positively contribute to the implementation of human rights by making at least some aspects of economic and social rights justiciable (Tushnet 2004; Brand 2006; Palmer 2007).

This explains how the issue of justiciability is linked up with our more specific topic of specifying obligations by way of doctrinal innovation. If the point is doing justice to the 'true character' of economic and social rights, as well as improving their implementation, the issue of obligations is of primary strategic importance. If we have certainty and specificity about obligations, it will inform our discussions on the feasibility of making the underlying rights justiciable. We will see below how obligation-related concepts in CESCR jurisprudence came to be associated with the issue of justiciability along these lines.

The second point to keep in mind is that claims about justiciability have implications for both international and domestic institutions. They are partly about encouraging national governments to subject their implementation of economic and social rights to independent review at domestic courts. But they are also about the suitability of international bodies to adjudicate over individual, collective, or interstate complaints. CESCR jurisprudence encompasses both aspects of justiciability: national governments should legislate to make at least some economic and social rights justiciable (General Comment 3 1990: ss. 5–6), and the Committee should be given quasi-judicial functions over the ICESCR (Craven 1998: 57). Effective implementation is possible only if national and international tribunals mutually inspire each other (Shelton 1999: 57).

Our focus in this analysis is international justiciability. In that respect, it is crucial to keep in mind that, when it comes to a complaints mechanism that the CESCR can operate, its feasibility only partly depends on

the doctrinal character of economic and social rights. It also crucially depends on how a series of related issues of political justifiability are handled. A fitting model for international justiciability must be developed under the pressure from two justificatory challenges: (1) the review of implementation must not constitute an illegitimate intrusion into the policy affairs of governments; and (2) international tribunals must appreciate that they have limited expertise to deal with complex socioeconomic issues that touch upon resource allocation (Tushnet 2004: 1896; Brand 2006: 225; Palmer 2007: 27–28).

This indicates that a balanced assessment of doctrinal innovation in CESCR jurisprudence has to operate along two dimensions: doctrinal plausibility and political justifiability. We will need to address both dimensions to substantiate the points made about CESCR jurisprudence in this analysis. I argue that, overall, the CESCR did an admirable job with its jurisprudence: it did well to bring the ICESCR into the 21st century. And, in the process, the Committee's determination to develop a plausible framework for state obligations was of key significance. However, the Committee's performance is less reassuring when it comes to handling challenges of political justifiability.

In terms of political justifiability, the mere fact that the CESCR prioritized issues of justiciability is unobjectionable. What is problematic is that the emphasis in General Comments has shifted too much toward the ways of identifying violations of economic and social rights (Dennis and Stewart 2004: 492). The focus is on determining criteria for clear violations of economic and social rights, and it looks a lot like unilaterally imposing normative expectations on state parties. Even the effort of clarifying state obligations seems a lot like targeted at improving the ability to declare clear violations of economic and social rights. This can be interpreted as a kind of 'violationist bias.'

Violationism, of course, has its own plausibility. It builds on the argumentative momentum generated by a pressing moral concern among many human rights activists: the urgency of addressing the violations of the economic and social rights of the poor and the destitute. *The Maastricht Guidelines* (1997) (the blueprint for Committee jurisprudence since 1997), with its clear focus on appropriate responses and remedies to violations, is a testament to this moral concern. But violationism is pushing the boundaries of the institutional competence of the CESCR – risking that the Committee goes beyond its legal mandate, and embarks on unilaterally redrawing the normative implications of the ICESCR. It is no surprise then that the interpretive practices of the Committee have been subjected to withering criticism (Mechlem 2009; Odello and Seatzu

2013: 34), and the Committee found itself in quarrels with a number of countries (like the United Kingdom) about the justiciability of economic and social rights (Bates 2007: 271). Quite regardless of their plausibility in the abstract, certain perspectives on justiciability have a tendency to exacerbate challenges of political justifiability.

Minimum core obligations

Let us turn now to the doctrinal constructs in CESCR jurisprudence. The CESCR General Comments rely on a broad variety of them. At the very minimum, one must reckon with the 'tripartite classification' of state obligations ('respect,' 'protect,' 'fulfill'), 'minimum core obligations,' the distinction between 'general' and 'specific' obligations, as well as obligations of 'conduct' and 'outcome,' and the distinction between violations 'through act of commission' and 'through omission.' In this analysis, I single out two of them for more detailed analysis: the 'tripartite classification' and 'minimum core obligations.'

'Minimum core obligations' are an early addition to the Committee's doctrinal arsenal. They first featured in General Comment 3 (1990) (Craven 1998: 141), following Philip Alston's suggestion that core obligations could be relied on as a doctrinal tool for specifying state obligations under the ICESCR. Importantly, Alston's did not mean to capture something specific about economic and social rights: he was talking of a feature of all rights (Alston 1987: 352; Bilchitz 2003: 13).

The idea of minimum core obligations offered a way to address the oft-repeated charge that economic and social rights are too indeterminate to lend themselves to meaningful implementation (Young 2008: 173; Fredman 2008: 124). One could argue that, even if their substantive implications are not fully determinate, they each have a core content that can be captured in terms of obligations. This, of course, made core obligations directly relevant for the justiciability debate. It seemed to substantiate the claim that, at least for their minimum content, it must be possible to apportion liability for violations of economic and social rights (van Bueren 1999: 57).

As we have seen, identifying determinate and readily enforceable obligations is particularly tricky in light of Art 2(1) of the ICESCR. The idea of minimum core obligations offered a way to address this challenge by limiting the relativizing force of 'progressive realization' (Young 2008: 121). It warranted a presumption that certain, basic forms of privation are definite violations of human rights (Green 2001: 1073). Almost as importantly, the idea reflected a minimalist strategy about human rights

(Young 2008: 113–114) – prioritizing a set of minimizing goals over lofty ambitions, and bringing CESCR jurisprudence in line with much of contemporary human rights activism (Lehmann 2006: 180; Young 2008: 122).[8]

However, relying on the minimum core in interpreting the ICESCR is not without difficulties. Once we look beyond the general (and generally plausible) idea, a series of challenges emerge. For example, minimum core obligations may limit the relativizing force of the 'progressive realization' standard but they cannot negate it. What may come out of the somewhat uneasy interaction between the minimum core and Art 2(1)? If progressive realization presupposes that, at different stages of development, under different levels of resource constraints, economic and social rights are to be implemented to different extent (Young 2012: 69), does that mean that resource issues enter into the minimum core obligations that apply to different countries? In other words, will the minimum core be state specific or universal (Craven 1998: 141–143)? Also, it is not obvious what feature of rights generates the minimum core obligations. Is it some of their essential, conceptual features that link them to underlying values (like 'dignity' or 'survival')? Or is it the way rights have been institutionalized in international law (reflecting some consensus among State Parties on minimum standards of governance)? Uncertainty on this point has actually generated a broad spectrum of different and often incompatible approaches – some essentialist (tying the concept to foundational values), some institutionalist (shifting the focus on the fact of an underlying agreement about the content of human rights) (Young 2008: 125).

The CESCR did a lot to confer doctrinal significance on the idea of minimum core obligations but it did surprisingly little to address any of the dilemmas arising from it. In some respects, its use of the minimum core has become a source of uncertainty and controversy. The CESCR may have shown how clear examples for the minimum core obligations look like when providing lists of them in General Comments: for example, securing access to safe and potable water (General Comment 14 2000: s. 43), adopting and implementing a national employment strategy (General Comment 18 2005: s. 31), and monitoring the realization of the right to social security (General Comment 19 2007: s. 59). But the doctrinal parameters of the legitimate use of the concept were never laid out. This explains the wide disparity of views among commentators on the way minimum core obligations feature in the General Comments. Most would probably say that the early references (primarily in General Comment 3 1990) are seriously lacking in clarity (Sepúlveda 2003:

366). But the contrary view also has advocates: initially, the concept was well defined and properly related to resource constraints (Mechlem 2009: 940–941). As to the trajectory of CESCR doctrine, some argue that there has been some welcome progress. There is more clarity about core obligations in General Comments 13 (1999) and 14 (2000) and afterwards (Sepúlveda 2003: 368). Others, on the other hand, see an inherent uncertainty in CESCR jurisprudence that the Committee never tackled. The CESCR 'variously equated the minimum core with a presumptive legal entitlement, a nonderogable obligation, and an obligation of strict liability' (Young 2008: 115). If there was development, it lay in the fact that the CESCR changed the character of the minimum core: it has become a device to outline the necessary steps of 'technical operationalization' of rights (Young 2008: 152).[9] The minimum core merges more and more with the idea of obligations that require immediate performance (Young 2008: 155). Some see here a movement toward a more expansive, less credible, and less coherent understanding of the concept.[10]

In light of all this, it is no surprise that some doubt that minimum core obligations can ever become a reliable doctrinal tool for all rights (Chapman 2007: 154–155). Karin Lehmann has rejected the minimum core as a conceptually and pragmatically misconceived idea – inimical to principled application (Lehmann 2006: 165–166). Katherine Young went as far as suggesting that we should give up on the minimum core as a doctrinal concept.[11] The skepticism was certainly fueled by the mixed reception the minimum core got in domestic courts.[12]

Even if one does not reject it on doctrinal grounds, one may worry about the way reliance on minimum core obligations distorts the political agenda for human rights implementation. Twomey complains that it shifts our attention to the more readily observed procedural aspects of rights (Twomey 2007: 64–65). Young argues that fixation with the minimum core (especially when driven by a particular vision for justiciability) favors the negative articulation of rights, and obscures positive obligations (Young 2008: 161). And some worry about the political connotations: our attention shifts to the performance of developing states. The responsibilities of developed states get obscured (Craven 1998: 143–144).

Clearly, some of the concerns with minimum core obligations are doctrinal, while others raise issues of political justifiability. And I admit that the CESCR can be faulted on both counts: its jurisprudence lacks doctrinal clarity, and is wedded to a politically charged vision of justiciability. But none of the objections is fatal to the idea of minimum core

obligations. The idea remains a useful piece of doctrinal innovation – in need of further clarification and a politically more sensible framing. It seems to me that many of the doctrinal worries can be addressed by integrating the minimum core with other obligations-related concepts in CESCR jurisprudence. I will say more about this after dealing with the tripartite classification of state obligations. The political objections can be trickier but I think we can go a long way toward handling them if we tackle the problem of violationist bias. I will also return to this issue later in the chapter.

The tripartite classification of state obligations

The tripartite classification of state obligations ('respect,' 'protect,' 'fulfill') started off as a pure scholarly invention. It has no textual basis in binding human rights documents. Not unlike minimum core obligations, its inclusion in CESCR General Comments had a lot to do with efforts to show that economic and social rights can have determinate content. The tripartite classification is actually a framework for identifying the full range of human rights obligations. A lot like minimum core obligations, the tripartite classification directly relates to the debate about justiciability: it bolsters the claim of (at least) partial justiciability. At the very least, it allows us to say that all human rights give rise to obligations to refrain from depriving the right-holders of what they have secured for themselves (in terms of health care, educational provision, food supplies, etc.). Such negative obligations are not exposed to the relativizing force of resource constraints, and they seem readily justiciable (Scott 1989: 835; Koch 2009: 15).

The emergence of the tripartite classification has a lot to do with the realization that the traditional distinction between negative and positive rights is detrimental to the credibility of economic and social rights. And it proved remarkably successful in undermining this troublesome distinction (Palmer 2007: 22; Landman 2009: 23). In theoretical terms, what the tripartite classification offers is a kind of 'two-step' reconstitution of the 'positive–negative' distinction. The first step is rejecting the suggestion that rights can be positive or negative. Instead, rights-related obligations may be positive or negative. (Theorizing on positive obligations remains both theoretically and doctrinally plausible – Fredman 2008.) The second step is moving beyond a simple dual categorization of obligations. Human rights have come to be seen as generating a 'spectrum' of different obligations (Künnemann 1995: 331; Koch 2009: 16). The three elements of the tripartite classification are actually heuristic

devices that cover 'ranges' on this obligation spectrum. 'Respect' obligations are closer to the negative 'pole' and 'fulfill' obligations are closer to the positive 'pole.'

The very idea, although not the current terminology, can be traced back to Henry Shue's seminal book, *Basic Rights*. Shue presents a particularly compelling critical attack on categorizing rights as being negative and positive. He shifts the emphasis to the issue of obligations, and introduces a general, tripartite categorization of the rights-related obligations: duties to avoid depriving, duties to protect from deprivation, and duties to aid the deprived (Shue 1980: 52–60).[13] Shue puts special emphasis on highlighting how the categorization applies to economic and social rights: he talks of duties not to eliminate a person's only available means of subsistence; duties to protect people against deprivation of the only available means of subsistence by other people; and duties to provide for the subsistence of those unable to provide for their own (Shue 1980: 53).

It is due to Asbjørn Eide's pioneering work that Shue's account of obligations quickly assumed a doctrinal construct. He developed the current terminology in the early 1980s (Eide et al. 1984), and consolidated it in later publications (Eide 2001: 24). Duties to avoid depriving became 'obligations to respect,' duties to protect from deprivation became 'obligations to protect,' and duties to aid the deprived became 'obligations to fulfill.' His Final Report as Special Rapporteur on the Right to Food (Eide 1987) played a crucial role in spreading the idea of the tripartite classification.

Importantly, there is no obvious theoretical reason why the obligation spectrum should be divided up among exactly three types of obligations. The categories are heuristic devices after all. In fact, there have been important attempts to elaborate on the categorization of human rights obligations (Sepúlveda 2003: 157–164). In 1984, van Hoof argued for including a fourth category: obligations to promote (van Hoof 1984: 106–108). Eide himself experimented with moving from three categories to four (adding a 'duty to facilitate') at some point (Eide 1999). Steiner and Alston proposed an alternative categorization that identifies five levels of obligations: duties to respect the rights of others; duties to create institutional machinery essential to the realization of rights; duties to protect rights/prevent violations; duties to provide goods and services to satisfy rights; and duties to promote rights (Steiner and Alston 2000: 180–185). The fact that Eide's original, tripartite categorization remained the most influential is largely due to the fact that it was 'canonized' in *The Maastricht Guidelines* (1997) and CESCR General Comments.[14]

The tripartite classification has been one of the established doctrinal tools for interpreting the ICESCR since the second half of the 1990s (e.g., Craven 1998: 107). (In terms of CESCR jurisprudence, it first featured in General Comment 12 1999) It has become the classical formulation of the multiplicity of human rights obligations (e.g., Yamin 2003: 328–329; Bernier 2010: 259; De Schutter 2011: 314–315), and made a remarkable career in quasi-official UN documents (Yamin 2003: 352; Office of the United Nations High Commissioner for Human Rights 2006: 2). It is widely accepted as capturing a conceptual feature of all human rights (Künnemann 1995: 327–328; Leckie 1998: 90–92; Fredman 2010: 303), and some see it as the cornerstone of a common doctrinal framework for all human rights bodies (O'Flaherty 2007: 32).

Doctrinal integration and dialogical monitoring

I have argued above that the ICESCR, due to some of its characteristic deficiencies as a human rights document, made doctrinal innovation necessary. We have seen how doctrinal innovation is manifested in two doctrinal constructs in CESCR jurisprudence: 'minimum core obligations' and the 'tripartite classification of State obligations.' I am quite convinced that both of them are major advances on our understanding of the normative implications of the ICESCR but they fared quite differently in legal and academic discourses.

The tripartite classification is by far the most successful piece in the doctrinal arsenal of CESCR jurisprudence. Considering that is not significantly clearer than other doctrinal devices,[15] it is almost surprisingly uncontroversial.[16] The idea of minimum core obligations, on the other hand, remained chronically controversial, and made very limited doctrinal impact on international human rights law outside the CESCR General Comments. How can we account for this discrepancy, and how could the minimum core obligations share at least some of the success of the tripartite classification?

I do not think that minimum core obligations are more controversial because they are inherently more combative. The tripartite classification is not merely a way to organize human rights obligations into useful categories: it has a hard edge in doctrinal debates. It can be used to promote the justiciability of economic and social rights (resolutely denied by many states – Dennis and Stewart 2004: 472–473). 'Respect' obligations actually show close affinity to minimum core obligations. The tripartite classification may be less controversial because it did not remain tied to the specific doctrinal agenda of the CESCR. The minimum core, on the

other hand, has become the symbolic manifestation of the violationist bias in CESCR jurisprudence.

If this is the case, the doctrinal credibility of minimum core obligations could be improved significantly by addressing one of the puzzling features of CESCR jurisprudence: the striking lack of efforts to integrate the obligation-related concepts in the General Comments. The CESCR resorted to an idiosyncratic demarcation of substantive issues in its General Comments: the tripartite classification ended up under the heading of 'specific obligations,' and minimum core obligations were laid out as a self-standing category in a separate section. There is a pressing need to clarify the relationship between the tripartite classification and minimum core obligations (Young 2008: 154). And it should start with linking minimum core obligations to the most plausible aspect of the tripartite classification: the idea of the obligation spectrum. Minimum core obligations are bound to look incompletely articulated without being located on the obligation spectrum. Importantly, this would also be an impetus for further doctrinal work on the tripartite classification. We would get to see more clearly whether minimum core obligations are likelier to be 'respect' obligations, or whether they just as well can be 'protect' and 'fulfill' obligations.

Of course, there is a limit to what doctrinal clarification can do to make minimum core obligations less controversial. As we have seen, some important objections concern the political justifiability of relying on minimum core obligations in interpreting the ICESCR. And those objections cannot be adequately addressed without facing up to the damage the violationist bias of CESCR jurisprudence has caused. Violationism systematically underestimates the extent to which the very character of international law makes human rights monitoring dependent on the cooperation of State Parties, and inflates expectations about the difference justiciable economic and social rights could make to the life prospects of people around the world.

But where would this curtailing of the violationist bias take us? The CESCR cannot be faulted for its efforts to lay the doctrinal groundwork of a complaints mechanism for the ICESCR. Pushing for a monitoring regime that reflects the justiciability of economic and social rights better is a move in the right direction. But it cannot call into question the centrality of dialogical monitoring under the ICESCR. The complaints mechanism can only be an important but limited addition to the monitoring mechanism (Vandenbogaerde and Vandenhole 2010: 231). It adds a dimension to the dialogue with State Parties, and it may have some role in raising public awareness of economic and social rights

(Chapman 1996: 39–40; Craven 1998: 99). The point that provides a rational ground for doctrinal innovation is that a dialogical model of monitoring is quite fitting for the ICESCR. What is at stake is how dialogical monitoring can be bolstered. We can safely say that the original implementation regime was not complete, and some (but not all) of its specific weaknesses can be addressed by a complaints mechanism (Fredman 2008: 165). Reporting in itself is never sufficient. There is a need for dynamic engagement: combination of 'peer review,' participation by stakeholders, incentives, and deterrents (Fredman 2008: 169).

It would be unfair to claim that the CESCR has turned its back on dialogical monitoring. It has actually made efforts to improve it. Most characteristically, the Committee pioneered the inclusion of NGOs in the monitoring process – accepting shadow reports from them, inviting them for discussions on state reports, etc. (Craven 1998: 80–83; Sepúlveda 2003: 69–70). But the CESCR could have made more sustained efforts to develop a vision on how the reporting system and the complaints mechanism were supposed to coexist, and its doctrinal work should reflect more explicitly the centrality of dialogical monitoring.

There is a bigger point in the background of these observations that I cannot address adequately in this analysis. The success of a doctrinally plausible monitoring regime for the ICESCR in furthering effective implementation ultimately depends on a particular understanding of state legitimacy. Participation in human rights mechanisms must make sense for State Parties because it addresses an aspect of their legitimacy that they cannot properly tackle through domestic legitimating processes (no matter how strong their democratic mandate is). They have to justify their practices of governance in the eyes of the international community and in light of mutually agreed international norms. They must see human rights monitoring as reflecting their responsibility toward the international community for the way they exercise their sovereignty on their respective territories.[17] Of course, doctrinal innovation by the CESCR cannot do much to consolidate this understanding of state responsibility. It is ultimately a function of the normative dynamics of international relations. But the long-term success of doctrinal innovation in human rights law crucially depends on it. This is what may make it politically justifiable.

Conclusion

I dedicated this analysis to exploring the character and prospects of doctrinal innovation in international human rights law. And I have

organized the discussion around an analysis of two characteristic doctrinal constructs in CESCR jurisprudence: 'minimum core obligations' and the 'tripartite classification' of state obligations. I have argued that the CESCR deserves praise for making the ICESCR more relevant to the human rights discourse in the 21st century. However, doctrinal innovations in CESCR jurisprudence were not consistently successful. As the political and institutional environment in which the CESCR operates is changing, there is need for a partial overhaul of CESCR doctrine. First and foremost, the CESCR must put more effort into integrating the obligations-related concepts it uses to specify state obligations. And it has to restore the centrality of a dialogical model monitoring to its doctrinal work. It requires the CESCR to reconsider its perspective on the justiciability of economic and social rights – curtailing its current violationist bias.

One can say that these considerations are put in a new perspective now that the Optional Protocol to the ICESCR has entered into force. It brings to conclusion a decades-long fight by the Committee for the establishment of a complaints mechanism. However, we should not forget that the Optional Protocol did not prove to be an obvious vindication for the doctrinal efforts of the CESCR. Remarkably, in its Article 8(4), the Protocol contains a sort of interpretive guide for the Committee on how state performance should be assessed. It steers the Committee's monitoring work toward a sort of 'reasonableness standard.' I believe that this development offers a chance to take a fresh look at the CESCR General Comments, and ask to what extent they can be taken as the authentic source of doctrinal insights into specific state obligations. It is a chance to address the violationist bias of CESCR jurisprudence.

Notes

1. This does not mean that I take human rights as mere legal constructs, or that I deny the downsides of the legalization of human rights. See Meckled-Garcia – Cali (2006). But I deal with an aspect of human rights that warrants a legal perspective here.
2. For a more complete account of varieties of accountability under international human rights law, see Chapter 5 by Gibney in the present volume. I remain focused on state obligations here.
3. Art 11(1) of the ICESCR makes the continuous (!) improvement of living conditions a right of everyone (that is, even of the citizens of the richest countries). On the other hand, Art 14 settles for an obligation to introduce a detailed plan (!) to implement compulsory primary education for countries that were not able to implement it before acceding to the ICESCR.

4. > Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
>
> ICESCR, Art 2(1)

5. See, for example, General Comment 2 (1990) s. 6; General Comment 3 (1990) s. 8. For a penetrating analysis of indivisibility and its complex relationship with the issue of justiciability, see Chapter 4 by Whelan in the present volume.
6. We have to note that, ultimately, the Optional Protocol was adopted, and it came into force in 2013. See 'Optional Protocol to the International Covenant on Economic Social and Cultural Rights' (adopted by General Assembly Resolution A/RES/63/117, 10 December 2008). All through this process, the efforts of the CESCR were bolstered by significant support from doctrinal writers (Sepúlveda 2003: 429). They often formulated doctrinal proposals with a view to a CESCR complaints mechanism (e.g., Chapman 1996; Shany 2007: 105–106).
7. The two typical examples for exciting domestic developments are India (Kothari 2007) and South Africa (Bilchitz 2003; Brand 2006).
8. This moderation clearly bolstered the support for CESCR jurisprudence among scholars and commentators. See Scott (1989: 837); Türk (1994: 175); van Bueren (1999: 57); Bilchitz (2002: 500).
9. See, for example, how technical some elements on the list of minimum core obligations are in s. 43 of General Comment 14 (2000): '(d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; (. . .) (f) To adopt and implement a national public health strategy and plan of action . . . .'
10. Mechlem (2009: 940–942) develops this point quite forcefully. General Comment 15 (2002) declares that core obligations are of immediate effect and hence not subject to progressive realization. However, General Comments 14 (2000), 18 (2005), and 19 (2007) do not include core obligations among the immediate obligations. General Comments 14 and 15 declare that noncompliance cannot be justified, while General Comment 19 allows for a justification of a failure to meet minimum core obligations if it is demonstrated that every effort has been made to make good use of the available resources.
11. Young's suggestion is that, due to the rhetorical force of the minimum core, the idea has to be turned into an 'interpretive device for advocacy networks' (Young 2008: 125).
12. The call to specify minimum core obligations was famously rejected by the South African Constitutional Court. See *Government of the Republic of South Africa* v *Grootboom* 2001 (1) SA 46 (CC), ss. 32–33. For commentary, see Bilchitz (2002); Bilchitz (2003); Lehmann (2006); Sachs (2007); Davis (2008); Fredman (2008: 84); Young (2008: 168). On the other hand, in Colombia, the vital minimum doctrine had a huge influence on domestic jurisprudence. See Landau (2012).

13. For Shue's impact on later theoretical development, see Fredman (n 33) 69.
14. The alternative proposals were not in vain: van Hoof's 'duty to promote,' Eide's 'duty to facilitate,' and Steiner and Alston's 'duty to provide' also found their way into CESCR jurisprudence. They have become the aspects of the 'duty to fulfill' in recent CESCR General Comments. For example, CESCR General Comment 19 (2007).
15. It is difficult to figure out whether the relationship between the obligations in the 'tripartite classification' is static or dynamic. For example, can 'duties to protect' expand or contract in relation to 'duty to respect' under changing circumstances? (Shue 1996; Young 2008: 163).
16. Koch stands very much on her own with her systematic critical attack on the tripartite classification (Koch 2009: 17–27). Even in her case, the criticism is partly unmotivated. It is designed to justify her decision not to rely on the tripartite classification in her analysis of the jurisprudence of the European Court of Human Rights.
17. This is, of course, a vision of the relationship between sovereignty and responsibility that underlies the UN documents on 'Responsibility to Protect' (R2P). For example, 'World Summit Outcome' (2005), ss. 138–139.

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4

Indivisible Human Rights and the End(s) of the State

Daniel J. Whelan

Introduction

The rhetoric of indivisible human rights has a long history, dating back at least to the initial division of the draft International Covenant on Human Rights into separate treaties in the early 1950s. Prior to that, there was no need to speak of the relationship between the two 'grand categories' of human rights as being 'indivisible' – the 1948 Universal Declaration of Human Rights includes both sets of rights, and all of the influential antecedents of the Universal Declaration had included a catalogue of key economic and social rights alongside 'traditional' civil and political rights. But the Declaration, by its very nature, was void of legally binding obligations or measures of implementation. When the time came to translate its principles into binding treaty law, divisions emerged over the different obligations that were deemed appropriate for the realization of the two sets of rights.

This division sparked the rhetoric of indivisibility. A frequently cited critique of the International Covenant on Economic, Social and Cultural Rights (ICESCR) centers on the progressive nature of its core obligations when compared to the ostensibly more 'immediate' or 'concrete' obligations contained in its companion, the International Covenant on Civil and Political Rights (ICCPR). As the argument goes, while the ICCPR envisions immediate implementation through legislative means, and adopts a 'violations approach' to adjudication and justiciability,[1] the ICESCR, as it was drafted and adopted, envisioned an incremental, programmatic approach to implementation – 'softer' obligations that do not carry the same force of legal justiciability as civil and political rights. Since the 1980s, advocates of stronger measures in the defense of economic and social rights have attempted to bolster the

rights-and-obligations *bona fides* of the ICESCR, in order to demonstrate the equal importance of economic and social rights, *as rights*, on the same level as civil and political rights. This is central to the rhetoric of indivisibility.

This chapter seeks to explore, conceptually and historically, the question of what the concept of 'indivisible human rights' tells us about the nature and extent of state duties for the protection and promotion of economic and social rights in particular. It begins by exploring two possibilities. The first is that what makes human rights indivisible is the fact that they are equally justiciable: just as we can readily identify violations of civil and political rights, so too can we identify violations of economic and social rights. Human rights are indivisible because they are equally rights despite the fact of their conceptual and institutional division into separate treaty regimes.

An alternative conception turns this formulation inside-out: rather than focusing on the indivisibility of *rights* (meaning, their 'sameness'), we should instead conceptualize the indivisibility of state *responsibility* to respect, protect, and promote all human rights, no matter their 'nature' or content. But instead of thinking of all rights as essentially the same (as in the first conception, above), this reconceptualization will inevitably lead us to consider the *different* responsibilities of states toward *different* categories of rights. We will need to consider whether these differential obligations dilute the idea of indivisibility or, on the other hand, they reflect a particular notion of the modern ethical state that has much broader ends than simply the protection and promotion of human rights. In other words, we will be compelled to ask questions about the end(s) of the state and how the protection and promotion of human rights figures into those end(s).

When we consider human rights through the lens of the indivisibility of state duties, we must consider the possibility that the *fundamental* end of the modern ethical state is not the protection of rights, but rather the creation and maintenance of an environment that enables the emergence, promotion, and protection of individual autonomy and self-determination of a type that leads to human welfare and well-being. In meeting this more ethically substantial end, the state has many different kinds of obligations, among them the different and distinct obligations to respect, protect, and promote rights. But it has other responsibilities that do not arise directly from rights claims of individuals, but which nevertheless are necessary for individuals to secure their autonomy, self-determination, and thus, their welfare and well-being. Many of those obligations have a direct bearing on the enjoyment of

what we know as economic and social 'rights.' But while the protection and promotion of human rights are critical tools and provide significant guidelines for the ethical state, human rights are, in most cases, means to the achievement of this greater end, rather than ends in and of themselves. If the ideal of the modern state is bound up with the ideal of the autonomous, self-determining human being who is not just *capable*, but *able* to live 'a self-made life' (Levine 2008: 15), then we will need to reconsider what duties the state has with respect to what we know as 'economic and social rights' that will support and not violate the principle of individual self-determination.

First, let me stipulate a couple of ground-level assumptions about human rights and state responsibility in general. For the purposes of my argument (and brevity), I will not be speaking to the specific moral and legal obligations of a whole host of actors – states, international organizations, and so forth – for responding to complex humanitarian emergencies, whether those be natural (e.g., earthquakes; weather events) or man-made (e.g., crimes against humanity; genocide). While these are certainly important circumstances that have significant human rights dimensions, these obligations are extraordinary and covered under other international policy and legal rubrics, such as international humanitarian law, refugee law, and humanitarian and disaster relief policy.

Similarly, I am going to reject a minimalist conception of human rights (especially of economic and social rights), which maintains that state responsibility can be reduced to the fulfillment of 'minimum core obligations' as expressed in the Maastricht Guidelines (International Commission of Jurists 1998). While international human rights are not meant to reflect a maximalist conception of 'the good life,' they must be concerned with much more than 'bare minimums' (see Donnelly 2003; 2008; Nickel 2007). In my view, as I hope will become clear in my ensuing investigation, focusing on 'minimum core obligations' alone quickly exhausts the robust and widely varied state responsibilities for economic and social rights, leaving us with the impression that the beginning and end of state responsibility rests with *direct provisioning* of goods and services. While severe deprivation of, for example, food, clothing, or shelter is clearly problematic and demands remedy, the impetus for including economic and social rights in a catalogue of human rights was in response (to use Donnelly's language) to *standard* threats, rather than *extraordinary* threats, to individuals posed by states and markets in the contemporary world.

The first part of the chapter will briefly explore the first concept of indivisibility, which argues for the fundamental equality and 'sameness' of economic and social rights with respect to civil and political rights – that economic and social rights create individual entitlements that are justiciable, in much the same way civil and political rights require justiciable remedies. I will conclude that such an approach, while important, is too narrow and overlooks much broader state responsibilities for economic and social rights. It will then turn to a conceptual examination of individual self-determination commensurate with welfare and well-being, and the nature of state duties and responsibilities for promoting these ends, which go beyond the individual legal entitlements suggested by the first conception of indivisibility. The third section of the chapter will examine some historical evidence regarding the most influential antecedents of the Universal Declaration, which clearly reflects this view of economic and social rights in relation to these wider state responsibilities. The chapter will conclude with a brief examination of the larger implications of state duties for protecting rights as part and parcel of fostering human self-determination and welfare.

Human rights indivisibility

There are a number of distinct yet interrelated discourses of indivisibility, all of which concern the relations between the two grand categories of civil/political and economic/social rights.[2] The term was first used, however, during the early years of human rights standard-setting at the UN. Soon after the Universal Declaration's adoption in 1948, the Commission on Human Rights immediately returned to finalizing the draft Covenant on Human Rights, which at the time included only civil rights. When the UN General Assembly decided in 1950[3] that political, economic, social, and cultural rights should be included as well, the Commission was able to draft new substantive articles fairly quickly. But the Commission also recognized that state duties and obligations for these new rights were different compared to the civil rights that were already included – about that there was little debate. However, they disagreed on what those differences meant in terms of the unity of the Universal Declaration (Whelan 2010: 96–101).

In terms of monitoring, implementation, and enforcement of the Covenant, the Commission had proposed a reporting procedure for economic and social rights, instead of extending the already-drafted state-to-state complaints procedure (for civil rights) to the section on economic rights.[4] The Commission had not yet determined whether

the reporting procedure should apply to civil rights as well – although René Cassin of France strongly endorsed that approach.[5] Given the odd nature of what one Soviet diplomat called 'a covenant within a covenant,' India made a proposal at the end of the Commission's seventh session (1951) to ask the General Assembly to reconsider its 1950 decision calling for a single Covenant with both sets of rights. The proposal was defeated in the Commission but resurrected in the General Assembly in late 1951 and early 1952. After a long, often acrimonious debate between the 'West' and several post-colonial states, the General Assembly adopted Resolution 543 (VI), calling for separate Covenants, which would be open at the same time for signature (Whelan 2010: 101–110, 130–133).

Central to these debates were profound disagreements about the *justiciability* of economic and social rights. Opponents of division of the Covenant cited the inclusion of economic and social rights alongside civil and political rights within their own constitutions as evidence of their justiciability,[6] even though those provisions did not necessarily yield legal, justiciable rights in the traditional sense of the word.[7] The prevailing view, however, was reflected in the reporting procedure the Commission had drafted for the implementation of economic, social, and cultural rights in the Covenant. The author of that procedure, John Humphrey, argued that in drafting the 'umbrella clause' that introduced the new rights in the draft Covenant, the Commission had already agreed that the realization of economic, social, and cultural rights were by nature 'progressive.' The reporting procedure was in aid of that fact: 'The idea is to help governments fulfill their obligations rather than penalize them for violations . . . ' (Hobbins 1996: 202).

These debates came alive again after the Covenants entered into force in the late 1970s and advocates arrived on the scene in the 1980s and 1990s – some of them vociferously pointing out the 'second class' treatment afforded to economic and social rights by governments, other NGOs, and at the United Nations (Leckie 1998). Once again, debates about the legal effect of having a 'right,' and that having a right must somehow give rise to a justiciable duty or obligation on the part of the state, reappeared in the form of a 'violations approach' to economic and social rights.

A violations approach: Indivisibility reaffirmed?

Since the late 1980s, many human rights advocates have advanced an argument that if human rights are indivisible, interrelated, and

interdependent, and if civil and political rights can be violated, it must be possible to identify violations of economic, social, and cultural rights (Chapman 1996; Dankwa et al. 1998; Leckie 1998; see also Whelan 2008). The 1997 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* define three broad state obligations arising from the ICESCR – to respect, protect, and fulfill economic and social rights (more on this below) – and that failure to meet these obligations may amount to violations of the Covenant (International Commission of Jurists 1998: 693–694).

The adoption of a violations approach is very appealing to human rights and development advocates because of the nature of the problem that these rights are meant to address:

> The idea of economic and social rights as *human* rights expresses the moral intuition that, in a world rich in resources and the accumulation of human knowledge, everyone ought to be guaranteed the basic means for sustaining life, and that those denied these [means] are victims of a fundamental injustice. Expressing this intuition in the form of human rights both gives the deprived the strongest possible claim to that of which they are deprived, and emphasizes the duty of responsible parties to uphold or help them meet their entitlement.
>
> (Beetham 1995: 44)

In an earlier era, when deprivation was thought of in terms of 'lack,' deprivation was largely ameliorated by the family or local community as a matter of duties that were *not* derived from individuals holding rights against the community (Levine 2008: 11, 29–30). But when we are expected to meet our own needs through a market system of private provisioning, the modern state takes on a special role: a publicly acknowledged duty to aid those with whom we stand in no special relationship (Beetham 1995: 53). If people have needs, and those needs give rise to (especially) economic and social rights, there must, by definition, be an institution whose duty it is to enable the needy to secure their entitlement – the state. Furthermore, Beetham maintains, when a state cannot meet its duty, then it becomes the duty of the international community.

As a matter of moral duty or obligation, this argument seems quite straightforward. But do situations of deprivation give rise to rights to assistance? Advocates point to economic and social rights and answer, 'yes.' But they also continue to invoke moral necessity to drive the point home by focusing our attention on the worst cases of human suffering,

poverty, and deprivation, and by citing poverty statistics and the growing gap between the rich and poor (see, e.g., International Commission of Jurists 1998: 691–692; Pogge 2008). Despite these kinds of appeals (which appear quite frequently in the literature), even some of the most ardent advocates of a violations approach to economic, social, and cultural rights occasionally acknowledge the limitations of the rhetoric:

> To label all displeasing situations as violations of human rights, even when the state concerned has acted in good faith and sought to rectify problematic dilemmas relating to social and economic policy, would serve only to erode the seriousness of the term. Violations language should only be utilized when a legal basis and an identifiable corresponding legal obligation exist.
>
> (Leckie 1998: 96)

Alston and Quinn also have cautioned that over-emphasizing legal justiciability might compel us to artificially mold the nature of economic, social, and cultural rights to make them conform to the *perceived* characteristics of civil and political rights (Alston and Quinn 1987: 160). Still, after nearly two decades of deliberation, the United Nations formally endorsed the violations approach to economic and social rights when it adopted the Optional Protocol (OP) to the ICESCR in 2008. It was opened for signature in September 2009, and entered into force in May 2013.[8] The OP establishes a state-to-state complaints procedure and a petition procedure that individuals or groups can use to claim redress for violations of their economic, social, and cultural rights. It also allows the Committee on Economic, Social and Cultural Rights (CESR) to initiate inquiries within states parties that have so recognized its competence.

For many indivisibility advocates, the adoption and entry into force of the OP represents a vindication of the indivisibility ideal: the assertion that economic and social rights are equally justiciable as civil and political rights. There are no real differences anymore between the two categories of rights insofar as their status as rights is concerned, and the institutional mechanisms and procedures for protecting and promoting both sets of rights now are essentially identical.

But are the results really the same? As of this date, 45 states have signed the ICESCR's OP – most during the official signing ceremony in September 2009; 13 have since deposited instruments of ratification.[9] Despite its entry into force, the dramatic decline in the rate of new signatures since 2009[10] suggests that it will be some time before

the Protocol enjoys the kind of widespread acceptance among the 161 States-Parties to the ICESCR as does the petitions protocol to the ICCPR.[11]

While this new mechanism represents a welcome addition to the UN's human rights machinery, as Mátyás Bódig discusses in Chapter 3, it represents a significant narrowing of the UN's jurisprudence on economic and social rights. Let us consider the *Maastricht Guidelines*' tripartite formulation of state obligations for economic and social rights:

> The obligation to *respect* requires states to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the state engages in arbitrary forced evictions. The obligation to *protect* requires states to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labor standards may amount to a violation of the right to work or the right to just and favorable conditions of work. The obligation to *fulfill* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.
>
> (International Commission of Jurists 1998: 693–694)

A violations approach speaks meaningfully only to the first two of these obligations. And the third (as it is presented in the Guidelines) seems to limit itself to direct provisioning of the object of the right in question. While the types of situations exemplified by the Guidelines are serious and demand remedy, when we consider the broader significance of economic and social rights, according to the Universal Declaration, 'to promote social progress and better standards of life *in larger freedom*,' we must conclude that the violations approach is too circumscribed: state responsibilities are limited only to those elements of economic and social rights that are amenable to legally justiciable claims made by individuals or groups. The Maastricht obligation to 'promote' – beyond direct provisioning – speaks to a broader state responsibility that cannot be reduced to individual entitlement. It is the obligation to create and maintain a facilitating environment for a much larger end: the protection and promotion of autonomy and self-determination commensurate with human welfare and well-being.[12]

A significant shortcoming in the violations/justiciability approach to economic and social rights is the implicit or assumed view, or theory, of the state that serves as its foundation. If we have been able to craft

justiciable elements of economic and social rights by looking at civil and political rights for guidance, we must conclude that we are working from a liberal-contractarian theory of the state: that its sole end is to protect individual rights. In its most classical instantiation, the best way to protect rights is to limit government to that end only. Limited government, based on individual rights, assumes that the state is (potentially) the enemy of rights, and remedies must be made available to keep the state and its power in check (Locke 1690).

But what of economic and social rights? The justiciability/violations approach, as outlined above, only considers this 'state as violator' idea in the obligation to respect: that the state must not directly violate economic and social rights. As for the obligation to protect, the state's role is to regulate the behavior of other individuals or groups in civil society. These both seem familiar when we consider potential violations of civil and political rights. But the obligation to promote moves us away from this frame entirely, especially in the direct provisioning of resources to individuals or groups. And if we think of the 'promotion' of economic and social rights *beyond* direct provisioning, the liberal-contractarian model seems wholly inadequate. In other words, we may need to reconsider an ideal or theory of the state that goes beyond rights, but can still accommodate the ideal of the human person that the catalogue of indivisible human rights envisions.

More than half a century ago, the Indian delegate to the Commission on Human Rights, Hansa Mehta, spoke about how the complexities and realities of underdevelopment would always complicate the wish that countries could simply implement economic, social, and cultural rights 'at one stroke of the pen.'[13] If we think of an alternative end of the state – not simply by expanding the number of individual rights that states must respect, protect, and fulfill, but by expanding the notion of the ethical obligations of the state for the broader purposes of securing and protecting human autonomy, self-determination, and welfare – then we may be able to consider alternatives for addressing the problems of poverty, lack of economic resources and opportunities, and the structural sources of underdevelopment other than creating rights that individuals can claim from the state. But we would still find that the state has a duty – in fact, its core duty would be to protect, promote, and ensure that individuals can secure and enjoy their welfare.

Welfare and the end(s) of the state

As a framework for reconsidering economic and social rights and state responsibility, the normative political economy scholarship of David

P. Levine provides compelling insights. Levine's work explores what kinds of social and political institutions are appropriate for promoting the ends of human welfare, well-being, creativity, and freedom (Levine 1998; 2001; 2004; and especially 2008). Levine defines welfare as 'the state or condition of doing or being well; . . . thriving or successful progress in life, prosperity.'[14] He distinguishes between pre-modern or traditional notions of welfare that emphasize needs-satisfaction in contrast to a modern ideal of welfare, which is concerned with the ability of self-determining, autonomous individuals to lead a self-made life, wherein our 'doing accords with our being.' What we do in life is part of a process of creative engagement with the world, in which we find a place for ourselves that is truly ours, rather than one that is given to us, or coercively put upon us by others. Our ends are not pre-determined; the course and trajectory of our lives are (ideally) of our own choosing and making. This emphasis on the individual should not be overstated. Self-determination is not about atomistic self-sufficiency; it is about living a self-directed life within a society of similarly self-determining people living in a social web of complex interdependency. In this world, welfare is 'the capacity and opportunity to make doing the expression of being and thus lead the self-made life' (Levine 2008: 17).

How does one come to have a particular capacity to lead this 'self-made life?' For the neoclassical economist, the proxy for 'capacity' is 'having choices' within a system of market exchange. Levine disagrees: simply having choices does not necessarily lead to *welfare*.[15] The quality of choices commensurate with welfare matters, as does the capacity for one to choose in a manner consistent with achieving welfare. And while the market is a critically important institution supporting the ideals of autonomy and self-determination, the market alone is not enough:

> [I]f the free market is the system that realizes the ideal of freedom, it can no more stand alone than the parties to the individual transactions can create the ideal of freedom and the self-made life on their own. A true free market is, therefore, only a part of the larger whole, does not stand alone, and does not exist without the work of a state committed to creating and maintaining a facilitating environment.
>
> (Levine 2008: 23)

While having choices (meaning: being free from interference from making choices, and having options from which to choose) seems to leave the most freedom and autonomy to the individual, it also 'refuses to acknowledge or address experience, since [a] person faces not only an

array of alternatives, but a special task, which is the task of making choices *suitable* to his or her welfare' (Levine 2008: 14, emphasis mine). The ability to choose, or to make choices commensurate with welfare, is just as important as the availability of choices. 'The end of choosing is not simply a state of being *of* an individual, but the state of being *an* individual' (Levine 2008: 15, emphasis mine). If we are to lead a life of self-determination commensurate with securing our own welfare, we need to work creatively in the world and to secure our livelihood (which is more than the barest minimum needed to survive) through our own work.[16] 'When living is shaped by the ideal of doing determined by the self, who we are, what we do, and what we need [in order] to be who we are and [in order to] do what we do must not be determined for us by any external authority' (Levine 2008: 18–19). This 'external authority' might be other persons, a group of people, or any organization or institution whose end it is to do the work of willing and choosing for the individual, coercively if necessary.[17]

However, to leave the securing of welfare entirely up to the individual and imagine it is no concern of the (properly constituted, ethical) state requires either that: (1) individual welfare does *not* depend on a complex system of interdependence, or that (2) such a system of interdependence works *best* when state oversight is absent. This system of interdependence – the market – is part of what Levine refers to as the facilitating environment necessary for the promotion of self-determination (Levine 2008: 19–20).

The state that Levine has in mind is an ethical institution that successfully instantiates the ideal of individual autonomy and self-determination through the construction of enduring structures, practices and law (Levine 2008: 92–93; see also Hegel 1967; and Durkheim 1957). The state has an end of its own – promoting the welfare or 'common good' – which is distinct from promoting the *particular* ends of the individuals in it. It supports the objective ideal, a universal for all. It seeks to enable all to secure their welfare, but cannot be necessarily concerned with the welfare of any particular *one* (although that may be necessary, but will complicate the ideal of individual self-determination; more on this below).

While the protection of individual rights is a critically important responsibility of the state, it cannot be the sole *end* of the state, if the state is to have anything to do with the promotion of the welfare of all. The reason is at the same time subtle and complex: the contractarian state already has a particular end in mind, a pre-determined outcome: the protection of individual rights. This is a very concrete end. However,

the alternative we are examining here acknowledges that while there are institutions within the state whose end it is to realize the ideal of individual self-determination in particular forms (such as through rights) or contexts (in civil society, in the family, in political affairs), the state concerns itself with the ideal *as such*. This universal yields something that is not known, that is not pre-determined, because we do not know what the lives of self-determining, autonomous individuals will be or look like. Each one's end will be his or her own. The work of the state is to create and maintain a facilitating environment that allows everyone (rather than any *particular one* of us) to live a life of autonomy and self-determination.

Put another way: if the end of the state were only about the protection of rights – even a more robust catalogue of rights than what Locke certainly had in mind in the late 17th century – then the state would have *no end of its own*: its end would be merely a reflection, or 'arithmetic calculus' of each of our own, *particular* ends – our individual rights. If the state has an end that is truly universal – the end of promoting human freedom defined as autonomy and self-determination commensurate with welfare – then the tasks of the state in the creation and maintenance of a facilitating environment must go beyond simply protecting individual rights. The state will, by necessity, need to be an active agent in the promotion of this universal end. When we think of the market, for example, one of the crucial roles that the state must play is to erect and maintain a functioning and effective monetary system, for such a system benefits all. But it would seem absurd for any one of us to claim that we have a 'right' to such a system.

The facilitating environment – A historical perspective

This understanding of state duties with respect to the importance of autonomy and self-determination for securing economic and social well-being is not novel. In fact, it is deeply embedded within the spirit and relevant articles of the Universal Declaration of Human Rights and, by extension, the International Covenant on Economic, Social and Cultural Rights. Some of the most influential antecedents of the International Bill of Rights reflected diverse understandings of state responsibilities for different kinds of 'rights'; or rather, that the content of most economic and social rights could be fulfilled in a number of ways, depending on the circumstances that gave rise to the need for any particular right. Many of these antecedents emerged in response to the Great Depression of the 1930s, in the form of President Franklin

D. Roosevelt's 'New Deal.' The outbreak of World War II had the effect of internationalizing these principles, such that toward the end of the war, many individuals and civil society organizations were beginning to articulate a comprehensive catalogue of human rights that included economic and social rights alongside older, more traditional civil liberties and political rights.

What was on the minds of those who first articulated economic and social rights in the way in which we understand them today? Did they have in mind the creation and maintenance of this facilitating environment, as outlined above? Or did they mean to enumerate specific individual entitlements – fully legal rights for food, housing, education, and social security that individuals could claim as a matter of individual right? A reading of the evidence suggests that while direct provisioning might be among the responsibilities of the state, it was, at most, of *minor* importance. But in the absence of any other kind of framework for articulating these broader state duties for the creation and maintenance of a facilitating environment, they chose the language of rights as a way to address economic insecurity and poverty – but not 'rights' in the sense of concrete legal claims to 'things.' They were thinking in the framework of broad state obligations and guarantees. But their discursive turn toward 'rights' has left a long-lasting legacy of complications we still encounter when thinking about the 'indivisibility' of human rights, which has informed our attempts to mold and shape economic and social rights in such a way as to make them legally justiciable.

The American Law Institute 'Statement of Essential Human Rights'

John Humphrey, a Canadian lawyer who was the first director of the UN's Division of Human Rights, played a crucial role in assisting the early stages of the Universal Declaration's drafting. After consulting a wide range of source material, Humphrey put together the first 'Secretariat' draft of the Universal Declaration, which served as the basis for all subsequent drafting. He recalled that the most influential source he consulted – in his words, the 'best text' – was the American Law Institute's (ALI) 1946 *Statement of Essential Human Rights* (Humphrey 1984: 32). The ALI Statement enumerated six economic and social rights on property, education, work and conditions of work, food and housing, and social security. All six appeared in the Universal Declaration, with some minor changes to wording and content. The full *Statement* appeared in the *Annals of the American Academy of Political Science* (American Law Institute 1946) and was accompanied by a series of articles exploring the history and nature of different categories of rights, and different

cultural and constitutional traditions in which they had been expressed in some form or another. The ALI drafters agreed that, 'a modern bill of rights should also include rights which involve positive action by public authorities'; there would be a need for 'boards, commissions, private contracts, agencies, personnel and programs which must be set up *to give them meaning*,' and that '[the state's] resourcefulness, and its social vision, rests upon the organized community' (Sohn 1995: 549–550, emphasis mine).

In the Anglo-American context, William Draper Lewis spoke of the growing complexity of a modern society that had given rise to a new conception of rights, which went beyond 18th- and 19th-century preoccupations with abusive government. '[P]rivate concentrations of economic power, such as corporations and labor unions,' and 'community mores and action, [which] in some areas deprive minority groups of equal opportunity for education, for work and for homes,' necessitated this new conception of rights (Lewis 1946: 66). Charles Merriam argued for the facilitating environment that I outlined above – that economic and social rights 'refer to certain types of situations in which the *personality must function* if *creative development is the goal*. No one of this series of rights is complete without the others. There must be coordination of social and economic rights with the political rights *which guarantee and protect them*' (Merriam 1946: 13, emphasis mine).[18] He saw this as an indispensable element of human development – 'claims upon society for recognition and protection of human personalities' (Merriam 1946: 14). Most notable is his acknowledgment that economic and social 'rights' are '*conditions* essential to the full flowering of the personality as truly as civil and political rights already accepted' (Merriam 1946: 14, emphasis mine).

In considering the right to work, labor lawyer and ILO official C. Wilfred Jenks contended that the state's obligations were more a matter of social and economic policy than law (Jenks 1946: 41). For example, adequate organization of the employment market 'implies a duty of the state . . . to direct the whole of its economic and financial policy as to maintain the highest possible level of employment and avoid recurrent fluctuations of crisis dimensions' (Jenks 1946: 41–42). A secondary obligation of the state is the safety net: 'employment must be provided by the state whenever a sufficient volume of private employment is not available' (Jenks 1946: 41–42). The same was true with respect to 'rights' to food and housing. Direct provision was a last resort – more robust state obligations would consist in 'taking such measures as may be necessary to ensure that [people] have an opportunity to obtain these

necessities. The article does not sap the self-reliance of men. "It guarantees nothing to the loafer"' (Jenks 1946: 43). In the area of food security, it was the duty of the state to protect the ordinary consumer from monopolies within the food production, distribution, and retailing sectors that might drive up the price of food (Jenks 1946: 44). As for housing: '[t]he accumulated experience of cities and metropolitan areas since the first days of the industrial revolution has led to the realization that to provide adequate modern housing' requires direct or indirect state involvement in city planning and zoning, real estate financing, construction, design, and management (Jenks 1946: 44). As we see in all of these instances, the state's fundamental duty is first and foremost regulatory and managerial, for the benefit of all of society. Direct provision was clearly secondary.

Roosevelt's Second Bill of Rights

An often-overlooked antecedent to the Universal Declaration was a Bill of Rights proposal outlined by the US National Resources Planning Board (NRPB) in 1942, which eventually became Roosevelt's 'Second (Economic) Bill of Rights,' which he proposed in his 1944 State of the Union address.[19] It provides further evidence of the emergence of thinking about governmental obligations about economic and social well-being framed in the language of rights. Echoing the 1941 'Four Freedoms' speech, Roosevelt suggested that the nation had begun to accept a conception of rights that had gone beyond the original Bill of Rights: 'We have come to a clearer realization of the fact . . . that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made' (Roosevelt 1950: 41). Roosevelt proposed that the time had come for Congress to formally enact a 'Second Bill of Rights,' of which he enumerated eight – six are among the same rights that appear in the ALI Statement. To that, Roosevelt added two more: the right of farmers to sell their products at a fair enough price to yield an adequate standard of living; and the right of commerce 'free from unfair competition and domination by monopolies at home or abroad' (Roosevelt 1950: 41).

The 'Second Bill' and its NRPB predecessor articulate quite clearly that the scope of government involvement in protecting and promoting these rights was much broader and far more significant than simply being the agent of direct provision. They outline state responsibilities for *ensuring* that everyone has equal *access* to these social and economic goods. It mentions that encroachments on these rights in particular

might come from either the market (compulsory labor, irresponsible private authority, unregulated monopolies) or the state (arbitrary public authority), suggesting something much deeper than a simple statement of rights and entitlements to public assistance.

As the ALI *Statement* and Roosevelt's 'Second Bill' (and its NRPB antecedent) make clear, state obligations to protect and promote the economic and social welfare of citizens do not necessarily have to be reduced to direct state provision. These early expressions of economic and social rights demonstrate that only the state can provide the necessary regulatory and supportive environment to promote and guarantee equality of opportunity to enter markets and compete fairly within them. First, state regulation is necessary for preventing the emergence of monopolies and preventing the kinds of rapacious practices that led to the Great Depression. Second, the state has a responsibility to foster opportunity by creating enabling conditions for people to secure their own livelihoods.

Consider the right to housing: in terms of the Maastricht Guidelines' 'obligation to protect' the right, certainly the state has a responsibility to sanction private actors for discriminatory practices that interfere with people's ability to find housing. But in terms of the 'obligation to promote,' the state might respond to housing shortages by providing incentives such as tax credits for builders or tax benefits for home ownership – robust responsibilities that respect and enable self-determination and autonomy. Finally, these proposals recognize a state responsibility to provide assistance to those unable to provide for themselves – but this kind of direct provision was viewed as a last resort. The idea of promoting a facilitating environment was essential for *preventing* the kinds of vulnerabilities that would necessitate direct state support.

Conclusion: Human rights and the problem of the state

This chapter has argued that the concept of indivisibility has mainly been used to challenge and overcome the widespread perception that economic and social rights are not 'rights' in the same sense as civil and political rights. Thus, indivisibility supports the notion that economic and social rights are just as justiciable as civil and political rights. If the latter can be violated, so can the former. The problem with this approach is that it is too narrow, and will likely do little to address historically long-standing problems of poverty, lack of opportunity, and economic insecurity. Human rights advocates inside and outside the UN labored for nearly 20 years to elaborate a complaints and petitions procedure

for economic and social rights – something they said should have been done in the 1950s – only to watch the instrument inch toward achieving the kind of widespread endorsement enjoyed by the ICCPR's petitions procedure. That does not sound like an overwhelming endorsement by states of a justiciable rights-based approach to solving the problems of underdevelopment.

As an alternative, I have tried to explore this problem by turning the question of indivisibility inside-out, and to look at state duties with respect not only to rights, but for the wider goal of promoting individual self-determination and welfare – in part through rights, but more significantly through the creation and maintenance of other institutions, or a 'facilitating environment,' within which people can secure their own welfare. I have also shown that it was this very notion that many of those responsible for first articulating what we now know as 'economic and social rights' had in mind. While there were alternatives – for example, the Soviet model of universal direct provisioning – I believe most human rights advocates would agree that such a model is not what the drafters of the Universal Declaration or the Covenants had in mind.

As far as direct provisioning of economic goods or benefits is concerned, I believe that these obligations are part of the right and proper work of the ethical state. However, we should be concerned that direct provisioning might actually compromise the ideals of individual autonomy and self-determination. When an individual is dependent upon the state – or any institution or individual for that matter – his or her self-determination is incapacitated. One question that must be explored (as I intend to do elsewhere) regards the implications for human rights and individual self-determination in those instances in which the state becomes a *custodian* of autonomy and welfare.

All of these issues point to a larger question. If the protection of rights alone is not the end of the state, what does that mean for the hope we have in the ability of indivisible human rights to change or alter state behavior? As a matter of international relations, should we be promoting more human rights, or more mechanisms for monitoring human rights? Or should we be focusing our attention on fostering the development of the kinds of states that have as their end the promotion of individual self-determination and welfare, including protection of their rights?

I have argued here that what defines the properly constituted ethical state is the embodiment, through policy and law, of the ideal of human freedom, defined as individual autonomy and ability to lead a life of self-determination commensurate with human welfare. In order to do

this, the state has duties and obligations that are in accord with that end: the creation and maintenance of a facilitating environment for self-determination to be realized. Part of that environment will be a system of rights and law to protect those rights: police; a functional judicial system, and so forth. Another, different set of duties will be necessary for the creation and maintenance of a market system of provisioning, in which we can secure our own welfare. This will include negative and positive duties.

But in international law, the state is defined largely with reference to its *sovereignty*. What makes a state a state is its sovereign independence and autonomy. In this account, states constitute themselves as they see fit. It is this autonomy and independence that is valued in international law – a norm that the United Nations is founded upon. Some states have as their end something approximating the ideal I describe above. Others are organized around different ends – instantiating the will of God, for example, or securing the private welfare of a particular group of people, who may or may not have a corresponding duty to dispense it to the people. Some are organized around the principle of securing a particular kind of rulership. Whatever the ends, traditional Westphalian or international legal sovereignty considers all of these institutions to be 'states.' Some of those will be commensurate with human rights and individual self-determination. Many will not.

For advocates of human welfare and well-being, the real work moving forward, perhaps, is to be found in eroding this notion of sovereign independence and autonomy as the hallmark of the state, toward something closer to the ideal I have described here. While the emerging norm of the 'Responsibility to Protect' has begun to reshape the sovereignty norm, the shift remains largely discursive (Stahn 2007) and, so far, only compelling in the most dire of human emergencies (and unfortunately, for example in Syria, not even then). Still, perhaps a reinvigorated focus on state duties and responsibilities that are commensurate with both the protection of human rights and the promotion of individual self-determination and welfare (not necessarily as a matter of rights) holds out the best promise for achieving these goals.

Notes

1. Even this may be overstated. The core obligation of both treaties relates to the reporting requirement. The violations approach of the ICCPR is based on the state-to-state complaint procedure that is included in the text of the treaty (a procedure that has never been used), and the first Optional Protocol on petitions, which entered into force the same year as the Covenant itself

(1976). But the petition procedure is still an *optional* one, not a core element of the treaty.

2. I explore these discourses at length in *Indivisible Human Rights: A History* (University of Pennsylvania Press, 2010).
3. United Nations General Assembly Resolution 421 (V).
4. It is important to keep in mind that, as the Covenant stood in 1951, the idea of an individual complaints procedure for civil rights was only a proposal. That procedure ended up becoming the first Optional Protocol to the ICCPR. The UN adopted both in December 1966.
5. And, as we know, that procedure was eventually incorporated into the ICCPR's text.
6. The Soviet Union and the other 'People's Democracies' often had the most elaborate of economic and social 'guarantees.' Many Latin American states also included such provisions, but they were generally more broadly worded.
7. In legal positivism, a right is said to be justiciable to the extent to which its claim can be adjudicated and remedy provided through the legal system. 'The essential element [of a right] is the legal power bestowed upon the [individual] by the legal order to bring about, by a lawsuit, the execution of a sanction as a reaction against the nonfulfillment of the obligation' (Kelsen, 1967:125–126).
8. On 5 February 2012, Uruguay became the tenth state to deposit its instrument of ratification of the Optional Protocol with the UN Secretary-General. It entered into force three months later, in accordance with Article 18 (1). For a list of ratifications/accessions, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en.
9. Ecuador (June 2010), Mongolia (July 2010), Spain (September 2010), El Salvador (September 2011), Argentina (October 2011), Bolivia (January 2012), Bosnia and Herzegovina (January 2012) Slovakia (March 2012); Portugal (January 2013); Uruguay (February 2013); Montenegro (September 2013); Finland (January 2014) and Gabon (April 2014).
10. Of the 45 signatories, 31 signed between September and December 2009, four signed in 2010, four signed in 2011, three signed in 2012 and two signed in 2013.
11. The ICCPR has 167 states parties, 115 (69%) of which have also ratified the first Optional Protocol on individual petitions. By contrast, only 7% of states parties to the ICESCR have ratified its Optional Protocol.
12. In some respects, the arguments I make below reflect the work, especially of Amartya Sen and Martha Nussbaum on human capabilities and functionings. There indeed are affinities between their approaches and what Levine considers; Sen is probably closer to Levine in terms of institutions, but Nussbaum's work (see, especially, 2011) is remarkably thin on the policy and institutional implications of her capabilities approach. I am also trying to reformulate their ideas of capabilities and functionings within the rights-and-duties framework of indivisible human rights.
13. U.N. Doc. E/CN.4/SR.248, 6.
14. Oxford English Dictionary, online version, March 2012.
15. As does Amartya Sen (1999), in his treatment of income as a proxy for 'choice.'

16. This ideal is central to Hegel's theory of freedom as found in the *Philosophy of Right*.
17. This would include powerful individuals (including family members), organizations and institutions (including those found in civil society) as well as states not organized around the principle of promoting and protecting individual autonomy and self-determination that leads to welfare.
18. It is worth noting that in this formulation the role of (presumably civil and) political rights is to *guarantee* and *protect* economic and social 'rights.'
19. For an excellent study of the Second Bill, see Sunstein (2004).

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5

Beyond Individual Accountability: The Meaning of State Responsibility

Mark Gibney

Introduction

The essence of human rights is to protect individuals, and two different approaches have evolved to accomplish this. The first involves holding individuals criminally accountable for directing and/or carrying out violations of international humanitarian law and human rights standards. Certainly, the Nuremberg and Tokyo proceedings against a select group of political, military, and economic leaders from Germany and Japan remain the high-water mark of establishing individual accountability, yet in the past decade or so the animating spirit of these trials has been revived. One of the most noteworthy achievements in this realm was the worldwide effort to extradite the former Chilean dictator Augusto Pinochet to Spain so that he could face charges for international crimes committed under his rule. Beyond this, the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) have both made significant contributions in terms of prosecuting and punishing war criminals, as have the special UN tribunals in East Timor, Sierra Leone, and Cambodia. But certainly the most noteworthy institutional achievement has been the creation of the International Criminal Court (ICC). What explains this attention to individual accountability? Perhaps the best answer was provided by the Nuremberg court (1946) itself and repeated frequently since then: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'

The second approach to protecting human rights focuses more on the obligations of 'states' to refrain from violating human rights standards and their responsibilities if and when they have failed to do so. No doubt, crimes against international law are only committed by men and not by abstract entities, but these 'men' invariably work for the state and their crimes are committed as part of state policy. As its name might indicate, state responsibility is concerned with the accountability of the broader collective and it serves as an important recognition that criminal proceedings (assuming there even are criminal proceedings) do not subsume the entirety of responsibility. Clearly, the criminal defendants at Nuremberg and Tokyo were not the only people in those countries who were responsible for carrying out international wrongs (Goldhagen 1996; Browning 1992). Thus, it was most appropriate that in addition to these criminal proceedings there were findings made against the German and Japanese states as well (Nollkaemper 2003: 619).

Of the two, individual accountability has received the lion's share of attention and perhaps with good reason in the sense that in just the past few years there have been a number of high-visibility prosecutions, most notably: Milosevic, Taylor and Mladic. However, state responsibility has experienced its own kind of renaissance. One reason for this involves the rise of the regional human rights adjudicatory bodies, which have done the bulk of the work of determining state responsibility: the European Court of Human Rights; the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights; and the African Commission on Human and Peoples' Rights and the newly created African Court on Human and Peoples' Rights.

The United Nations has played a prominent role as well. One aspect of this involves the work of the UN treaty bodies, which monitor and interpret the various international human rights treaties and in so doing have helped to establish human rights standards for states. Another has been the International Law Commission, a UN body tasked with the progressive development of international law. In 2001, the ILC completed its Articles on State Responsibility, thereby completing more than four decades of work (Crawford 2002). These articles were then forwarded to the UN General Assembly, which adopted Resolution 56/83, commending the articles 'to the attention of Governments without prejudice to the question of their future adoption or other appropriate action' (General Assembly 2001). Although the legal status of the Articles remains unclear, still, it is noteworthy that the International Court of Justice (ICJ) relied extensively on them in ruling on the Serbian genocide case, which will be discussed below.

Because of its strong connection to domestic criminal law, individual accountability should need little explanation (Drumbl 2007). Mirroring its domestic counterpart, international law has created more than 20 international crimes (Bassiouni 2008), such as the prohibition against torture or the commission of war crimes, and at least in theory, those who violate such standards are to be prosecuted for doing so. Although there is a punishment component involved in this, the ultimate goal is to prevent atrocities from being committed in the first place.

State responsibility is a much more nebulous concept than individual accountability, although the overall goal is the same. For one thing, how does a 'state' violate human rights standards, and what does it mean to say that a state is 'responsible' for doing so (Lang 2011)? On one level, this could simply mean that a state has violated its contractual obligation under a particular treaty. Yet, it is clear – is it not? – that the offending state has done something more than this. Such a statement also carries a moral dimension to it. It denotes a moral rebuke – and a rebuke that certainly goes well beyond the failure to keep promises. In other words, the finding that a state has violated certain human rights standards also ascribes a certain moral responsibility for doing so. What this also means is that a state will not be held responsible for events unless it is somehow blameworthy.

If a finding that a state has violated a human rights treaty involves a moral rebuke, who is the rebuke directed toward? The most obvious target would be the policy leaders who have designed and/or implemented such illegal policies. Yet, state responsibility goes beyond this and it is a way of passing judgment on the behavior of the larger social collective – and this even includes those who had actively opposed the policies in question (Miller 2007).

Finally, what purpose is served by ascribing responsibility to a state that violates human rights standards? Like individual accountability, the ultimate goal of invoking state responsibility is to prevent human rights violations. However, there are at least two things that differentiate state responsibility from individual accountability. The first is the target. Criminal prosecutions should pursue the most obvious culprits – the Milosevics, if you will. State responsibility also encompasses such individuals, but its purview is much broader than this.

The second distinction relates to the manner in which the end is reached. Individual accountability not only wants to punish political and military leaders for their past behavior and prevent them from being able to continue to carry out such atrocities in the future, but it also seeks to send a strong message to other leaders. Generally,

there is no punishment component to state responsibility as such, although judicial bodies have increasingly ordered financial compensation, which raises some important issues that have not received sufficient analysis. If properly carried out, a determination that a state is responsible for violating international human rights standards should prompt citizens to reflect on the practices of their own government so that they can respond by making the appropriate changes in policy. Individual accountability and state responsibility are, or at least should be, natural complements to one another (Nollkaemper 2003). Ideally, criminal prosecutions should pursue the worst offenders, while state responsibility would engage all other members of this society.

Notwithstanding the developments referred to earlier, there are at least two problems with state responsibility as it relates to international human rights standards, and both of these are particularly acute whenever national borders are traversed. The first relates to the indeterminate nature of international human rights law and the difficulty of differentiating between levels or degrees or wrongdoing (*culpa*). Unlike domestic law, which is based on gradations of wrongdoing, international human rights law is a much blunter instrument. The example of torture is used and, as will be shown, there are a variety of means by which a state can be found to have violated this prohibition, although there are substantial differences in terms of the level of wrongdoing involved. Thus, what is noteworthy is that in its recent decision in the Serbian genocide case (*Bosnia v. Serbia*) the International Court of Justice offered a model of how courts might help give more meaning and nuance to the law on state responsibility.

A second problem relates to the manner in which state responsibility is determined and assigned. In particular, what is deeply troubling is the model adopted by the European Court of Human Rights (ECHR), which is generally recognized as being the leading human rights adjudicatory body in the world. The concern is that under its current approach, state responsibility has lost much of its meaning. Rather than deciding cases in a way that would be conducive to societal dialogue and meaningful change, the ECHR has gone far in the opposite direction. Within the domestic realm, virtually everything has come to be seen as involving 'human rights,' while individuals living outside of Europe who have been harmed by the practices and policies of the European states have been rather systematically turned away. What emerges from all this is a rather perverse sense of state responsibility – but also human rights.

The (indeterminate) nature of human rights law

One of the most vexing aspects of human rights treaties is that they do not recognize degrees of violations. Thus, unlike domestic law, which differentiates between crimes according to their perceived level of seriousness – the distinction between 1st degree and 2nd degree murder, for example, or the difference between murder and manslaughter – international human rights law does not provide anywhere near this same level of nuance. Consider by way of example the prohibition against torture within the context of European law. Article 3 of the European Convention reads in its entirety: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

When does a state fail to meet this standard? The easiest and most straightforward case is when agents of a particular European country (State A) carry out torture – and they do so within that state's own domestic borders. In this situation, State A has acted in violation of Article 3. But there are a number of other ways in which a state can violate Article 3. In *Soering v. United Kingdom* (1989), one of the landmark decisions of the European Court of Human Rights, the Court held that the United Kingdom would be in violation of Article 3 if it extradited a German national in its custody to the United States so that the defendant could be brought to trial for double murder charges, thereby facing the possibility of being put on death row in the state of Virginia, which the Court ruled constituted torture or inhuman and degrading treatment.

The problem is that it is not easy to think of these two situations as analogous and to consider these two violations as comparable or equal. In the first case, the state acts purposely and directly. It is clear that the intent is to inflict torture. In the second case, a state is responsible for 'torture' although the acts that constitute this crime will be carried out on foreign soil and at the hands of foreign agents. More than this, a sending state may be responsible for violating Article 3 even when no ill-treatment ultimately takes place. According to *Soering*, a state violates its obligations under Article 3 at the time it returns an individual to a dangerous country. Thus, whether the returnee is actually subject to this treatment upon his return is irrelevant, at least with respect to the legal duties of the sending state. In that way, then, a state could be responsible for violating the prohibition against 'torture' – even when no torture or ill-treatment of any kind ever takes place.

The 'war on terror' has spawned even more possibilities of state responsibility in this regard. For one thing, it is now known that several European countries were willing participants in extraordinary rendition

operations that ultimately resulted in torture (or worse). In the case of Osama Mustafa Hassan Nasr, to use one of the most visible and startling examples, there is evidence that European (and American) agents were involved in the kidnapping of Nasr in broad daylight from the streets of Milan. It is believed that the Egyptian cleric was first taken to the Avian Air Base in northern Italy, then flown to the Ramstein Air Base in southern Germany, before being sent to Egypt. During his nearly four years in captivity in that country, Nasr was repeatedly and systematically tortured.

This, perhaps, represents an extreme example. However, it has also been established that several European states housed secret detention facilities for 'enemy combatants,' while other European states served as refueling sites for these so-called 'torture flights' (Council of Europe 2006). In all of these cases, a strong argument could be made that a violation of Article 3 has taken place. Yet, the problem is that this conclusion helps to mask differences in behavior and differences in wrongdoing – and, ultimately, differences in state responsibility.

The final example comes from within the domestic realm and it involves the responsibility of a state to protect its citizens from harm at the hands of non-state actors. An example of this is *A v. United Kingdom* (1998), where the European Court of Human Rights ruled that the United Kingdom had violated Article 3 due to its failure to protect a child from his abusive stepfather.

The point is that these examples represent a wide spectrum of state behavior: from a situation where state agents intentionally and purposely torture a person; to a situation where a state kidnaps and then sends a person to a country where torture is a near certainty; to a situation where harm might (but might not) be carried out against someone the state has extradited in order to face criminal prosecution; to a situation where a state maintains secret detention facilities for those who will be sent on to other countries to be tortured; to a situation where a country serves as a refueling stopover for so-called torture flights; and finally, to a situation where the state has not sufficiently protected a young person from an abusive parent. My goal here is not to minimize these harms or to justify the actions (or inactions) of any of these states. However, what seems clear is that a great deal is lost by simply labeling each one of these wrongs as a violation of Article 3.

Bosnia v. Serbia

In light of this, one of the most important aspects of the International Court of Justice's ruling in *Bosnia v. Serbia* (2007) is the manner in which the Court sought to establish varying degrees of responsibility

for genocide. It is not clear why the ICJ approached the matter in this way. However, one might surmise that the Court believed that there are important differences between (a) committing genocide, (b) aiding and assisting in genocide, and (c) preventing genocide. I am in complete agreement with the notion that international tribunals should distinguish between varying degrees of violations even though human rights treaties technically do not call for such an approach. On the other hand, the standards applied by the Court were both problematic and incomplete. On the positive side, however, the ICJ's ruling should help to establish a broader understanding of state responsibility within the context of international human rights law.

The backdrop for this case was the attempt by Bosnia and Herzegovina to break away from the former Yugoslavia (Serbia) in order to establish its own independent state. The fighting that ensued pitted Bosnia forces against a range of Bosnian Serb paramilitary groups that were closely allied with the Serbian government. The horrible conflict that engulfed this region in the early 1990s resulted in the deaths of an estimated 200,000 civilians and the displacement of upwards of 2 million people.

In 1993, Bosnia and Herzegovina brought a claim against Serbia and Montenegro alleging responsibility for gross and systematic violations of human rights, including genocide. Based on jurisdictional grounds, genocide was the only claim addressed by the ICJ. Article I of the Genocide Convention provides: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

Based on a literal reading of Article I, an argument could be made that the only duty (or duties) that state parties have is 'to prevent and to punish' genocide. Although the Court ultimately did address these issues, what is far more noteworthy is that it devoted most of its ruling to whether Serbia had committed genocide itself (through its Bosnian Serb allies), and then whether Serbia was responsible for 'aiding and assisting' genocide. More than this, the ICJ held that an analysis of these duties was antecedent to whether a state had met its obligations 'to prevent' and 'to punish' genocide.

As an initial matter, the Court had to address whether genocide had occurred. Here, it relied heavily on the rulings of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and it concluded that genocide had taken place – but only during a short period of time immediately following the fall of Srebrenica. The next question was whether Serbia was 'responsible' for this genocide.

The ICJ's approach to the law on state responsibility is important to note. Rather than attempting to discern 'responsibility' from the treaty itself, the Court immediately turned to the International Law Commission's Articles on State Responsibility. It then began its analysis by examining whether the Bosnian Serb forces could be considered as 'state organs' of the Serbian government so that the actions of the former could be attributed to the latter.[1] It concluded that they were not, on the basis that there was no evidence that these forces had a 'complete dependence' on the Serbian state. The Court then examined whether the Bosnian Serb forces were acting under the 'direction and control' of Serbian officials.[2] In addressing this matter, the ICJ invoked the standard it first enunciated in *Nicaragua v. United States* (1986), ruling that in order to hold Serbia responsible for the acts of genocide carried out by the Bosnian Serb military forces, there must be conclusive proof that Serbia had exercised 'effective control' with respect to each operation in which the alleged violations occurred, and not generally in respect of the overall operations undertaken by the persons or groups of persons having committed the violations. Referring to what it perceived as 'differences' between the Bosnian Serbs and the Serbian government, the Court ruled that this requisite level of 'effective control' had not been achieved.

The final issue was whether Serbia had 'aided and assisted' or was 'complicit' in this genocide. Article 16 of the Articles on State Responsibility, which is entitled *Aid or assistance in the commission of an internationally wrongful act*, provides:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) The act would be internationally wrongful if committed by that State.

In addressing this issue, the ICJ first referred back to the Genocide Convention and noted that under Article III not only is genocide itself a punishable crime, but so is *conspiracy* to commit genocide, *directing and inciting* genocide, *attempts* to commit genocide, and finally, *complicity* in genocide. The Court then proceeded to equate 'complicity' in Article III of the Genocide Convention with 'aiding and assisting' under Article

16 of the Articles on State Responsibility. After this, it ruled that in order to be responsible for aiding and assisting in genocide, the sending state had to have full knowledge of the genocidal intent of the receiving entity and, presumably, take measures in furtherance of this genocidal goal. According to the Court's interpretation of events, this had not been established 'beyond any doubt.'

In sum, although the Genocide Convention only makes mention of state parties having the duty to prevent and to punish genocide, the Court seemingly sought to establish the principle that there are varying degrees of state responsibility for genocide, with the commission of genocide at its apex. In doing this, the Court should be applauded because such an analysis provides a much more nuanced and accurate portrayal of the wrongdoing involved.

However, the Court's analysis can be faulted in at least two ways. The first involves the standards themselves. One problem is that the ICJ never explained how or why it employed the tests that it did or where these came from. But what is perhaps an ever larger problem is the near-impossibility of ever meeting the standards that it set forth. In determining whether the Bosnian Serb paramilitary forces were acting as Serbian 'state organs,' the Court demanded that these groups would have to be completely dependent on the Serbian government. With respect to whether these forces were operating under the 'direction and control' of the Serbian state, the ICJ employed an 'effective control' standard – which in reality is much closer to an 'absolute control' test (Gibney et al. 1999). And finally, in terms of the issue of 'aiding and assisting,' the Court read an 'intent' requirement into Article 16 that simply does not exist in the article itself (Nahapetian 2002).

The point is that under these standards, there will be few (if any) situations where a state will be 'responsible' for committing genocide or aiding and assisting in genocide that occurs in another country. Moreover, although the Court made some reference to the seriousness of the crime involved as a way of justifying these heightened standards, there is no indication that these same tests (or something close to them) would not apply to all areas of human rights.

There is, however, another problem with the ICJ's standards and it is that they are not complete. In particular, the ICJ never considered, let alone addressed, whether Serbia could be responsible for genocide based on a standard of recklessness or gross negligence, or something comparable to this. What is incontrovertible is that the Serbian government had provided massive levels of military, economic, and political support to various Bosnian Serb paramilitary organizations that were known to

be dangerous at best, and genocidal at worst. One may (or may not) agree that there is not enough evidence to hold Serbia responsible for committing genocide, or that it had aided and assisted in genocide. But what the Court simply fails to address is why it did not extend its analysis and apply any other levels of responsibility. What the ICJ could have done is send a very clear message that it is imperative that states be cognizant of the nature of the regimes and entities that they provide material support to and that they align themselves with. The problem is that by not addressing a matter such as this, the Court's ruling could easily be read to mean that states have license to engage in behavior that is anathema to human rights, in this case providing massive amounts of military, economic, and political support to an abusive regime. The simple explanation for why the Court did not do this is that there seemingly are no such standards in the Articles on State Responsibility.[3] However, this might well indicate that, among other things, the ICJ was simply too wedded to the International Law Commission's Articles, at least with respect to matters regarding human rights.

Although the Court's commission/complicity analysis is both surprising and disappointing, its treatment of whether Serbia has met its obligation under the Convention to 'prevent' genocide is, in many ways, just the opposite.[4] In determining that Serbia had violated its obligation to 'prevent' genocide in Bosnia, the Court spent a considerable period of time explaining what this responsibility was based upon. First, the ICJ specified that the obligation to 'prevent' genocide was an obligation of conduct and not of result, and that state parties had to take 'all measures' to prevent genocide that were within their power that might contribute toward this end – whether these efforts ultimately were ever successful or not, or whether other states were attempting to meet their own obligations. Second, the ICJ interpreted the Convention as demanding that state parties exercise 'due diligence' that is based on state capacity. For the ICJ, what was paramount was the ability of a state 'to influence effectively the actions of persons likely to commit, or already committing, genocide' (par 430). The Court continues:

> This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of 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.
>
> (par. 430)

What this means is that different states will have different responsibilities based upon differences in circumstances. All, however, have a legal duty to contribute as much as they can toward the elimination of the substantive evil (genocide). Finally, in contrast to its approach to the issue of 'aiding and assisting,' where the ICJ had ruled that in order to be 'responsible' sending states had to be fully aware of the genocidal intent of the recipient, in the context of the duty to 'prevent' the Court did not demand anything close to such certainty. Instead, the ICJ ruled that state responsibility arose whenever there was a 'serious risk' of genocide occurring, and that this standard had certainly been met in the present case:

> The FRY leadership, and President Milosevic above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted . . . it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica . . . which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the [Bosnian Serb forces].
>
> (par. 438)

In extolling the virtues of the 'influence' standard, I do not mean to suggest that there are no shortcomings in the Court's approach. The most notable flaw is the suggestion that geographic proximity should necessarily play an important role in determining state responsibility. Still, the Court's analysis of the duty to 'prevent' was vastly superior to the way in which it treated the 'aiding and assisting' issue. The problem, then, becomes how to reconcile the coexistence of these two standards. According to the Court, there are important distinctions. In its view, 'aiding and assisting' constitutes an act of commission while the duty

to 'prevent' constitutes an act of omission. However, the problem is that the Court assigns the opposite standards that one would otherwise expect. That is, in the context of 'aiding and assisting,' in order to determine that a state is responsible what must be proven 'beyond any doubt' is that the sending state possessed full knowledge of the genocidal intent of the recipient. However, in terms of the duty to prevent, all that has to be shown is that an outside state was somehow aware that there was a 'serious danger' that genocide might take place. The point is that under general legal standards, these two would generally be reversed (Gattini 2007).

Despite several shortcomings in its approach, the *Bosnia v. Serbia* decision represents a major advance in terms of our conceptualization and understanding of state responsibility. What the ruling has done is to establish the notion that it is important to articulate different degrees of state responsibility for genocide, and presumably this principle could be applied to all other types of human rights violations as well. Thus, committing genocide is a more serious wrong than aiding and assisting in genocide, and both are more serious than a failure to prevent or the failure to punish genocide. To those only versed in domestic law, this result will not appear to be particularly noteworthy or exciting. After all, these kinds of distinctions in terms of degrees of responsibility serve as the very basis for all (or nearly all) systems of domestic law. Still, because these distinctions are generally not made under international human rights law itself, it is important that a judicial body such as the ICJ has attempted to fill this void, and in doing so has helped to give more meaning to the notion of state responsibility.

Judicial review and state responsibility: The case of the ECHR

In this section I shift gears slightly and examine a different form of judicial involvement in the development of the law on state responsibility by focusing on the world's leading human rights adjudicatory body: the European Court of Human Rights. The question is this: has the ECHR done as much for the protection of human rights as it could? My own answer is that it has not. To be clear, although I am generally critical of the approach of the ECHR, this is not because of any opposition to the principle of judicial review as such, but rather, the way in which the Court has come to exercise this power. Thus, unlike those who decry the principle of judicial review because of its perceived anti-democratic nature, I work under the belief that the judiciary can (and should) play

an instrumental role in protecting human rights, and that one of the keys in achieving this is by helping to initiate enlightened dialogue within those states.

There are two fundamentally different ways that human rights adjudicatory bodies can operate. The first is to attempt to deter violations by raising the 'costs' (political as well as financial) for states that abuse human rights. Yet, it is by no means clear that this approach necessarily leads to any greater understanding of human rights or that it will result in any internalization of human rights values. Perhaps this would not be a problem if deterrence always worked and human rights were universally or even generally respected, but there is strong evidence that at least in some cases offending states have adopted something akin to a 'violate and pay' policy. This seems to be an apt description of the situation involving Turkey in the 1990s (based on that state's practices involving Kurdish separatists in the south-eastern part of the country) and the Russian Republic during the past decade or so (for its policies in Chechnya). Both countries have been subjected to a number of adverse rulings from the ECHR, but this seems to have had little effect on state practice. Instead, both countries have routinely paid off judgments rendered against them by the ECHR – and then went on to pursue the same policies.

The other approach, and the one advocated for here, is one in which the primary goal of the court is to help the citizens and the policy makers in the offending state to recognize the wrongfulness of their acts so that these and similar practices will be avoided in the future. A ruling that a state is 'responsible' for violating international human rights standards is – or at least should be – considered as an extraordinarily serious matter that should spawn an enormous amount of domestic debate and national soul searching. Unfortunately, there is no evidence of this under the European system, where ECHR rulings against states now occur almost as a matter of course. Oddly enough, perhaps, but one of the essentials in developing state responsibility is by limiting the nature and scope of that responsibility. When a state is responsible for (seemingly) everything, it will ultimately be responsible for (almost) nothing.

'Human rights' cases?

The ECHR has an enormous caseload. During the period 2005–2007, the Court received approximately 45,000 applications and as of 2007 there were some 81,000 pending cases. One thing that is odd about this is that the Court's caseload is oftentimes presented as proof of the 'success' of

the Court. Although laced with appropriate humor, Luzius Wildhaber, the President of the Court from 1997 to 2007, provides a telling account of the wide (and rather wild) array of cases brought before the ECHR and addressed by it, at least in some fashion.

> All sorts of cases reach our Court. Issues of Communist nationalizations of property in Czechoslovakia, Slovakia and Eastern Germany and the question of whether the Czech Republic after the fall of the Iron Curtain could restrict the restitution of nationalized goods to Czech nationals only were declared inadmissible. Two applicants elected to the parliament of San Marino refused to take the required oath on the Holy Gospels and were disqualified from sitting in the parliament, which our Court qualified as a violation of the freedom of religion in the Buscarini case. A French-Moroccan drug trafficker held in custody was beaten up so severely by the police that medical certificates listed about 40 visible injuries all over his body, for which no plausible explanation was given, so our Court had to decide in the Selmouni case that he had been tortured. The Swiss Animal Protection Society wanted to run an ad on TV, showing piglets and encouraging people to 'eat less meat'; the TV refused saying this was 'political' speech, whereas, if people had been invited to 'eat more meat,' this would have been 'commercial' speech and therefore permissible; our Court saw in this a violation of the freedom of expression. . . . An imaginative applicant complained that the right to marriage of Article 12 must mean that the State was under an obligation to provide him with a suitable wife; unfortunately for him, the applicant was turned down.
>
> (Wildhaber 2007: 528)

Wildhaber continues:

> Functionally speaking, the European Court of Human Rights is becoming a European quasi-Constitutional Court. It is less handling the exceptional cases which captivated the attention of the founders of the Convention, but is becoming more and more a broad-based, 'normal' institution, although a very symbolic one.
>
> (Wildhaber 2007: 528)

Although Wildhaber himself has started to back away from his staunch defense of the Court's approach and its work (Wildhaber 2011), I take issue with his depiction of the ECHR as a quasi-Constitutional Court.

Rather, a much more apt description is that it has become a 'claims court.' I make this charge for two reasons. The first is that the whole notion of 'human rights' seems to have been extended almost beyond recognition. What Wildhaber ignores is that while a demand for the state to provide a 'suitable wife' is seemingly harmless enough (although he makes no mention of the time and resources that the ECHR spent on this case alone), this also represents the manner in which seemingly any and all wrongs are now viewed as implicating 'human rights.' More importantly, what Wildhaber fails to recognize is the degree to which the Court itself has encouraged, or at least not discouraged, this kind of misguided thinking.

The other reason for analogizing the ECHR to a 'claims court' is that what it seems to be reaching for is some ideal where individual justice is meted out, but which also gives the Court the political cover not to address broader legal principles. The point is that constitutional courts attend to larger constitutional principles – and 'human rights' courts should attend to larger human rights principles.

What is also telling is that at the same time that the Court has shown a great willingness to address a wide array of claims, many of which are only tangentially related to 'human rights,' the ECHR has refused to address almost an entire category of true human rights cases where the victims of this abuse reside in countries outside 'Europe' itself. The leading case in this realm is the ECHR's decision in *Bankovic et al. v. Belgium et al.* (2011), which was based on a NATO bombing mission over Serbia that resulted in the death or injury of 32 civilians. Article 1 of the European Convention provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention.' Since Serbia was not a state party to the European Convention, the question before the Court was whether these Serb civilians were within the 'jurisdiction' of these European countries at the time of the bombing. The ECHR ruled that they were not, and on this basis it dismissed the case as inadmissible. In arriving at this conclusion, the Court held that Convention was 'primarily' or 'essentially' territorial in nature, but that individuals who were outside of Europe could be brought within the jurisdiction of the contracting states under 'exceptional circumstances,' namely, when these states exercised 'effective control' over them. In this case, the ECHR never provided a definitive accounting of when this 'effective control' test will be met, although what is known from the Court's ruling itself is that dropping bombs and killing and injuring people on the ground does not meet this standard (Roxstrom et al. 2005).

In proceedings since then, the ECHR has tempered its *Bankovic* ruling, at least to some degree. In *Ocalan v. Turkey* (2000), the Court ruled that an individual who was arrested and detained by Turkish officials at the airport in Nairobi, Kenya, was thereby within the 'jurisdiction' of this one contracting state. And in what seems to be the Court's strongest move away from *Bankovic*, in *Issa v. Turkey* (2005), the Court ruled that if Turkish soldiers had gone on to Iraqi soil and had mutilated and killed a group of Iraqi civilians as alleged, the protections of the Convention would thereby apply on the basis that Turkey had exercised what it termed 'temporary effective control.' The Court reasoned that 'accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory' (par 71). However, after enunciating what appears to be a new standard, the Court then went on to dismiss the case on the basis that the applicants had not provided sufficient evidence that Turkish troops had actually carried out these human rights violations.

The governing law remains murky. However, what is quite clear is that the extraterritorial application of the European Convention will remain the exception and anything but the rule. Thus, in *Al-Skeini v. United Kingdom* (2011), the British High Court had ruled that only one of six civilian deaths in a British-occupied area of Iraq was protected under the European Convention on the ground that what differentiated this one case from the other five was that at the time of the killing the deceased had been in custody in a British-run prison – and thus were within the United Kingdom's 'effective control' – while all the other deaths had occurred on 'the street,' and outside such control.

To its credit, the ECHR disagreed with this holding and it ruled that all six individuals were within the 'jurisdiction' of Great Britain. However, *Al-Skeini* does little to overturn the reality that, absent military occupation and death on the ground (and from bullets and not bombs), nearly all individuals outside of 'Europe' who are harmed by the practices and policies of the European states will have no opportunity to hold these states responsible – at least under the European Convention.

Transforming the ECHR

Judicial bodies can play a unique and essential role in protecting human rights. The legal philosopher Ronald Dworkin (1981: 517) has written: 'Judicial review insures that that most fundamental issues of political morality will finally be set out and debated as issues of political

principle and not simply issues of political power, a transformation that cannot succeed, in any case not fully, within the legislature itself.' In a similar vein, the American legal theorist Alexander Bickel (1970: 177) has argued that 'society also values the capacity of judges to draw its attention to issues of the largest principles that may have gone unheeded in the welter of its pragmatic doings.' The problem is that the ECHR, the world's pre-eminent human rights body, has not attended to matters of principle in the manner that it could, or that it should.

In more practical terms, one of the first things that the Court needs to do is to gain control of its docket. In achieving this, the ECHR could draw upon the experience of the US Supreme Court, which sifts through thousands of claims each year and now hears less than a hundred cases per year. In doing this, the ECHR would leave most matters to the democratic institutions of the various Europeans states, much in the manner of its 'margin of appreciation' doctrine, but expanded much more broadly than this.

But the European Court of Human Rights needs to go well beyond the issue of case management. One of the best descriptions of the United States Supreme Court is that it serves as a 'teacher in a vital national seminar' (Rostow 1952: 208). In the same way, the ECHR needs to evolve into an institution that serves as a teacher in a vital seminar – only the seminar is on the meaning of human rights. The ECHR will certainly not achieve this by attempting to address thousands of claims each year, many of which can only be considered to be about 'human rights' in a very technical sense. It will also not achieve this by almost systematically refusing to hear claims involving the actions of the European states, but where the victims live outside Europe.

Like the US Supreme Court, the ECHR must be strategic in terms of which legal issues it addresses, but always keeping in mind the singular contribution that it can make to the protection of human rights. For starters, the ECHR should recognize that rather than serving to initiate democratic dialogue, its method of decision making has almost always had just the opposite effect. Seemingly without exception, the Court's opinions are long, dense, and mechanical in nature, without any apparent hint of dialogue between the ECHR's ruling opinion and any concurring and dissenting opinions. More importantly, there is no indication that the Court is at all interested in initiating any kind of broader societal examination of the issue at hand. What exists, instead, is human rights by fiat, which is the antithesis of the very notion of human rights.

Conclusion

State responsibility concerns itself with the collective wrongdoing of societies. Rather than being in competition with one another, state responsibility and individual accountability are natural complements. The latter focuses on the acts of political, economic, and military leaders, while the former serves as an acknowledgement that a society's culpability will in almost every instance go well beyond the actions of a few. What must also be said is that while individual accountability and state responsibility are backward looking in the sense of focusing on international wrongs that have already taken place, both are forward looking in the sense that the ultimate aim is to prevent future wrongs from occurring.

Although individual accountability has received vastly more attention than the issue of state responsibility, there have been encouraging developments in the law on state responsibility, in large part due to the work of international and regional human rights adjudicatory bodies. However, there are certain reservations about some of this work. In terms of the analysis of the International Court of Justice, especially in its decision in the Serbian genocide case, while the ICJ's effort to establish varying degrees of responsibility for genocide must be praised, what needs to be questioned are the standards set forth by the Court, but also the enormous gaps in state responsibility that still remain.

In terms of regional bodies, due to its pre-eminent position, much of the focus has been on the European Court of Human Rights. While there is much to admire about the ECHR, the question raised here is whether it truly can be described as a 'human rights' court. The problem is that the overwhelming majority of cases that the Court deals with have only a tangential relationship to 'human rights,' as that term is commonly understood, while at the same time it has systematically ignored true human rights claims that arise from the European states' actions in the world. One of the consequences of the Court's approach is that the entire meaning of human rights is in serious danger of becoming lost. Taking a cue from the US Supreme Court, it has been argued here that the ECHR needs to see itself as a teacher in a seminar on human rights.

Notes

1. Article 4 provides: 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions . . . .'

2. Article 8, which provides: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct.'
3. However, another interpretation is that Article 16 already addresses such state behavior, but that the ICJ completely misread these standards by demanding such a high level of involvement by the outside state.
4. The ICJ also found that Serbia had not met its obligation 'to punish,' based on the government's lack of cooperation with the ICTY.

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Part III

Responsibilities of Non-State Actors

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6

Putting the Blame on Governments: Why Firms and Governments Have Failed to Advance the Guiding Principles on Business and Human Rights

Susan Ariel Aaronson and Ian Higham[1]

Introduction

Some 67 years after the Holocaust, Guillaume Pepy, the chairman of Société Nationale des Chemins de fer français (SNCF), the French national railway company, apologized for transporting 76,000 people to Nazi death camps during World War II. Pepy acknowledged that his firm's failure to respect human rights in the past was creating business risks in the present, and he feared that US state legislators would block the company from competing for high-speed rail contracts (de la Baume 2011).

When businesses violate human rights, executives may create wounds that cannot be easily healed by apologies, time, or new management. As markets, technology, and politics change, many executives have struggled to ensure that their operations do not undermine the human rights of their stakeholders. For example, during the first days of the February 2011 protests in Egypt, Vodafone suspended mobile and Internet service at the behest of the government. After reinstating the service, the Mubarak regime next used it to send pro-government text messages, calling for rallies and actions against democratic protestors (Tripathi 2011). Vodafone executives claimed that they were forced to comply with the emergency rules invoked by the Egyptian government and that the company could not contest the authorities. However, many

human rights activists asserted that in doing so, Vodafone was indirectly complicit in violating human rights (Vodafone Group Plc 2011 and Satter 2011).

As these examples illustrate, when firms directly or indirectly violate human rights, they can create business risks. Such risks occur when an existing practice, relationship, or situation places the company at risk of involvement in human rights abuse. The costs to the firm may include legal liability, reputational and operational risks (such as work stoppages, boycotts, blackmail, and sabotage), and loss of investor or consumer confidence (Bernstein 2008).

Firms should thus seek to prevent actual or perceived human rights risks. However, some executives may not be aware that their operations can affect human rights. Moreover, not all executives understand how to measure and assess their actual and perceived human rights risks (Taylor 2009: 6–7). Executives will need guidance, tools, practice, and time to learn how to ensure that they do not undermine the human rights of their stakeholders.

This chapter describes how Professor John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, developed guidance and tools for the United Nations to help firms respect human rights. Under the Guiding Principles on Business and Human Rights (the GPs), executives are expected to attempt to monitor and measure their human rights 'due diligence' and provide injured parties with access to remedies. These executives can no longer be wilfully deaf, dumb, or blind to the human rights consequences of their company's actions.

We make several points about the Guiding Principles. First, the GPs are a governance hybrid: they link governments' international human rights obligations to voluntary initiatives by businesses. Policy makers are supposed to take steps to ensure that all firms operating in their country protect and respect human rights at home and abroad. Second, the GPs are not well known or well understood. Although they were developed in a transparent, global, and inclusive manner, very few individuals, firms, and NGOs actually participated in the development of the GPs. The public and most executives were unaware and uninvolved in this process. Third, many executives seem to believe it is too costly and time consuming to implement the GPs. Hence, we argue that this hybrid governance tool needs more policy maker support and creative thinking to succeed.

We have been studying the adoption of the GPs since 2011. Although the number of firms implementing the GPs is gradually increasing,

the number of corporate adopters remains small. We believe governments are not doing enough to inform their firms about their human rights responsibilities or about the GPs. After all, under international law governments have the principal responsibility to protect human rights against abuse by third parties. According to the GPs, states 'should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations' ('Guiding Principles' 2011: 7). The GPs also recommended that states could use tools, including regulatory or procurement policies, to encourage business respect for human rights ('Guiding Principles' 2011: 7–12).

This chapter is organized as follows: we begin with background on Ruggie's work. Next we assess how business and governments responded to the GPs. Finally, we put forward our argument that states must do more to encourage understanding and uptake of the GPs.

Background

In 2005, UN Secretary General Kofi Annan decided it was time to develop clearer standards for business and human rights responsibilities. Annan appointed Harvard Professor John Ruggie to be the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises. Ruggie was determined to develop workable human rights norms. He knew that many policy makers and executives viewed an earlier attempt to develop workable standards ('the Norms') as a 'train wreck' (Human Rights Joint Committee 2009). He also recognized that although some corporations accept some human rights responsibilities (as shown by their human rights policies or codes of conduct), most executives oppose imposing mandatory human rights obligations (Bilchitz 2012).

Ruggie and his team began the process that ultimately led to the GPs by mapping out the state of play of business and human rights. The team found that it would not be easy to develop actionable recommendations for several reasons. First, every firm is different, and the human rights that a textile firm may impact may be different from those that an Internet company may impact. The team examined 320 instances of alleged corporate human rights abuse between February 2005 and December 2007. They found that firms not only violated labor rights, but also many other internationally recognized human rights, such as the right to a fair trial, the right to marry and form a family, and the right of peaceful assembly. Moreover, they found that workers constituted

only 45% of the persons affected by these abuses; communities were affected in 45% of cases and end-users in 10% (Ruggie 2013: 19–24). Second, managers may not be aware that their firms can impact human rights because they may never have had a scandal or seen human rights as creating liability. Third, because the advancement of human rights has long been seen as the exclusive domain of states, 'business policies and practices in the area of human rights remain largely voluntary' ('Human Rights Policies and Management Practices' 2007). Fourth, it would not be easy to hold firms and their affiliates accountable because many multinational corporations operate globally through subsidiaries and indirect suppliers. Many of these firms are incorporated locally and are corporate citizens of the host country. Therefore, these same firms could have thousands of suppliers, which would make it difficult to hold firms and their affiliates accountable (Aaronson 2005, McKinnon and Thurm 2012). Indeed, Ruggie's study of corporate human rights abuses found that 41% of alleged abuses occurred through indirect operations, such as through the supply chain (Ruggie 2013: 27). Fifth, firms have different cultures and affinities toward human rights. Those cultures not only reflect leadership from the top, but also the economic and political culture of the host countries (Aaronson 2005: 175–176). In 2007 Ruggie's team also found that the political culture of a firm's home country strongly influenced the rights the firm recognized (Ruggie 2013: 73). Hence, Ruggie had to create an internationally acceptable framework for states to hold their firms accountable for human rights. Although the Universal Declaration of Human Rights (UDHR) calls upon all organs of society to protect and promote human rights, whether civic groups, corporations, or governments, it does not distinguish specific responsibilities for business (United Nations General Assembly 1948).

Ruggie began by ascertaining what firms were doing as well as what governments were asking their domestic firms to do. Ruggie and his team recognized the complexity of this task, first analyzing options for a business and human rights treaty. He ultimately concluded that there was no appetite for a new human rights treaty amongst UN Member States, that such a treaty could take many years to negotiate, and that a treaty may be ineffective, especially due to a lack of impact after ratification, the difficulties of establishing an enforcement mechanism, and conflicting obligations under other international treaties (Ruggie 2013: 55–68).

To understand what executives thought and what firms were doing, the Ruggie team did four separate surveys of human rights practices among the world's firms. The team conducted their first survey in

2005, which focused on the Fortune Global 500; some 102 executives responded (20%). Ninety percent of those respondents reported that they had an explicit set of human rights practices or management practices, but fewer than half said they had experienced a significant human rights issue. Almost all of the responding companies said they included human rights in their code; only 40% of those polled had a free-standing human rights protocol ('Human Rights Policies and Management Practices' 2007: 68–74). Most companies focused their codes on the rights of workers, referring to the core International Labor Organization (ILO) conventions. Almost none of the companies referred to the International Bill of Human Rights; however, some referred to the UDHR (Ruggie 2013: 12).

The respondents showed significant regional variations in human rights practices. Ruggie found, 'European multinationals were more likely than their American counterparts to reference the rights to health and to an adequate standard of living. They were also more likely to state that their human rights policies extended beyond the workplace to include their impact on the communities where they operate. US and Japanese firms tended to recognize a narrower spectrum of rights and rights holders. The most widely cited right by Chinese companies at the time was the right to development, which few Western governments or companies recognize' (Ruggie 2013: 73). Thus, how or whether firms protected human rights had a lot to do with the culture and priorities of firms' home countries. Ruggie and his team concluded that this survey was skewed, as it had a relatively low response rate and few of the respondents came from Asia or Latin America ('Human Rights Policies and Management Practices' 2007: 67–70).

The team next examined the human rights policies of a more general sample of 300 firms through a second survey in 2006. As before, they found most companies include labor rights in their code, but fewer firms recognize non-labor rights, such as the right to privacy (Wright and Lehr 2006).

The third survey, administered in 2007, focused on 25 Chinese companies. The results showed that Chinese firms recognized fewer rights than European or North American companies, but were 'slightly more likely to recognize social and economic rights,' reflecting Chinese government activism related to some rights, such as access to education ('Human Rights Policies of Chinese Companies' 2007).

With this mapping, Ruggie and his team were able to create a framework that defined the responsibilities of states and business (Prepared Remarks at Clifford Chance 2007). He considered voluntary initiatives,

such as corporate social responsibility (CSR) practices, to be 'a significant force to build on,' although they 'fell short as a stand-alone approach,' as firms were reluctant to integrate CSR activities into core business functions and to provide affected individuals with any means of recourse (Ruggie 2013: 76). Ruggie found 'little evidence to support the claim that companies have direct human rights obligations under international law' (Prepared Remarks at Clifford Chance 2007). However, companies would be 'tried in the court of public opinion' for their failure to respect human rights. Ruggie added that where national legal systems already provide for the criminal punishment of companies, international standards meant to apply to individuals could also apply to business enterprises that are persons in the legal sense (Prepared Remarks at Clifford Chance 2007).

Ruggie's team conducted eight studies of how governments interpret the state duty to protect against human rights violations. There are over 30 human rights set forth in the UDHR (United Nations General Assembly 1948). To ensure that governments promote these rights, policy makers developed two covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (United Nations General Assembly, ICCPR and ICESCR 1966). Together, the UDHR and the two covenants comprise the International Bill of Human Rights. However, not all states have signed onto both covenants (United Nations Treaty Collection 2014), and that political reality may be reflected in the human rights practices of their national firms.

The team found that 'not all states appear to have internalized the full meaning of the state duty to protect and its implications with regard to preventing and punishing abuses by business enterprises' (Prepared Remarks at Clifford Chance 2007). The team also discovered that policy makers were confused as to when and how they should protect citizens from corporate human rights abuse as part of the state duty to protect. Finally, while no treaty bans extraterritorial actions, Ruggie argued that states do not take full advantage of available legal and policy tools to exercise extraterritorial jurisdiction over companies (Prepared Remarks at Clifford Chance).

Ruggie concluded that states should take steps to 'prevent, investigate, punish and redress' human rights abuses (United Nations Human Rights Council: 6). In doing so, policy makers will 'foster a corporate culture respectful of human rights' (United Nations Human Rights Council 2008: 27). To achieve this goal, he asserted, policy makers can provide assistance and guidance to the businesses domiciled within

their borders, enforce existing laws, and create greater policy coherence among government departments, such as trade and investment that can have unanticipated human rights spill-over effects ('Guiding Principles' 2011: 9).

By 2008, Ruggie had developed the foundation of his effort: *Protect, Respect and Remedy: A Framework for Business and Human Rights*. This framework outlined the state duty to protect citizens from human rights abuses, the corporate responsibility to respect human rights, and the need for corporations as well as states to provide access to effective remedies when rights are violated (United Nations Human Rights Council 2008: 9). The 47 members of the UN Human Rights Council (UNHRC) unanimously endorsed *Protect, Respect and Remedy* in 2008 and extended Ruggie's mandate so that he could report on 'operationalizing' the framework (United Nations Human Rights Council 2009: 1).

This framework declared that firms should have a means of due diligence, which is 'the steps a company must take to become aware of, prevent and address adverse human rights impacts' (United Nations Human Rights Council 2008: 56). The framework included four components of due diligence: adopting a human rights policy; conducting impact assessments to understand how business activities may affect human rights; integrating human rights policies throughout the company by fostering employee awareness of the policies; and tracking performance through monitoring and auditing processes. The framework also stated that a firm's due diligence process should apply to its business partners and suppliers (United Nations Human Rights Council 2008: 61–63). In so doing, Ruggie's team had made it clear that firms would be expected to hold their affiliates responsible for human rights.

From 2008 to 2011, Ruggie and his team focused on implementation. On 22 November 2010, he released a draft version of the *Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework*. The draft was open for public consultation via an online forum until 31 January 2011 (Ruggie 2010). Ruggie released a final version that incorporated these comments, the *Guiding Principles on Business and Human Rights*, on 21 March 2011 ('Guiding Principles' 2011: 9). The 47 members of the UNHRC formally approved the GPs by consensus on 16 June 2011 (Office of the High Commissioner for Human Rights 2011).

Ruggie stressed that in order to hold firms accountable for their behavior, policy makers, consumers, and other corporate stakeholders should be able to monitor corporate performance ('Guiding Principles' 2011: 19). Hence the GPs encouraged firms to report on their human

rights impacts and make such reports public: 'Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them' ('Guiding Principles' 2011: 20).

Finally, the GPs stated that both states and corporations should provide victims and potential victims of human rights abuses with access to remedies through grievance mechanisms. Grievance mechanisms could either be state-based judicial or non-judicial mechanisms or non-judicial mechanisms administered by a business enterprise alone or with stakeholders, an industry association, or multi-stakeholder group. The GPs also stated that these grievance mechanisms must be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning, while company-provided mechanisms must also be based on engagement and dialogue ('Guiding Principles' 2011: 20–26).

On 15 December 2010, Ruggie released a paper called 'Applications of the UN "Protect, Respect and Remedy" Framework.' This document lists examples of both states and companies that Ruggie found to have 'applied' his guidelines in some manner. It also includes examples of applications from NGOs, national human rights institutions (NHRIs), business associations, multi-stakeholder initiatives, investors, academics, multilateral organizations, and legal organizations. He updated the list monthly until June 2011 ('Applications' 2011). However, many of the companies supposedly implementing the GPs were in fact simply noting that they existed; there was little evidence that these firms were actually altering their policies or practices.

Barclays provides a good example. Although Barclays was supposedly implementing the GPs, as of December 2013, it had not outlined a commitment to conducting human rights impact assessments, and it is still part of an informal group 'reviewing the implications' of the GPs for the financial sector (Barclays 2013). GE was also highlighted in this report for changing its policy to reflect Ruggie's guidelines. Yet, as of December 2013 the company's policy still did not recognize the complete International Bill of Human Rights, the company did not have robust reporting on its human rights and did not publish information on how it had integrated human rights into its operations and whether it had established grievance mechanisms. The company does state that it conducts impact assessments 'as appropriate,' but only related to major infrastructure project financing (GE 2013). Both Barclays and GE are doing more to monitor their human rights footprint, but we can hardly argue that either firm is implementing the GPs.

For the GPs to be successful, policy makers need to make them well known and well understood. Ruggie's team tried: they held 41 multi-stakeholder meetings on every continent during the six-year mandate ('Consultations, meetings & workshops' 2013). Every document, comment, and meeting report was posted on the website of the Business and Human Rights Resource Centre (BHRRC) ('UN Secretary-General's Special Representative' 2013). The team also asked for public comments on the GPs, and commentaries could be submitted online from 22 November 2010 to 31 January 2011. However, they received only 90 submissions by the deadline (Ruggie 2010). Moreover, the bulk of the submissions came from academics and activists, rather than executives and policy makers ('Submissions to consultation' 2013). We don't know why executives were so uninvolved, but the failure to encourage firms, NGOs, and in particular governments, to participate in the development of the GPs resonates today.

What states have done

Throughout most of the period in which the framework and GPs were developed, policy makers were relatively silent about Ruggie's mandate. In 2006, his team sent a survey to each of the 192 UN Member States, but only 29 responded. Moreover, many of those 29 governments did not respond to all of his questions ('Human Rights Policies and Management Practices' 2007: 4–10). As a result, the survey provided an incomplete picture of the role of states in encouraging firms to respect human rights. But the survey provided a revealing picture of policy makers' ambivalence about prodding firms to respect human rights. The team found that most of the responding governments did very little to monitor the human rights practices of national or host firms or to educate national firms as to their human rights responsibilities. Most states did little to inform firms of their human rights responsibilities or to coordinate their foreign economic and human rights policies. Some 30% of the states replying did allow the prosecution of firms as legal persons and enabled extraterritorial jurisdiction over human rights violations committed overseas. For example, Australia, Belgium, Canada, France, the United States, and the United Kingdom allow individuals to sue companies for human rights violations ('Human Rights Policies and Management Practices' 2007: 35–64 and Aaronson 2003: 63).

Ruggie's team also asked policy makers why they found it so difficult to encourage multinationals to advance human rights. Policy makers cited the nonexistence of an international framework, the absence of

an internationally recognized body to monitor violations, the lack of information among states, and 'the uneven playing field in this area, resulting in very different national laws and regulations ("Human Rights Policies and Management Practices" 2007: 54).' The team also asked what governments should do to ensure that firms did not undermine human rights. Eleven states responded that they should promote CSR, 14 said states should enforce human rights norms for business and two states argued that governments should mediate disputes between firms and alleged victims of human rights abuse ('Human Rights Policies and Management Practices' 2007: 55–56). Governments were clearly divided as to how to encourage business–human rights responsibility. Ruggie's team also looked at how governments use corporate and securities law to affect business–human rights practices. In a 2009 survey, the team found virtually no jurisdiction that explicitly regulates corporations on the issue of human rights through corporate and securities law ('Corporate Law Project' 2010).

As noted above, the GPs make clear that governments have the principal responsibility to protect against human rights abuse by third parties, including business enterprises. States were thus advised to meet their duty to protect by enforcing existing human rights laws, ensuring policy coherence, providing guidance to firms on how to respect human rights, and encouraging firms to report on their human rights performance. The GPs also advised on how states could use tools such as procurement policies, new legislation and regulation, and denying access to public support to advance business respect for human rights ('Corporate Law Project' 2010: 7–12).

In 2011, some states worked multilaterally to reinforce the GPs ('Applications' 2011). In May, 42 countries (the 34 members of the Organisation for Economic Co-operation and Development (OECD) as well as many other middle-income countries) endorsed the revised OECD Guidelines for Multinational Enterprises, which for the first time included human rights language from the GPs. These guidelines are voluntary recommendations that governments make to their firms; they state that firms should adopt human rights due diligence processes ('Applications' 2011). The OECD Guidelines also include a new, tougher process for complaints as well as a process for mediation on human rights issues (OECD 2011).

The members of the OECD and Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania also approved a 'Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas' (OECD 2013). This

2011 recommendation was developed to provide guidance to firms that rely on conflict minerals, which are minerals mined in situations of conflict and human rights abuse. The recommendation discusses how to identify and reduce use of these conflict minerals to ensure that mineral trade does not encourage human rights abuse or further conflict (OECD 2013).

States also began to act within their borders to advance the GPs. In October 2011, the European Commission invited Member States to develop by the end of 2012 national action plans (NAP) for implementing the GPs (European Commission 2011). Although the EC asked members to submit plans by the end of 2012, as of December 2013 only one state had published its NAP: the United Kingdom, in September 2013. Spain and the Netherlands had announced plans to publish NAPs by the end of 2013, and Norway (not an EU Member State) began drafting an NAP in November 2013 (Graft 2013: 6). The Spanish government released a draft NAP in November 2013, and it was unclear at the time of writing whether the Dutch government finalized a draft ('Implementation by governments' 2014). The EC published sector-specific human rights guidance for employment and recruitment agencies, information and communications technology (ICT)/telecommunications firms, and oil and gas firms in June 2013. These guidelines provide specific guidance, tailored by sector, for each component of human rights due diligence, including what the GPs expect, why that component is important and how to develop and implement the relevant policies and systems (European Commission 2013).

The British government has been active in trying to encourage adopting the GPs and other voluntary initiatives. It has partnered with other countries such as Colombia that want to implement the GPs. It used diplomacy to encourage other states to support implementation of the GPs, as well as internationally recognized voluntary standards such as the OECD Guidelines. The UK National Action Plan (NAP) also approaches this policy issue by sector and ownership, with specific plans for ICT companies, private security service providers and state-owned companies. The plan also includes provisions for fostering wider participation in multi-stakeholder initiatives, such as the Voluntary Principles on Security and Human Rights (HM Government 2013).

The United States has also become active in implementing both the GPs and in encouraging other business and human rights initiatives. The Department of State has argued that it is in the US national interest to ensure that business respects human rights at home and abroad, and thus bolsters, rather than undermines, US soft power ('U.S.

Government Approaches on Business and Human Rights' 2013). In July 2012, the US State Department developed reporting requirements for US firms investing in Burma (Myanmar). Firms should report on anti-corruption and environmental issues, their due diligence policies and procedures that address operational impacts on human rights and worker rights (US Department of State 2012). The State Department clarified in September 2013 that these requirements are directly informed by the best practices outlined in the GPs ('Responsible Investment Reporting Requirements FAQ' 2013).

The United States has also used public–private partnerships to encourage business respect for human rights. For example, the US government has been active in shaping the Public Private Alliance for Responsible Minerals Trade, an initiative 'designed to support conflict-free supply chains in the Democratic Republic of the Congo, and promote conflict-free sourcing from within the region' ('U.S. Government Approaches on Business and Human Rights' 2013). The United States was an early leader on the issue of conflict minerals in corporate supply chains. The 2010 Dodd–Frank Act included a provision for the Securities and Exchange Commission (SEC) to adopt rules requiring companies to disclose the use of conflict minerals where such minerals are necessary for the production or function of the company's product. The SEC adopted these final rules in August 2012 ('U.S. Government Approaches on Business and Human Rights' 2013).

The US government has also been active in public–private partnerships pertaining to the human rights of privacy and freedom of expression. The United States helped to create the Freedom Online Coalition, a group of 19 governments engaging with private sector companies and coordinating diplomatic efforts to promote Internet freedom. The government was also involved in creating the Global Network Initiative, which assists technology companies in developing policies and best practices for respecting these human rights ('U.S. Government Approaches on Business and Human Rights' 2013).

In sum, several industrialized nations are taking steps to encourage the firms they call home to adopt the GPs. The United Kingdom is also trying to encourage other governments to adopt the GPs. But these governments are few. Moreover, no government has found a way to ensure that all of its firms implement the GPs in all operating contexts. Sector-specific guidelines and regulations for firms investing in high-risk jurisdictions could be useful, but such initiatives may not cover the full range of internationally recognized human rights.

What companies have done

The global business community's response to the GPs was relatively unenthusiastic. Major international business associations such as the International Chamber of Commerce, International Organisation of Employers, and the Business Industry Advisory Committee to the OECD fully participated in Ruggie's process and ultimately expressed support for the GPs, calling on the UNHRC to endorse them (IOE, ICC & BIAC 2011). They did not, however, explicitly call on member states to adopt them.

Moreover, most firms said little about the GPs. Some firms were critical. Talisman Energy generally opposed the principles, describing their comments as 'largely in the nature of caution or objection' (Cyr 2010). Other firms were supportive but cautious. Control Risks expressed appreciation for Ruggie's work, but stressed 'without clearer guidelines for States, we fear that these principles may remain aspirational when they deserve to be operational' (Fenning 2011). BASF called for greater clarity regarding 'the effective limits of this extended scope for human rights diligence' (BASF 2011).

Executives from a few firms expressed more enthusiastic support. Susanne Stormer, vice-president of Global Triple Bottom Line Management at Novo Nordisk, welcomed the guidelines (2010). A. P. Galaev, CEO of Sakhalin Energy, a joint venture among several oil companies, wrote, 'It is my sincere hope that the Human Rights Council will endorse the GPs at its forthcoming session in June, helping to establish them as the authoritative reference point for states, companies and civil society' (2011). Sime Darby, a Malaysian firm, also expressed its support for the framework and GPs (Selvanathan 2011).

Many of the more supportive firms had been seeking clarity on the human rights responsibilities of business. These firms wanted to avoid business risk in the future and to ensure fair practices by their competitors. According to Novo Nordisk, '[C]ommon standards for business would help to provide a level playing field and prevent human rights violations' (Novo Nordisk 2011). Likewise, BP called the framework 'a unique chance to lay to rest a long-standing international debate about whether mandatory norms are required' (BP 2012). BP asserted that common standards will 'help to clarify some of the more challenging human rights issues businesses face' (BP 2012). The firm also claimed that in 2012 it developed an action plan to implement the GPs, although it was not clear as of December 2013 whether this plan had been integrated into the firm's operations (BP 2013).

These comments reveal that some firms were prepared to adopt the GPs, but most firms will need greater understanding about the GPs and how to implement them. Moreover, unless the majority of firms take action, early adaptors could face an uneven playing field, where some firms establish due diligence mechanisms at considerable cost and others do nothing.

Although a growing number of executives acknowledge human rights responsibilities, most executives in the bulk of the world's firms do not. In Ruggie's studies at the onset of his mandate, he received responses from only 102 of the Fortune Global 500 firms regarding their human rights policies. In May 2011, the BHRRC listed 275 companies that had explicit policies on human rights; these 275 companies formed the basis for our initial study on corporate uptake of the framework and GPs (Aaronson and Higham 2013). As of December 2013, we found that 323 firms had these policies ('Company Policy Statements on Human Rights' 2013).

We looked at these policies closely. We noted that the BHRRC list does not include all companies with strong human rights records, because such companies may not have formal policies or made such policies public. Hence this list, like Ruggie's surveys, is incomplete. Nonetheless, we chose to use this list as the basis of our study as it is the most complete list available, and some firms note their inclusion in the list in their CSR reporting. Moreover, having a policy is the primary component of a due diligence process according to the GPs and is the basis for integrating respect for human rights into corporate operations.

In the nearly three years that have passed since the GPs were approved by the UNHRC, only 48 companies have developed and publicized their human rights policies at this site. In total, the 323 firms listed account for just 0.40% of all 80,000 multinational corporations. Additionally, while each of these 323 firms has a policy, most of them do not meet the minimum criteria of Ruggie's framework for the GPs, which is a publicly available human rights policy that is approved at the most senior level of the business enterprise, is informed by internal and external expertise, stipulates the enterprise's human rights expectations of personal and business partners, is communicated internally and externally to all personnel and business partners, and is reflected in operational policies and procedures necessary to embed it throughout the enterprise ('Guiding Principles' 2011: 15). It is difficult to quantify the policies that meet these criteria, as firms do no consistently report on the extent to which they communicate human rights policies to staff and the level at which the policy has been approved. Moreover, many companies with human

rights policies do not address the full range of human rights covered in the GPs. Ruggie suggested that 'companies should look, at a minimum, to the International Bill of Human Rights and the core conventions of the ILO' when determining their human rights responsibilities (United Nations Human Rights Council 2008: 58). While in our original study we found that only eight companies acknowledged the complete International Bill and the five ILO core conventions, we also found that it was common for companies to selectively implement aspects of these standards, such as the UDHR and some of the five ILO conventions.

Moreover, European firms are the most likely to delineate and implement human rights policies. Of our 323 firms, 192 (59.44%) are incorporated in Europe, with 172 (53.25%) in EU Member States. British companies are by far the most heavily represented, with 59 firms having human rights policies – 18.27% of the total and 30.73% of the total in Europe. The list also includes 30 Swedish firms, 20 French firms, 18 German firms, 13 Dutch firms, and 11 Spanish and Swiss firms. North American (defined as Canada and the United States) firms comprised 20.74% of the total, with 67 firms represented. Of these, 58 (17.96% of the total) are incorporated in the United States. Just seven firms on the list are incorporated in Australia, seven in Sub-Saharan Africa, five in the Middle East-North Africa, ten in Latin America, and 35 in Asia (28 of which are Japanese).

We believe that country trends are the most pronounced in our study and clearly support our thesis that governments must encourage firms to implement the GPs in order for the guidelines to have an impact. Although it is difficult to establish a direct causal relationship between state implementation of the GPs and corporate uptake of human rights policies, it is clear that these firms' self-regulatory actions reflect national policy agendas. The United Kingdom and the EU in general are disproportionately represented on this list, and both governing bodies have made the GPs a policy priority. Hence, firms in developing countries and countries that do not make human rights a priority are less likely to acknowledge their human rights responsibilities.

Going forward: Human Rights Council follow-up

Ruggie asked the UN Human Rights Council to develop a 'follow-up mechanism' to his mandate. In 2011, the Council set up the UN Working Group on Business and Human Rights consisting of five independent experts. The Working Group was given three years to 'provide advice and recommendations regarding developing domestic legislation

and policies relating to business and human rights'; 'to conduct country visits and to respond promptly to invitations from States'; 'to integrate a gender perspective throughout the work of the mandate and to give special attention to persons living in vulnerable situations, in particular children'; and 'to develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors, including relevant United Nations bodies, specialized agencies, funds and programmes . . .' ("Resolution 17/4" 2011). Throughout 2012, the Working Group held a series of meetings designed to stimulate international policy convergence (United Nations Human Rights Council 2012: 3).

We could not ascertain if most governments are fully supportive of this endeavor. The Working Group issued a call for recommendations from states, NGOs, corporations, and other stakeholders on 4 November 2011 ('Have Your Say!' 2011). They only received responses from 14 firms and 13 governments (Office of the High Commissioner for Human Rights 2013). While no respondent expressed hostility toward the Working Group, most states did not specifically call for guidance on regulatory policies. Only Sweden and the United Kingdom made such a request. Sweden said that priority focus areas of the Working Group should include providing, 'advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights' (Ministry for Foreign Affairs of Sweden 2011). The United Kingdom called for work on Principle 3 'in order to assist states in their efforts to regulate the activities of businesses operating in their territory' (HM Government 2011). Thus the response from governments remains limited and shows that policy makers are not ready yet to bolster the GPs with clear regulation.

The Working Group hopes to encourage business leaders and policy makers to include the Guiding Principles in existing international initiatives. For example, the group collaborated with the OECD to launch a Global Forum on Responsible Business Conduct in 2013 to support dialogue between non-OECD and OECD countries to 'promote greater convergence both in standards regarding how businesses should understand and address the risks of their operations, and in understanding how Governments should support and promote responsible business practices' (United Nations General Assembly 2012: 15–22). In addition, the Working Group identified regional organizations as 'key multipliers in dissemination efforts' and it was planning to engage with the African Union and the African Commission on Human and Peoples' Rights (United Nations General Assembly 2012: 33). Despite this progress, the Working Group has admitted, 'there is an overwhelming lack of

awareness of the Guiding Principles among stakeholders globally, particularly business, and especially small and medium-sized enterprises' (United Nations General Assembly 2012: 4–5). We believe that this persistent ignorance from business stems from a lack of education from governments.

Conclusion

The Guiding Principles represent a governance innovation: they are a transparent, multisectoral effort to clarify the human rights responsibilities of business. The GPs encourage firms to move beyond apologies toward positive actionable steps. In doing so, the GPs are righting business. However, governments and corporations have thus far taken little initiative to implement the GPs.

Readers may wonder why so few firms are implementing the GPs or adopting human rights policies. First, human rights are relatively new on the business agenda. Second, governments have long struggled to respect human rights – firms are in an early phase of the learning curve. Early adapters may be better positioned to amortize the costs of adhering to human rights and could use their support of human rights as a marketing and public relations tool. Unfortunately, early adopters are rare. Those companies that have not acted may not perceive that their firm is at risk for directly or indirectly violating human rights or they may not be aware of this initiative. Third, implementing the GPs will be expensive and time consuming. Many executives are still unconvinced that they need to do more than they are already doing.

However, herein we put most of the blame on governments. We argue that most states have not made implementing the GPs a policy priority. It is evident that firms' respect for human rights is more prevalent when business and human rights is higher on a national policy agenda. The few states that have created actionable plans for implementing components of the GPs also see higher numbers of domestic firms adopting human rights policies. Until governments provide the incentive for executives to act, uptake of the GPs will continue to be minimal.

If policy makers want to be supportive of the GPs, they should take several steps to encourage business implementation. First, policy makers must educate their national firms regarding their human rights responsibilities. They should clearly delineate their expectations for firms and provide assistance in implementing human rights impact assessments, grievance mechanisms, and other aspects of due diligence. Policy makers

should also make it clear that firms are responsible for the behavior of their suppliers.

Governments, such as the United States, South Africa, and Malaysia, that have not ratified all components of the International Bill of Human Rights, will need to decide if they will selectively encourage implementation the GPs. For example, US officials may find it difficult to encourage US companies to respect and remedy human rights, such as the right to health, access to affordable medicines and access to water, that are not reflected in national law. Second, policy makers should do their own due diligence and examine the signals domestic laws and regulations send to market actors about protecting human rights. If trade, investment, tax, and corporate governance rules send confusing messages, policy makers should find ways to foster greater understanding. Additionally, they should develop a regular channel for human rights concerns to enter into the policy making process. The United States and the EU already examine the labor and environmental impacts of their trade agreements; they and other countries could broaden that analysis to include other human rights (Aaronson 2011). Such reforms may slow policy, but over time state policy will become more coherent.

In sum, Ruggie and his team effectively altered the debate over business and human rights. They made it clear why firms and states needed to act. However, if only a few firms from some countries implement the GPs, these guidelines will have minimal impact.

In our earlier study, we noted two key gaps in the GPs: they do not discuss the important role of business in paying taxes and in so doing, being good corporate citizens; and Ruggie never received a mandate to build a public case for business to respect human rights (Aaronson and Higham 2013). In an influential article, Ruggie (1982) argued that many industrialized countries found a compromise to make globalization acceptable, which became known as embedded liberalism. These countries put in place a social compact: workers would receive a cushion from the vagaries of globalization; this cushion (unemployment, retraining, and in many countries health care) would be paid for by higher taxes. In recent years, however, embedded liberalism has been under threat by corporations and policy makers. First, corporations have signaled less willingness to accept this grand bargain. Executives recognize that they can move to lower tax venues or shelter income (US Government Accountability Office 2008). They have directly and indirectly pressured government officials to keep taxes and budgets low. Many industrialized states have gradually lowered their taxes on multinational corporations. Policy makers recognize that they can't maintain

jobs if they don't entice business to invest (Tax Policy Center 2007). Second, these same officials are under pressure to reduce government spending to bring deficits under control. But these cuts often hurt the poor and needy, who benefit from subsidies, such as health care and education.

The GPs say nothing about the political responsibilities of business to pay taxes to ensure that citizens have access to affordable health care, education, water, etc., which are basic human rights according to the International Bill of Human Rights. We therefore argued that the corporate responsibility to pay taxes, which essentially are investments in public goods, is a key, albeit missing, element of the GPs. As of December 2013, we still have not found evidence of governments addressing these issues from a human rights perspective, nor has the Working Group provided any clear guidance on this front.

Additionally, Ruggie did not receive a mandate to build a public case for business to protect human rights. Thus, although the debate over the GPs was open to the public, the public was uninformed and uninvolved. As governments, activists, and firms work to implement the GPs, they should begin by explaining to the public why these principles are necessary, useful, and in the public interest.

Note

1. An earlier version of this chapter was published as Susan Ariel Aaronson and Ian Higham (2013) '"Re-righting Business:" John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms,' *Human Rights Quarterly* 35, 333–364. © 2013 by The Johns Hopkins University Press. Revised and reprinted with permission of Johns Hopkins University Press.

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7

The Concept of Human Rights Protection and the UN Guiding Principles on Business and Human Rights

David Jason Karp[1]

Introduction

What does it mean to have a duty to 'protect' human rights? Neither political philosophy nor international political practice has furnished a single, uncontested answer to this question. In fact, one can distinguish between at least three different conceptions that are grounded in the contemporary practice of human rights. The first conception has come out of international-level work on the right to food in the 1980s, and has crystallized in the form of the respect–protect–fulfill trichotomy (hereafter: 'the trichotomy') (Eide et al. 1984; Shue 1996: 52–53; Koch 2005; Donnelly 2008: 124; Pogge 2011: 5–6).[2] The trichotomy defines the responsibility to protect human rights in terms of a duty, which usually falls on states, to stop third parties from depriving individuals of access to the objects of their human rights. The paradigm of this first conception is a government stopping non-state actors from doing harmful things to others in domestic contexts. The second conception is even more recent, coming out of practitioner work by the International Committee on Intervention and State Sovereignty in the 1990s, and becoming further developed in the 2000s in the form of the 'Responsibility to Protect' policy doctrine (ICISS 2001).[3] It defines the responsibility to protect human rights in terms of a cosmopolitan and specifically international duty of all states to all of the people in the world. This duty is thought to exist irrespective of a Westphalian understanding of sovereignty according to which a state's responsibility

stops at its own borders. The paradigm of this second conception is intervention, usually taking a military form, by some states in the affairs of others, when residents are being subjected to atrocities at the hands of their own governments. These two conceptions are very different. The first focuses on a very broad range of human rights and views states at the domestic level as the main protectors of insiders. The second, by contrast, focuses on mass atrocities only, and views the responsibility to protect as importantly international in the sense that it falls on outside states.

However, these two conceptions share an important deficiency. They both conceptualize the responsibility to protect human rights as a derivative rather than fundamental kind of responsibility for human rights. By this I mean that it is seen as something that only becomes activated when agents fail at whatever other primary or 'fundamental' human rights responsibilities that they have. A third conception of the meaning of the duty to protect human rights – the basic contours of which are outlined by this chapter – rejects the mass atrocity focus of the R2P, and views the duty to protect as a fundamental rather than derivative kind of responsibility for human rights. It is most directly associated with the systemization and institutionalization of the conditions of human rights, rather than with an agent's reaction to 'violations' of other (non-'protection') human-rights-based duties.

The chapter makes this conceptual argument about the nature of the responsibility of human rights protection with special reference to the UN Guiding Principles on Business and Human Rights (hereafter: 'Guiding Principles' or 'GPs'). The GPs (Ruggie 2011), and the 'protect, respect and remedy' framework upon which they are based (Ruggie 2008), were developed under the leadership of John Ruggie between 2005 and 2011 in his capacity as Special Representative to the Secretary-General of the United Nations (UN). They have rapidly come to be seen as an authoritative focal point for international public policy on business and human rights. In the GPs, the responsibility to 'respect' human rights is thought to fall on all actors, including businesses, while the responsibility to 'protect' human rights is thought of as falling only on states. Much of the scholarly discussion so far about the GPs focusses on their way of developing the 'corporate responsibility to respect' all human rights (for example, Cragg 2012; Deva and Bilchitz 2013). At first glance, this focus is understandable. If one wants to explain and to understand the contribution that this policy framework can make to the responsibility for human rights of business actors, then it seems natural to focus on the kind of responsibility ('respect') that the framework explicitly says

business actors have. However, on closer analysis, it is actually short-sighted to prioritize the 'corporate responsibility to respect' in one's analysis and evaluation of the GPs, to the exclusion of what they can contribute to our understanding of human rights *protection*. This chapter begins to fill this gap.

The GPs are very explicitly not grounded in the second conception of human rights protection. However, there is room to interpret – and perhaps even a tension about – whether they are best viewed as grounded in the first or in the third conception. It is a subtle yet potentially very important contribution of the GPs that, according to their conceptual framework, 'protect' comes *first*, and respect comes *second*. This inverts the traditional order of the respect–protect (or should it be protect–respect?) relationship that one typically finds in philosophy and in international-legal scholarship. The Guiding Principles, whether intentionally or not, allow for an interpretive space, in which one can push at the usual boundaries of the trichotomy by establishing the 'duty to protect' as first: as a core, independently important first pillar in an overall account of human rights responsibility. The fact that the GPs provide this interpretive opportunity should be viewed as one of their key strengths. However, it is a key weakness of the GPs that they fail to address in substantive terms – terms that go beyond an uncritical positivist international-legal foundation – the question of the circumstances in which non-state actors may take on the duty to protect human rights in contemporary world politics.

The argument of this chapter is particularly significant, because theoretical views about the nature of the responsibilities associated with human rights have been directly influential in framing and constituting international action. The rhetoric of the 'responsibility to protect' behind the R2P, which is only one conception among others of the actual nature of the responsibility, is increasingly invoked by politicians, policy makers, and journalists, as though it were the *only* conception that matters and has any importance or impact. One of the independent contributions of this chapter is to challenge this, by teasing the concept of human rights protection apart from its specific instantiation in the R2P.

Three conceptions of human rights protection

The first of the three conceptions of human rights protection that this chapter investigates comes from the respect–protect–fulfill doctrinal trichotomy, which is introduced and analyzed in depth in Chapter 3.

According to the standard way of understanding the doctrinal trichotomy, 'respect' is defined in terms of a mainly negative duty not to deprive individuals of access to the objects of their human rights; 'protect' is defined in terms of a mainly positive duty to ensure that third parties do not deprive individuals of access to or enjoyment of the objects of their human rights; and 'fulfill' is defined in terms of a mainly positive duty to ensure proactively that the objects of individuals' human rights are provided to them. The main problem with this first conception is that it encourages us to think about the duty to protect human rights as something that is only activated when human rights are actually (or imminently going to be) 'violated,' with 'violation' being understood very narrowly, as the breach of a duty to respect (not to harm) someone's important moral rights.

According to the trichotomy, protection duties are about regulating the human-rights-respecting behavior of non-state actors, and punishing them in an appropriate way, for example through criminal law, when they step clearly out of line. Stealing food from a starving man's mouth is a failure to 'respect' human rights, according to the trichotomy, but failing to stop the thief, when one has a duty to do so, is a failure to 'protect' human rights. 'Protect' is sometimes thought to fall in the middle of a spectrum that runs from purely negative duties (that can be honored simply by remaining passive) to purely positive duties (that can be honored only by taking active steps), with 'respect' at the negative end and 'fulfill' at the positive end (Koch 2005: 86; see also Bilchitz 2010). However, another, perhaps more accurate, interpretation is that the trichotomy maintains a clear distinction between negative and positive duties, and thinks of protection in terms of a (derivative) positive duty to make sure others do not violate their (fundamental) negative duties. I call this a derivative and third-party-oriented understanding of the responsibility to protect human rights. It is a model according to which there are certain 'fundamental' human rights responsibilities in one conceptual space, which does not include protection responsibilities within it. Then, only in circumstances of non-compliance (in non-ideal theory) one needs an additional category of responsibilities. The latter are called responsibilities to 'protect.' These involve obligations, traditionally falling on the state, to make sure that certain of those original 'fundamental' responsibilities, whatever they are and whoever has them, are upheld.

Pogge (2011) explicitly begins with the trichotomy-based definition of human rights responsibility, and uses the categories that it furnishes to develop the view that 'respect' is the only *fundamentally* important

kind of human rights duty. He says that 'protect' and 'fulfill' responsibilities would be entirely superfluous and indeed practically unnecessary if only everyone in the world would respect human rights. One of the main original purposes of the trichotomy was to enable a discussion of the variety of different kinds of responsibility for all human rights that agents can potentially have: one that moves beyond a putative distinction between negative and positive rights (Shue 1996). However, on the 'responsibility' side rather than on the 'rights' side, the trichotomy does indeed lend itself to Pogge's view. The particular way in which the trichotomy links 'protect' with 'respect' as explained in the preceding paragraph – despite having been done in the spirit of establishing the interrelatedness rather than separateness of different kinds of human rights responsibility – has paradoxically ended up with theory and policy that prioritizes respect responsibilities as the ones that can be most obviously violated, and therefore as the ones around which the entire human rights enterprise necessarily revolves (see the chapters in Part II of this book).

This conception is deficient, exactly because protection responsibilities are best viewed as a fundamental rather than derivative kind of responsibility for human rights. They are important even in circumstances where third parties have no intention or inclination to cause harm to particular others. The contemporary human rights regime was created in the middle of the 20th century, and has continued to develop and accelerate from the 1970s until today. Very real harms were caused to people and their human rights during sometimes-brutal colonial rule over much of the rest of the world by European great powers, which came to an end during the largest wave of decolonization in the middle of the 20th century, and during the Holocaust of World War II. Very real harms to people continue to attract the focus and attention of contemporary human rights practitioners, including: inhumane treatment of detainees by American soldiers in prisons at Abu Ghraib and Guantanamo Bay; discrimination that women, ethnic minorities, or members of the LGBTQ community face in their daily lives on the basis of gender, perceived racial differences or sexual orientation; or severe poverty that is attributable to poor social policy rather than to actual scarcity of resources. Harm to individuals is a serious moral problem. However, it is not necessarily a 'human rights' problem just because it happens.

The first conception of human rights protection says: Take all of these failures to 'respect' human rights. They happen because people are sometimes mean, nasty and brutish to each other when they exist in

the absence of authoritative human rights institutions. The right kinds of social institutions (associated with 'protect' and 'fulfill' responsibilities) are solutions to these problems, as is using the language of human rights to try to activate and to encourage that part of human nature which involves everyone 'respecting' everyone else in the first place. This argument resembles the state-of-nature reasoning for which Hobbes (1982/1651) is famous, except that human rights protection and fulfillment, rather than the sovereign state, are offered as the solutions to persistent failures to respect human rights. Crucially, these failures to 'respect' – which are theorized as occurring in a vacuum of authoritative social structures, rather than as a natural consequence of social structures – are defined as 'the problem' to be addressed.

However, there is something wrong with that view. *Human rights* harms, in order to be correctly constituted as such, do not just happen by accident, or because there are individual people in the world with evil intentions. The human rights issues listed in the preceding paragraph as examples as focal points of practitioner effort are separable from other forms of harm to human beings. They are all enabled, to at least some extent, by problematic social, political and/or legal structures rather than by the absence of any such structures (see also Ainley 2008). The Nazis drummed up hate, and made even good people rightly fearful. Soldiers exist within military hierarchies where they are conditioned to follow orders, and within military cultures where the enemy is usually dehumanized. Bullies who harass people because of aspects of victims' identities that are viewed as non-mainstream take comfort in the existence of a majority that silently accepts the behavior. Shared assumptions about social justice – which often go unchallenged because they are so deeply embedded – can make even abject poverty seem explicable and legitimate in some circumstances. The thick web of social and institutional facts within which such problems exist can sometimes even make it extremely difficult to see any 'harm' at all (Karp 2009). Gender or class discrimination, for example, may not seem harmful to those – even those most affected by it – who have internalized such discrimination as a norm. If a society has been whipped into a genocidal rage, and is convinced that a certain group is sub-human, then the human rights 'harm,' so apparent from the outside, may not seem that apparent from within. These are all problems that are worth addressing prospectively, *as issues of human rights protection*, so defined, even if no 'harm' can be clearly identified or has yet been caused.

Pogge (2002) has tried to address this by saying that it is social structures, rather than solely the isolated actions of individual human agents,

that are directly harmful. His argument aims to take structural and systemic factors into account whilst keeping 'respect' and 'do no harm' at the center of human rights responsibility. It ultimately places responsibility for human rights on individual agents who are causally involved in creating and maintaining those structures and systems (see Chapter 8 by Flor González Correa in this book). However, this involves stretching as far as possible, perhaps to the breaking point, the definition of what counts as a definite human rights 'harm,' and especially of who or what is responsible for causing one (Karp 2014: 72–79). His argument focuses on the question of who is causally involved in creating and maintaining structures – as though this ran uni-directionally from affluent individuals all the way 'up' – and excludes a recognition of how those structures can *constitute* those same agents' views about what counts as human rights 'harm' in the first place (Searle 1995). A different idea is to de-couple 'respect' and 'protect' more sharply. It may or may not be possible to stretch 'respect' for human rights to include structural, systemic, and constitutive factors, as a peripheral extension of one's idea of what it means to refrain from causing harm. By contrast, however, these factors are unambiguously at the very core of human rights 'protection.' There is nothing peripheral or questionable about it. This means thinking about the responsibility to protect *in parallel* to the responsibility not to harm human rights and the causal form of analysis that it involves. The responsibility to protect human rights can thus be understood as a fundamental kind of responsibility for human rights. Its importance is not grounded in any direct and observable link to a reduction in harm; it is, rather, an independent part of contemporary human rights practice that has the capacity to address human rights problems in a different and parallel way.

The second conception of human rights protection is based on the way that the 2005 World Summit outlines the seemingly eponymous idea: the 'Responsibility to Protect.' To be clear, I refer to the concept under discussion as the 'duty to protect' or the 'responsibility to protect' (lower-case letters) human rights, and to the specific, recent policy framework that has aimed to unpack that idea as the 'Responsibility to Protect' (capital letters) or the 'R2P.' This policy idea finds its counterpart in the work of philosophers such as David Miller (2009), who says that when one speaks of an international responsibility to protect human rights, one is talking specifically about the worst and largest-scale humanitarian disasters such as famine or mass forced displacement, and not about rights that go beyond this 'core' such as ordinary civil-political rights. Three of the main overall characteristics

of the R2P policy framework are: (1) its identification of states as duty-bearers, (2) its predominant focus on intervention in the affairs of other states in order to 'protect' individuals, (3) its focus on large-scale mass atrocities as constituting the circumstances in which such a responsibility is activated (Evans 2006–2007; Bellamy 2008; 2010). These are not entirely independent and separate elements. Rather, the third point is taken as the only politically and ethically acceptable consequence of the first two. The R2P's reasoning starts with the question of which problems – realistically and practically speaking – states could universally agree are legitimate to resolve by way of international intervention in the affairs of sovereign states. Once (and only once) things have been framed in this way, it then becomes possible to conclude with some degree of plausibility that widespread atrocities are realistically capable of generating agreement about the justifiability of global action, up to and including military intervention, in a way that other human rights issues are not. Daily failures to respect, protect and/or fulfill human rights (e.g., laws that forbid all women from driving) – however problematic and even urgent they may be from a moral perspective – are thought by the R2P's framers to be incapable of realistically generating international consensus about the justifiability of external intervention in those circumstances (Evans 2006–2007).

When one starts with the perspective of outside states and/or the international community as the agents for whom the R2P is action-guiding, and asks what they can or should do directly for individuals, then one might very well get to a conclusion that the most systematic, widespread, and severe atrocities are uniquely capable of generating interstate agreement about a responsibility to act (Walzer 1977; Rawls 1999: 79). However, once one picks apart the reasoning process that leads to this conclusion, it becomes immediately clear that it depends entirely upon assumptions that one does not actually need to incorporate. What if one jettisons the assumption that the very point and purpose of something called a global duty to 'protect' human rights is to guide the action of other states and the international community when they take decisions about action in the affairs of outsiders that include military intervention as an ultimate option as just that: an assumption rather than an argument? One would then lose the normative rationale for the focus on only the most serious international crimes and humanitarian disasters as driving one's understanding of the circumstances in which global action to protect human rights is required.

To view human rights protection as inextricably tied to questions of legitimate outside intervention is problematic if one intends to

understand the nature of responsibility *for human rights* rather than a thinner and more general form of international responsibility to all of the world's people. A much fuller range of human rights than that captured by the R2P has been the concern of the contemporary international human rights regime since its inception in the 1940s and its acceleration since the 1970s. Starting-points for defining these human rights could include the International Covenant on Civil and Political Rights; the International Covenant on Social, Economic and Cultural Rights; and the numerous other human rights agreements (for example, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination against Women, and so on) that have subsequently been agreed upon internationally. I certainly would not advise that one take these texts uncritically as representing final and authoritative definitions of what belongs on 'the list' of abstract and physical objects that contemporary human rights practice is designed to protect (Karp 2013; see also Langlois 2004). The R2P, however, is not a 'hard case' for these debates. It is very clear that the concerns of contemporary human rights practice – whatever else they are or are not – include a much broader range of civil-political and socioeconomic moral rights than the very narrow group of mass atrocities that are the traditional focus of international *humanitarian* (not human rights) law (see Meron 2006), and now the R2P. The prevention of the gravest international crimes is only one aspect of a broader discussion about human rights protection. The R2P has activated an important discussion about the duty to protect people from the gravest humanitarian problems, but it is ultimately a mistake to think of it as constitutive and co-extensive with the duty to protect *human rights*.

The major advantage that advocates of the second (R2P) conception of the responsibility to protect human rights claim to have over the first (international-legal trichotomy) is political realism. Gareth Evans (2006–2007: 715; 2008: 295), for example, believes that to adopt this focus means that the R2P has the capacity to generate a widespread agreement of the international community on action, whereas, in his view, other more expansive ways of operationalizing an international responsibility to protect would not. Even engaging with Evans' argument on its own terms, it is important to note that the Guiding Principles have also generated the recent widespread agreement of states (for critical perspectives, see Deva 2013; Lopez 2013). The GPs adopt a very different conception of the state duty to protect, which explicitly focuses on *all* human rights rather than on just some sub-set. Yet this did not prevent states from widely agreeing to adopt them.[4] The point

is that proponents of the R2P can overstate the case for how 'expansive' a list of human rights might be included in an internationally acceptable conception of the duty to protect human rights, once the sole functional focus on external intervention by states in the affairs of other states is removed as a factor that constrains the contours of the debate. As the next section of this chapter will explain in more depth, the GPs encompass a wide range of human protection issues, but still (as a matter of historical fact rather than abstract speculation) meets Evans' 'realism' test of what states have been willing to endorse.

The trichotomy and the R2P are ultimately similar in one important respect. In terms of where they place the duty to protect within an overall structure of responsibility for human rights, they both treat protection duties as derivative human rights duties, which become activated when some actor fails at a more fundamental duty not to violate human rights. The so-called 'first pillar' of the R2P describes states' primary duties to residents. These need to be breached before international duties of R2P protection are activated. Even though this first pillar of the R2P uses the term 'protection,' on closer analysis the R2P is actually activated when governments fail to do what the trichotomy would call *respecting* the human rights of citizens and residents (therefore they have manifestly failed to protect), rather than when governments fail at ordinary, day-to-day protection and provision of human rights. This is a much more accurate grafting of the R2P onto the terms of the trichotomy than the view that the R2P is through-and-through about 'protection.' In fact, the second conception does not exactly treat states at the domestic level, or any other actor, as bearers of a fundamental and primary duty to protect human rights. Rather, states at the domestic level are treated by the R2P as the bearers and main potential violators of the primary duty to *respect* human rights of insiders (understood as the duty not to harm their own people), and 'protection' is understood as a secondary duty, and something that 'the international' level can uniquely do. This is the essence of the R2P framework, and it shares with the trichotomy the definition of 'respect' responsibilities as fundamental and 'protect' responsibilities as derivative.

A third way to understand the responsibility to protect human rights responds to the major weaknesses of the first two. It has three basic contours. First, it is a fundamental and primary duty, rather than a derivative and/or secondary duty. It involves the systematization, by agents who have the prospective responsibility to do so, of secure access to the objects of human rights, irrespective of the intentions or inclinations of third parties to cause harm. Second, at the core of the duty

to protect human rights is the idea that it is a duty to protect political insiders rather than a duty of last resort to protect outsiders with whom a duty-bearer has no political relationship.[5] Third, at its core, it also includes a broad range of moral human rights described as a starting-point (though not as the final word) by those found in the international human rights law instruments of the 20th and 21st centuries. This aspect of the third conception is similar to the first conception (the trichotomy) but dissimilar to the second (the R2P). Putting these contours together, the third conception of human rights protection involves the responsibility to protect individuals in a systematic way in the context of the daily, as well as the extraordinary, human rights problems that they do or might experience, in a way that goes beyond a narrow and what I would call 'sub-minimalistic' sole focus on mass atrocities.

Rather than developing this third way of understanding human rights protection as an entirely abstract concept or theory, this chapter will now turn to developing it in more detail through an analysis of contemporary business and human rights practice. This is an important and under-studied case of the recent generation of wide agreement of states on a way to define and to understand the idea of human rights 'protection.'

. . . and the UN guiding principles on business and human rights

International organizations such as the International Labour Organization (ILO) and the Organization for Economic Cooperation and Development (OECD) have been setting standards since the 1970s that apply to businesses with regard to labor rights. The Guiding Principles aim to move beyond this already established attempt at norm-setting in one particular area. They explicitly set out to answer the question of how best to capture the nature of the responsibilities that states and non-state actors have duties with regard to *all* human rights, rather than just with regard to a particular sub-set such as labor rights (Ruggie 2008: 15–16). Just as the GPs do not start by setting apart one area of human rights from any other, they also reject a sole or primary focus only on the worst mass atrocities. The GPs' conceptual framework very plainly says: 'the duty to protect is well established in international law and must not be confused with the concept of the "responsibility to protect" in the humanitarian intervention debate' (Ruggie 2008: 4, note 5). This statement underscores the relative novelty – and indeed differentness – of the R2P's conception of human rights protection. The GPs are

therefore operating with an idea of responsibility for human rights in general, and the duty to protect human rights in particular, that is very different from the second, R2P, conception.

Moving from the 'rights' side to the 'responsibility' side, the GPs (Ruggie 2011) present responsibility for human rights as clearly differentiated according to a framework with three parts: protect, respect, and remedy (Ruggie 2008). They separate the 'state duty to protect' human rights from the 'corporate responsibility to respect' them. The state duty to protect human rights in the GPs includes: responsibilities to take legislative, executive, and judicial steps to ensure that corporations have rights-respecting corporate cultures; responsibilities to ensure the existence of domestic and international policy environments that prevent foreign investors from setting socially detrimental terms of investment; responsibilities to work internationally to develop a set of global best practices for companies' rights-respecting behavior; and responsibilities to oversee companies extraterritorially when they operate in conflict zones, where there is no effectively functioning government at the domestic level. The meaning of the corporate responsibility to respect human rights in the GPs is explicitly grounded in a moral duty to 'do no harm' to individuals and to the objects of their rights. In *Responsibility for Human Rights* (Karp, 2014), I critique this equation of 'respect' with 'do no harm.' This equation does not adequately capture the richness of what it means to 'respect' individuals, along with the fact that each individual has equal moral worth and therefore a set of moral human rights (Karp 2014: 79–87). However, for the sake of clarity in this chapter, as well as consistency with the other chapters in this book, I put this objection aside, and engage with the GPs on their own terms of grounding 'respect' in 'do no harm.' The GPs expand the 'corporate responsibility to respect' human rights beyond a negative duty that can be honored simply by remaining passive and not getting harmfully into the way of individuals as they conduct their daily lives. The responsibility to respect in the GPs includes a set of obligations to conduct due diligence about human rights impacts proactively. This reflects the very intuitive idea that a duty to 'do no harm' cannot possibly be honored unless one takes steps to investigate systematically the harm that one may be causing. For example, when a large company's smaller supplier is the proximate cause of harm to human rights that befalls an individual, that large company can still be held responsible, according to the GPs, if those harms were predictable and preventable. The third pillar, 'remedy,' takes a retrospective perspective on individuals' and groups' normative rights to redress when violations happen, assuming that the principles in the first two pillars will be breached at least some of the time.

It is important to draw out of this that the GPs do not explicitly challenge the trichotomy's traditional way of defining 'protect,' nor did the GPs' authors necessarily intend to mount any direct challenge of this kind. For example, Principle 1 of the GPs says: 'States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication' (Ruggie 2011: 6). Principle 2 says further: 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations' (Ruggie 2011: 7). Both of these principles align with the first conception's definition of human rights 'protection,' according to which one actor regulates a third party's human-rights-respecting conduct in order to minimize harm and to create accountability. This is a very clear attempt to frame the GPs as a conservative rather than a radical interpretation of the doctrinal understanding of 'protect' as it is understood in the respect–protect–fulfill trichotomy (see also Ruggie 2008: 9). However, I now suggest that it is just that: an attempt to *frame* the nature of the duty to protect in a way that is likely to be non-offensive to the states and the businesses who had rejected a different and more ambitiously radical 'business and human rights' initiative, the failed UN Norms (Weissbrodt and Kruger 2003). On closer and deeper analysis, the GPs' framing attempt, which is reflected in the first two Principles, is not particularly tethered in substantive terms to the trichotomy when they move on to develop the specific nature of the duty to protect as it applies to the issue of business and human rights.

I make this argument in two parts. First, I look at the question of whether the duty to protect human rights is derivative (as per the first conception of the responsibility to protect human rights) or fundamental (as per the third). The Guiding Principles are explicitly put forward as an identification and clarification of existing standards rather than an attempt at creating new international law. However, there is also an element of interpretation involved when it comes to the best way to understand the protect–respect relationship. Consider this quotation, which refers to protect, respect, and remedy as the three pillars of the GPs:

> Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic

> expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.
>
> (Ruggie 2011: 4)

The GPs put 'protect' first. Moreover, they emphasize the independence as well as the interconnectedness of each of the three pillars. Respect, in particular, is at the same level as the other two, rather than something that takes logical, conceptual or practical priority. In doing so, the GPs at the very least open up a space to interpret 'protect' as something other than a derivative category of responsibility for human rights, which becomes important only when (and because) 'respect' responsibilities are breached by delinquent actors. In other words, the duty to protect human rights in the GPs is not presented as derived from or as secondary to a third party's duty to respect. By contrast, it is at the 'very core' of human rights practice. This is strikingly different from Pogge's (2011) view, which he takes to be a sound interpretation of the trichotomy, that 'respect' is the only element at the very core of responsibility for human rights.

In fact, the GPs incorporate third-party-oriented obligations into the 'corporate responsibility to respect,' rather than only into the 'state duty to protect.' Among other things, the 'corporate responsibility to respect' requires companies to take appropriate, proactive steps to prevent their suppliers (third parties) from harming human rights, as part of a due diligence process (Lindsay et al. 2013). Therefore, if a duty to protect *means* a duty to prevent third parties from violating their duties to respect, then it seems as though 'respect' and 'protect' are being conflated. This is because these third-party-oriented duties are included within the 'respect' part of the framework, where it discusses how to operationalize due diligence for the specific sake of business and human rights. However, I do not think that this should be understood as a conflation. Nor is it best understood as an intention on the part of the GPs' authors to indicate that companies have duties to 'protect' human rights. Rather, it is best understood as an indication that the duty to protect is being conceptualized in a fundamentally different and more expansive way than the third-party violations focus indicated by the first two Principles – and by the trichotomy – such that this focus can be wrapped into both 'protect' and 'respect' responsibilities without any conceptual conflation.

Specifically, the GPs (Ruggie 2011) require states: to have laws that 'do not constrain but *enable* respect for human rights throughout their

operations' (Principle 3(b), emphasis added); and to '*maintain adequate domestic policy space* to meet their human rights obligations when pursuing business-related policy objectives' (Principle 9, emphasis added). These requirements do not present a picture according to which the main 'business and human rights' problem is delinquent economic actors causing harm, and according to which states take the role of neutral arbiters between one kind of non-state actor (businesses) and another (individuals), in order to prevent and/or to punish abuses. Rather, they are grounded in a responsibility to construct systematically an institutional environment that enables human rights to be protected. This structural environment partially constitutes, and therefore is conceptually partially prior to, any agents who cause harm. In other words, they are grounded in the third conception of human rights protection. There is a normative need for human-rights-protecting social structures, not primarily or simply because there are evil agents in the world who are inclined to cause harm, but because the battleground of human rights problems and their solutions is often at the level of authoritative structures – which can constitute the actions of agents – rather than at the level of specific harmful actors (see also Hopgood 2006).

Second, in order to assess from a different angle the extent to which the GPs reflect the first and/or the third conception of human rights protection, I turn to the question of who has the duty to protect human rights and to whom the duty is owed. Who, if anyone, can protect human rights when states fail to do so? The Guiding Principles do not examine this question, placing the duty to protect squarely on states, and preferring to look in detail at the responsibility to respect human rights and/or to remedy violations that non-state actors have in such circumstances. However, the GPs suggest a structural framework of responsibility for human rights according to which it could make more sense – especially as compared to the R2P's structural set-up – to explore to the primary and prospective duties to protect human rights of a broader range of insiders. This is an important alternative to the tendency to jump straight to the often retrospective duties of outside states to all of the world's people. All things considered, it is a weakness of the GPs that they are state-centric about the duty to protect. The political reasons for this are broadly understandable, given the earlier failure of the UN Norms, which failed to gain traction because they failed to gain even the rhetorical support of the actors who would need to implement them (Ruggie 2013). Nevertheless, the GPs still pass up an important opportunity explicitly to consider the question of whether

and in which circumstances non-state actors can have duties to protect human rights.

In many parts of the world, companies go beyond having simply the *capacity* to protect and to provide for human rights, which, as I have argued elsewhere, is not a sound basis for the assignment of specific human rights responsibility (Karp 2014: 89–115). They are engaged in governance functions either alongside or independently of the state, which is a much more significant fact for the sake of their potential human rights duties (Karp 2014: 116–135). In the global North, people are used to thinking about the state according to its Westphalian ideal-type: as an actor with both the responsibility and the capability to provide public goods for citizens and residents (or at least to maintain the latent capacity to regulate any non-state actors to whom such functions are delegated). In much of the world, however, this neat way of separating state and non-state actors does not stand up to scrutiny. There is a huge gray area, both conceptually speaking and in practice, between 'failed' or 'conflict' states, on one hand, and states that are fully functioning according to their Westphalian-sovereignty ideal-type on the other. As only one example, think about a series of famous (to business and human rights practice) events that occurred in Nigeria in the 1990s. Ken Saro-Wiwa and several of his colleagues were killed on 10 November 1995 after having been rounded up by the military (in what was then a dictatorship) due to their peaceful protest against the social and environmental impacts of oil extraction activities, especially by transnational oil company Shell, in the Niger Delta region of Nigeria. This case is well known because activists and lawyers acting on their behalf have been through long legal battles in New York's court system, in which they attempted to use the United States' Alien Tort Claims Act to sue this non-American company for its actions, in Nigeria, against Nigerian citizens (*Wiwa v. Royal Dutch Petroleum Co*. 2009; *Kiobel v. Royal Dutch Petroleum Co*. 2011).

This is a context in which Shell was, and is still, engaged in what Abrahamsen and Williams (2011) have called a public–private 'security assemblage' together with the government. The private security that the region's oil companies provide is so embedded as a norm that it is indistinguishable by residents from government-provided policing, even in terms of the uniforms that private security officers wear (Omeje 2006). It is this sort of systemic and institutionalized engagement with a set of social structures for a group of political 'insiders' – in this case the residents of the Niger Delta – that can activate the third conception of duties to protect human rights. (Karp 2014: 135–151). This is a key

reason why a simplistic distinction between states and non-state actors, made on the basis of who has been internationally-legally recognized as sovereign, should not be used uncritically or in isolation in order to assign responsibility for human rights protection. Among other things, doing so involves a lack reflection on how states – which even today often act for private interests rather than public good – became states in the first place (Tilly 1985).

Companies are only typically understood in the law of nations to have the duty to *respect* human rights (if they are understood to have any human rights duties at all). Therefore, a central issue in the *Kiobel v. Royal Dutch Petroleum Co.* (2010) decision by US Second Circuit Court of Appeals was whether the plaintiffs put enough evidence before the court that the oil company acted '*with a purpose*' to cause any serious human rights harm (such as arbitrary detention and quasi-judicial executions) that befell the activist victims.[6] Even though the appeals-court judges disagreed on other legal questions relevant to the case, their answer to this core question was unanimously 'no.' There was insufficient evidence that Shell acted with the express purpose of causing these men to be rounded up and executed, despite whatever level of more generalized collaboration might have existed between the company and the government at that time. The US Supreme Court subsequently heard arguments on this case, but not on this issue, which in fact is the one that generated the unanimity of the decision in favor of the defendants.

This is an under-noticed, important, and problematic implication of grounding responsibility for human rights primarily in the duty to respect (defined in terms of 'do no harm') – and of the related idea that only a violation of the latter can constitute an actual human rights violation. If the duty to protect human rights were understood in terms of the practice of the R2P, then it would not give very much critical leverage on this issue. From that perspective, hanging without due process by a military tribunal of a handful of prominent activists would be viewed as profoundly unfortunate by liberal states, but not constitutive of the sort of widespread atrocity that activates an international responsibility to protect in practice. However, the Guiding Principles are also ultimately state-centric about who has the duty to protect. They also retain the largely negative formulation – do no harm – as the basis of the 'respect' duties that non-state actors can have. If the focus, rather than any of these other options, were on Shell's duty to protect human rights, because of the systemic and institutional governance role that it plays in the specific Niger Delta context in which it operates, then the question of whether it acted purposefully or not to cause harm to Saro-Wiwa

and his co-activists would not need to be at the center of the debate. Rather, at the center of the debate would be the question of which actors are responsible for human rights to the residents of the Niger Delta, because they have a prospective duty of human rights protection. The Nigerian government and military would certainly be included as responsibility-bearers. However, the third conception could allow the inclusion of non-state actors who act in a role that involves governance and *de facto* (though not necessarily legitimate) political authority.

Conclusion

Human rights protection is best defined as the specific duty of some agents, including but not necessarily limited to states, to put in place the structural conditions where the moral rights that all humans have because they are human can be secured. This is different from the R2P, which starts methodologically from the perspective of atrocity prevention and response, rather than the perspective of the global protection of the full range of moral human rights. On one hand, the UN Guiding Principles usefully re-state the traditional way of understanding the ideas of protect and respect in international human rights practice: those which are found in the respect–protect–fulfill trichotomy. This is useful because it reminds those people who are interested in policy (without necessarily being steeped in the law and/or in the theory) that the nature of the 'duty to protect human rights' is separate and separable from the R2P. On the other hand, however, according to the interpretation that was offered in this chapter, the GPs push gently at the boundaries of the conventional protect–respect relationship. This is because they offer 'protect' as a first pillar, which is not dependent on, peripheral to, or derived from, universal moral duties not to harm the human rights of others.

The overriding conservatism behind the GPs' project of 'interpreting and clarifying' (Ruggie 2013) what international law already establishes might have been important to generate a level of interstate agreement. However, there are still important problems in the way that the Guiding Principles conceptualize the duty to protect. These should be the objects of further scholarly and practitioner attention going forward. The first is the starkly unjustified state-centrism when answering the question of who has the duty to protect. The second is the tension in the GPs between a definition of 'protect' as 'ensuring that third parties respect,' and the suggestion, though not exactly full-fledged re-interpretation, that is available within them, according to which the duty to protect

can be decoupled more sharply from the responsibility to respect. The latter interpretation would allow the possibility that human rights can be violated due to a lack of adequate protection by an agent (who has a duty to protect) even if no harm is caused.

All of this is important, because the UN Guiding Principles on Business and Human Rights are becoming widely debated politically and legally. The R2P does not offer the only recent politically realistic and internationally acceptable definition of human rights 'protection.' The challenge that the Guiding Principles poses to the R2P in terms of the very concept of the responsibility to protect human rights should be more fully appreciated. The Guiding Principles are robustly grounded in the contemporary tradition of human rights, whereas the R2P is arguably based in the different traditions of humanitarianism and humanitarian intervention.[7] It is the author's hope that the tensions suggested in this article will spark future debate about the nature of the duty to protect human rights in contemporary global politics.

Notes

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2. The trichotomy is analyzed in depth by Bódig in Chapter 3 of this book.
3. For an attempt to situate this second conception in broader historical perspective, see Glanville (2011).
4. Whether states and other actors will implement the GPs rigorously and effectively is a distinct question from their willingness to agree to the principles, as Aaronson and Higham's chapter in this book investigates. However, the same difference between commitment on one hand and implementation on the other exists manifestly with the R2P.
5. Human rights protection duties might indeed have an international or global component, but only to the extent that all human beings in today's world can be understood as 'insiders' rather than 'outsiders' (in this sense) in relation to certain potential duty-bearers (which is indeed a case that has been made by Young 2004).
6. See also *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (2009).
7. See also Chapter 2 by Mitoma and Bystrom in this book.

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8

Human Rights Ltd.: An Alternative Approach to Assessing the Impact of Transnational Corporations on Human Rights

Flor González Correa

Introduction

The state has been traditionally considered as the main duty-bearer in relation to human rights given its superior powers and capacities compared to other actors. However, this traditional view has been challenged given that the assumptions under which the current human rights regime emerged have suffered significant transformations in recent decades. It has become recognized that non-state actors may also be allocated some duties in relation to human rights, especially as some of them rival the economic and organizational powers of the state, enabling them to interfere in the realization of human rights but also putting them in a position to protect and fulfill them. This view, along with the apparent inability and unwillingness of some states – for example, quasi-states, failed and weak states – to protect and fulfill the human rights of their populations have contributed to the existence of a perceived 'governance gap:' that is, a vacuum in the effective regulation of non-state actors' activities (Koenig-Archibugi 2004: 235; Macdonald 2011: 549).

The case of transnational corporations (TNCs) is paradigmatic as some of the largest ones have more revenues than small- or medium-sized states,[1] sophisticated infrastructure, and mobility, and they control important resources ranging from raw materials to health services and mass media. Such powers have allowed corporations to exert influence on the authorities in charge of regulating them, through mechanisms

ranging from providing money to political campaigns to colluding with authoritarian governments (Koenig-Archibugi 2004: 239–240).

The discussion about the role of business in relation to human rights gained special prominence in the United Nations from the early 2000s. The most recent initiatives on this issue are the 'Protect, Respect and Remedy' Framework for Business and Human Rights (Ruggie 2008), also called the 'UN Framework' and the Guiding Principles for that framework's implementation (Ruggie 2011). These were developed by John Ruggie during his post as Special Representative of the Secretary General on the Issue of Human Rights, Transnational Corporations and Other Business Enterprises (see also Chapter 6 by Aaronson and Higham). In a series of documents, also known as the 'Ruggie Reports,' the Special Representative develops the argument that states bear the responsibility to protect the rights of their populations and to seek remedy for the victims of abuses committed by third parties including corporations, whereas businesses bear the primary responsibility to respect human rights, that is, to avoid doing harm, as recognized under various instruments of soft law (Ruggie 2008: 8).

This chapter argues that the concept of 'impact,' understood as causation and contribution to harm, used in the UN Framework and in other recent accounts of corporate responsibility, is limited. It tends only to account for the outcomes corporations directly caused or to which they contributed. As a result, these accounts do not contemplate at least one other possible way in which corporations may impact human rights: namely by shaping and maintaining a harmful global institutional order. Such interpretation implies that responsibility cannot be attributed to corporations if a negative human rights outcome cannot be traced directly back to their conduct, even when they indirectly contribute to or benefit from that outcome. This chapter proposes to consider the role of institutions in the assessment of impact in order to depict more accurately the different ways in which corporations may affect human rights. In turn, this realization may modify the current understanding of what the duty to respect entails for corporations, as the instances in which they might be considered to impact human rights will become significantly broader.

Current notions of 'impact' and 'responsibility'

Many of the recent normative accounts of business and human rights, including the UN Framework, allocate responsibility to TNCs in relation to their impacts on human rights. For them, the exercise of unmediated

agency in the causation of and contribution to harm is a key factor for determining impact, and therefore, for attributing responsibility. In one of his early reports as Special Representative, John Ruggie (2007: 24) rejected the concept 'sphere of influence' to describe the contribution of TNCs to human rights outcomes. He based his decision not only on the lack of 'legal pedigree' of the term but also on the fact that at least one of its possible meanings did not refer to a direct relation between the company and the regretful outcome. As Ruggie (2008: 19) explains:

> [The term] sphere of influence conflates two very different meanings of influence: one is impact, where the company's activities or relationships are causing human rights harm; the other is whatever leverage a company may have over actors that are causing harm. [...] Anchoring corporate responsibility in the second meaning of influence requires assuming, [...] that 'can implies ought.' But companies cannot be held responsible for the human rights impacts of every entity over which they may have some influence, because this would include cases in which they were not a causal agent, direct or indirect, of the harm in question [...]. Asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another.

The Special Representative makes a sharp distinction between 'influence' and 'impact.' While he recognizes that companies may have some influence in cases where they were not direct or indirect causal agents of harm, it is not enough for attributing responsibility. In contrast, he accepts the idea of determining responsibility on the basis of the impact corporations may exert on human rights. Here the defining characteristic of impact seems to lie on the exercise of unmediated agency and somewhat direct contribution to human rights harms through their activities and relations. On the other hand, a corporation is said to exert influence over human rights if it has some leverage over the actors back to whom human rights harms can be traced. According to the Special Representative, attributing responsibility on the basis of influence alone could lead to a case of duty-dumping where the government '[...] can deliberately fail to perform its duties in the hope or expectation that a company will yield to social pressures to promote or fulfill certain rights [...]' (Ruggie 2008: 19). Furthermore, in an extreme scenario, corporations would have little incentive to grow and expand because to do so could mean increasing their leverage over other entities and therefore their responsibilities.

Similar considerations of impact and responsibility can also be found in the 2011 edition of the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD). These are a set of legally non-binding recommendations addressed to TNCs operating from or in adherent countries (plus Argentina and Brazil) in a range of issues such as employment and industrial relations. The Guidelines ask corporations to

> [...] address adverse human rights impacts with which they are involved [...], within the context of their own activities, avoid causing or contributing to adverse human rights impacts [. . . and] provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.
>
> (OECD 2011b: 31)

Similarly to the UN Framework, the Guidelines consider that the involvement of corporations in human rights harms is limited to the contexts of their own activities. As a result, responsibility is attributed to corporations in relation to the impacts they caused or directly contributed to cause.

These accounts can be identified with what cosmopolitan political theory has labeled the 'interactional' moral approach. According to this approach, social phenomena can be understood as effects of the conduct of agents, and therefore, they can be traced back to specific collective or individual entities (Follesdal and Pogge 2005: 2–3; Pogge 2010: 10). Evaluating a morally relevant outcome requires questioning if the agents involved could have foreseen that their actions would lead to it and if they could have acted differently without substantial costs to themselves or to anyone else (Pogge 2010: 15). The interactional moral approach thus allocates responsibility to those who produce or contribute to produce a regretful outcome. The extended usage of accounts identified with the interactional approach seems to respond partly to certain appealing theoretical features and their adequacy to explain most of the current cases of human rights harms involving transnational corporations. As Macdonald (2011: 551) explains, the theoretical attractiveness of the interactional approach '[...] can be understood in part as resulting from its normative grounding in a set of individualist normative assumptions that command a reasonably broad-based consensus across a range of political and ideological positions [...]'.

Limits to interactional accounts of corporate responsibility

Despite the fact that these approaches are appropriate to explain and to attribute responsibility in many cases of corporate wrongdoing, they have an important deficiency: '[They are] based on the conception of corporate agency that does not take sufficiently seriously the significance of social institutions as mediating channels between the exercise of corporate agency and resulting human rights outcomes' (Macdonald 2011: 552). Their conceptualization of impact is problematic because it does not correspond with the way in which corporations operate in reality. They rely on an artificial image of the world where social phenomena can be traced back to the conduct of specific agents. As a result, these accounts tend to be suitable for analyzing specific cases in which corporate wrongdoing is confined within narrow geographical and temporal boundaries.

Approaches consistent with the interactional account recognize that an agent's conduct may have long-term and spatially distant implications. However, they tend to focus on proximal outcomes, as they rely on tracing the causal relationship between the agent's conduct and the effects to which it contributed. Such relations tend to be more clearly identifiable in proximity. According to Scheffler (1995: 228), agency tends to be perceived as implicated to a larger extent when it affects local surroundings in the present and near future. This approach thus tends to overlook the fact that the political and economic developments in one part of the world can have dramatic effects on people in other places and epochs. Thus, the abstraction on which interactional approaches rely has limited explanatory adequacy, particularly at a time of great global interconnectedness in which somebody's actions can reverberate in spatially and temporally distant places (Scheffler 1995: 229; Pogge 2010: 17).

The limitation of analyzing complex social phenomena exclusively through the interactional approach is that the resulting explanations might be at best misleading and incomplete, and at worst simply wrong. In fact, this is an important problem in the study of transnational corporations and their impacts on human rights. Most assessments have focused on human rights violations directly generated as a result of the conduct of transnational corporations thus omitting the human rights violations to which they indirectly contribute and where agency is limited or institutionally mediated. The close links among agency, impact, and responsibility mean that a corporation might not be considered to impact human rights in cases when the harms are not directly linked

to the corporation's operations and activities, even if it has reaped the benefits or contributed to harm through complex institutional channels. Furthermore, considering exclusively direct impacts from TNCs creates perverse incentives for corporations to obscure their relations with regretful human rights outcomes.

The indirect impact of TNCs on human rights

In response to the shortcomings of current accounts of corporate responsibility, Macdonald (2009; 2011) has proposed the 'Spheres of Responsibility' Framework: a multilevel account of corporate responsibility that takes into consideration the participation of corporations in institutional channels through which they can influence human rights outcomes, such as business networks and supply chains. This framework suggests distributing responsibility between multiple actors that contribute to causing harm through complex institutional processes. Additionally, it proposes to allocate some derivative positive duties to require from corporations' reasonable efforts to avoid participating in collective practices that will foreseeably produce harm (Macdonald 2011: 558).

In a similar vein, the Guiding Principles for the operationalization of the UN Framework have broadened the understanding of the responsibility to respect to require that businesses 'seek to prevent or mitigate human rights impacts that are directly linked to their operations, products or services by their business relations, even if they *have not contributed to those impacts*' (emphasis added) (Ruggie 2011: 14). In order to prevent adverse impact on human rights, corporations are also allocated some duties of due diligence, which, it is argued, 'should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships' (Ruggie 2011: 17; see also the chapter by Karp in this book). After the launch of the UN Guiding Principles, some corporations have started to embrace this wider notion of the responsibility to respect by including some business relations such as joint ventures, mergers, acquisitions, disposals, suppliers, service providers, and investors in their human rights policies (IHRB and GBI 2012).

To acknowledge that transnational corporations can impact on human rights through mediating channels and that they can do harm from a distance is a welcome step in the right direction. However, both the 'Spheres of Responsibility' Framework and the Guiding Principles

overlook at least one other possible way in which corporations can contribute to human rights harm, namely by helping to shape and to maintain a global institutional order that engenders human rights deficits. The following sections will develop an alternative account to attribute responsibility to transnational corporations, which can be identified with the institutional moral approach. In contrast with current approaches, it recognizes that while certain events can be seen as the result of particular agents' conduct, some of these can also be traced back to the standing features of the social system in which they occur (Pogge 2010: 15). This approach requires making counterfactual statements about how such outcomes would have been different if alternative social rules were in place (Follesdal and Pogge 2005: 3; Pogge 2010: 15). While the interactional approach explains a social event by the conduct of individual and collective agents including the person who is suffering the harm, the institutional approach evaluates the social structures that enable that event to occur. Therefore, responsibility can be attributed on the basis of the contribution to the shape and maintenance of an institutional order.

The next section will explain the significance of the global institutional order in the causation of harm, as well as the participation of corporations in its configuration and maintenance. This will help to argue why it is necessary to account for the contribution of corporations to the global institutional order in the attribution of moral responsibility.

Transnational corporations and the global institutional order

Globalization, understood as a process of increasing global interaction and interdependence, has given rise to a scheme of globally shared institutions, where the term 'institution' refers to a system of rules that defines positions, rights, duties, powers, immunities, and so on (Rawls 1999: 47–48). According to the institutional approach, institutions, and the institutional order are crucial factors to understand social phenomena, as they create expectations; encourage some forms of behavior and discourage others; define and install core norms, identities, capabilities, purposes and relationships; and also act as constraints on agency (Macdonald 2011: 552).

The fairness of the institutional arrangement can be judged by the outcomes its design foreseeably and avoidably engenders. Thus, if its incentives and penalties make a harmful outcome likely to happen and

if taking reasonable measures could prevent it, then this arrangement can be regarded as harmful. Thus while it is true that one may not foresee the exact effects of a particular institution, one can evaluate the likelihood of certain outcomes given the structures in place. For example, if I play with a gun I might not be able to predict for sure if I will injure someone, but it is more likely that I will do so, and such likelihood increases further if I do not have any knowledge on basic safety measures. In comparison, one can reasonably expect that increased patent protection of medicines will result in higher prices, thereby affecting the access of the poorest people to patented drugs, which could lead to avoidable deaths. Alternative systems for drug pricing have been proposed in order to incentivize companies to make available affordable medicines for treatable diseases with disproportionate incidence in developing countries (see Pogge 2009). Thus, some of the harms the current global arrangement foreseeably engenders can be regarded as easily avoidable insofar as there exists at least one feasible alternative, whose adoption entails reasonable costs (just as averting harming someone may require not to play with a gun).

It has been argued that the design of the current global institutional order foreseeably and avoidably engenders human rights harms including severe poverty and radical inequality (Pogge 2000; 2005a: 47–50; 2005b: 55; 2008: esp. Ch. 4; 2010: esp. Ch. 2). According to the institutional approach, those agents who help to shape and to maintain the global institutional order – that is, the most affluent countries – can be attributed some responsibility for the regretful outcomes that this order produces. Given that most of these countries are reasonably democratic, their citizens are seen as sharing responsibility for the arrangement their governments support, and for the human rights deficits that this arrangement foreseeably and avoidably engenders (Pogge 2005b: 58; 2010). Some have seen the approach proposed by Pogge as overwhelmingly state-centric. This is because it considers that the main players in the global arena are states, whose influence in the shape of the global institutional order is highly dependent on the power that their economic assets confer on them (Gould 2007: 388); consequently, the responsibility of individuals is attributed only on the basis of their membership to a nation-state. This approach thus seems to overlook the fact that global non-state actors can also exert considerable influence in the shape and maintenance of the global institutional order. Furthermore, unlike citizens, they are not bounded to restrictions of membership to a national community. As Pogge argues, '[…] the traditional conception of the world of international relations as inhabited

only by states is rapidly losing its explanatory adequacy – through the [...] creation and increasing stature on the international stage of non-state actors, such as multinational corporations, international agencies, regional organizations, and NGOs' (Pogge 2010: 17). Even when states have a privileged position in intergovernmental organizations, other entities such as NGOs and TNCs have input in the states' decisions, and also beyond those states' decisions.

The participation of transnational corporations in the configuration of a global institutional order seems to be different from the participation of individual agents. In Pogge's account, the input from citizens is confined to their actions as public individuals and to their participation in the political life of their nation-states. Thus, there appears to be a clear distinction between the public and private participation of the individual. In fact he uses the term 'citizens' – instead of 'nationals,' 'inhabitants,' or 'individuals,' – which emphasizes the public role of the these actors. In the conceptualization of 'global institutions' Pogge mentions 'social practices,' which might also be influenced or modified through the actions of individuals as private actors, but does not acknowledge this fact about individuals' influence in the private arena (or at least he does not allocate duties to citizens on this basis). For him, '[...] all these institutional schemes are shaped and reshaped though political struggles' (Pogge 2010: 4).

In contrast to individuals, corporations do not influence the global institutional arrangement only via national governments. Some of the largest corporations or corporate associations can also directly participate in international organizations and forums. Furthermore, unlike ordinary individuals whose private actions may have limited impact on the institutional affairs, some corporations' economic power, size, and high mobility allow them to exert influence when they are performing in the private sphere. In the next section, the role of corporations in the political and private spheres will be reviewed in more detail. For the purpose of clarity, I will present them as separated; however, it is important to note that the impact of TNCs in the private sphere can have, in fact, important public consequences.

Transnational corporations in the political sphere

Transnational corporations can be considered as private entities representing private interests; nonetheless their power and participation in several aspects of the public life have allowed them to impact public interests significantly. As Wettstein (2009: 180) argues: 'In a

market-controlled society the institutions that shape and dominate the global economic sphere inevitably turn into major political forces that affect the organization of society as a whole.' Corporations can engage in the political sphere by participating in national or international forums, by supporting political campaigns, by influencing national legislators, by normalizing rules and practices, or even by engaging in illegal practices such as bribery of government officials in order to incentivize or deter legislations or institutional developments.

One of the mechanisms by which TNCs can influence the deliberation and establishment of legal rules is the practice of lobbying. The most evident case is the United States, where corporations and other collective groups are allowed to participate indirectly in the policy-making process and decisions to represent their interests (Wettstein 2009: 240). With the increasing 'marketization' of politics and political campaigns, candidates and parties have become more dependent on the financial contributions from corporations (Wettstein 2009: 240). As a result, it is possible to observe 'regulatory capture,' which refers to the process through which corporations end up influencing the government agencies that were supposed to regulate them (Dal Bó 2006: 203). This means that public interests, which were supposed to be represented by democratic governments, are in effect subordinated to private interest.

The impact of lobbying, nonetheless, is not confined to national boundaries. Economic interests increasingly drive relationships among states and, given the pervasive role of corporations in the economy, they, along with industry associations, have earned a prominent place in deliberating foreign policy in the capacity of experts or advisors (Wettstein 2009: 241). A consequence is that corporations have become able to exert significant pressure and influence on governments to curb regulations or to design them to protect their private interests. Such regulations, even if they are of a domestic nature, can have significant consequences for global structures. An example can be found in the financial sector. In 1999, the United States *Glass–Steagall Act*, which prohibited commercial banks from engaging in the investment business, was repealed. One year later, US President Bill Clinton signed the *Commodity Futures Modernization Act*, which effectively allowed unregulated trading of financial derivatives and put them beyond the reach of federal regulators, which arguably, played a crucial role in the 2008 financial crisis (Corn 2008; Topham 2011: 134). The *Modernization Act* also made possible the entry of commercial banks into markets of derivatives based on food commodities, which, it has been argued, is a critical factor

in the soaring prices of food experienced since around 2005, threatening food security across the developing world (De Schutter 2012; 2013: 2–3).

There is evidence that some of the largest financial corporations exerted significant influence in passing the *Modernization Act* (Corn 2008; Lipton 2008; Harper et al. 2009; Martinelli 2012: 36); it has been estimated that large Wall Street banks spent over US$5 billion from 1998 to 2000 to lobby to pass it and to overhaul the *Glass–Steagall Act* (Topham 2011: 142). Evidence of corporate influence on the *Modernization Act* can also be found in a legal provision requested by the former American energy company Enron, the so-called 'Enron Loophole,' which exempts crucial energy commodities from government oversight (Corn 2008; Lipton 2008; Martinelli 2012: 36). As Wettstein (2009: 240) argues: 'Even though it is difficult to link certain policy changes to a specific donor company, the general correlation between industry donations and the number of votes in Congress in favor of the respective industries leaves no doubt about the success of such corporate political strategies.' Thus, by 'feeding the political carrousel,' corporations ensure their interests are represented in the political arena, and in turn, political processes become a reflection of corporate interests and a manifestation of corporate authority (Wettstein 2009: 240–241). While corporations were able to exert influence on national scale, the *Modernization Act* had significant consequences in the configuration of financial instruments and institutions, an important part of the global institutional order, whose effect on the international prices of basic commodities has an impact well beyond the US borders.

This phenomenon is also present in other parts of the world. In Europe, for example, large corporations are believed to spend up to €1 billion on lobbying yearly (Wettstein 2009: 242). Large industrial groups such as the European Roundtable of Industrialists (ERT) and the Union of Industrial and Employers' Confederations (UNICE) are considered to provide significant inputs to the decision-making processes in Europe (Balanya et al. 2003). While there is no consensus on the level of influence of these groups in shaping European law, it is widely acknowledged that they had active involvement in the enactment of the 1989 *Single European Act*, the legal framework of the European Single Market. Some argue that TNCs' business groups were decisive sources of the single-market initiative (Balanya et al. 2003: 5, 6, 21). According to this account, the document *Completing the Internal Market*, which became the basis of the 1989 *Single European Act*, was almost identical to the document *Europe 1990: An Agenda for Action* presented in 1985 by Wisse

Dekker, the ERT's chairman. However, others consider that this claim exaggerates the role of corporate groups, which only reacted to initiatives that were proposed by governments or the European Commission and the Parliament (Moravcsik 1998: 356). In spite of the actual input of such groups in the creation of the act, what is clear is the existence of a close relationship between industrial leaders and government officials, suggesting that the boundaries between government and business are blurred (Wettstein 2009: 242).

One of the manifestations of this melding is the 'revolving door' phenomenon, which refers to the movement of personnel between roles as public servants and employees in the private sector – including corporations, lobbying groups, business networks and councils, chambers of commerce, and trade associations (Drahos and Braithwaite 2002: 70). A prominent example is Dick Cheney, who, after serving as CEO of the oil company Halliburton from 1995 to 2000, became Vice-President of the United States in 2001. Other cases include senior figures in Pfizer such as former CEO Edmund Pratt who later joined the US Advisory Committee on Trade Negotiations and Gerald Laubach, former president of Pfizer who later became part of the Pharmaceutical Manufacturers Association and the Council of Competitiveness (Drahos and Braithwaite 2002: 69). In Europe, this phenomenon is also observable among members of the European Commission, which have later joined boards of large transnational corporations. For example, Peter Sutherland, who served as European Commissioner from 1985 to 1989, later became Director General of the General Agreement on Tariffs and Trade (GATT) and Group Secretary and General Counsel of World Trade Organization (WTO) from 1993 to 1995, and since then has been part of the advisory boards and has occupied senior positions in several corporations including BP and Goldman Sachs.

While the precise impact of the revolving door phenomenon is still discussed, there are arguments that it may bias regulators in favor of business. Having a background in the industry may influence politicians to make pro-industry decisions, either because they become biased partisans of business interests or because they become more sensitive, receptive, or aware of the concerns of business (Dal Bó 2006: 214). On the other hand, the possibility of future employment in the industry may bias decisions of politicians, who may act in order not to limit their chances of future employment in a company (Dal Bó 2006: 214). Furthermore, the employment of former government officials by lobby groups allow them to have privileged access to legislators, which in

turn, can generate favorable legislative outcomes for companies (Blanes i Vidal et al. 2012). These effects can transcend boundaries, as it has been earlier noted.

Corporations, however, can influence policy making not only through lobbying or by participating in international negotiations, but also by setting the agenda of public discussion, as exemplified in the case of property rights. While it had been widely discussed in national and international fora, from the early 1980s some companies began to exert public pressure to turn intellectual property into a trade issue at the global level. Drahos and Braithwaite (2002: 27) highlight the prominent role of corporations of certain industries – including computer, pharmaceutical, and chemical – to bring the topic into the national discussion and to influence public opinion on this issue by linking copyright violation to organized crime. A similar approach has been found in the biotechnology industry where some corporations have tried to promote genetically modified food by changing the public perception about this technology through a rhetoric that has appealed to food security, environmental sustainability and the end of world hunger (see Williams 2009).

So far, this chapter has presented examples regarding the influence of TNCs on national and international legislation; however, institutionalized practices are also an important element of the global order. An example is the 'international borrowing privilege' that refers to the accepted principle that whoever rules a country – regardless how they seized power – can borrow funds in the name of the whole country, which has foreseeable harmful effects, especially in countries ruled by dictators (Pogge 2000: 57; 2005a: 49). In a similar vein, corporations uphold and normalize international practices that are particularly harmful for developing countries. For instance, some corporations have been actively involved in the exploitation of minerals in countries in conflict, making available financial resources to rebel groups and aiding the transfer of illicit funds, thus incentivizing the emergence of illegal networks and fueling conflict (UNSC 2001: 3, 37).

Another case is the imposition of stabilization clauses from corporations to signing countries in investment agreements. These clauses aim at protecting foreign investors against political risks by dictating how future changes in the law are to be treated and the extent to which they may modify the rights and obligations of foreign investors. For example, they can fix the term of applicable legislation thus insuring investors against future modifications of national laws or they can also bind the signing government to indemnify the investor for the costs of

complying with new laws. While these clauses may intend to give confidence to foreign investors, they have tended to be detrimental for host countries, as they curtail the freedom of the government to improve social or environmental standards and its ability to discharge its human rights duties (Ruggie 2009: 12).

A further example of harmful practices in which TNCs actively partake is bank secrecy. This system has facilitated money laundering of groups linked with narcotics and terrorism (IBAHRI 2013: 70–71), as well as plundering and embezzlement by public officials of developing countries. Examples include Muammar Gaddafi in Libya, Ferdinand Marcos in the Philippines and Sani Abacha in Nigeria, all of whom had large bank accounts in secrecy jurisdictions. Such practices incentivize the continuation of harmful conducts, undermine domestic processes in developing countries, and also deprive them from substantial resources that could be invested in policies and programs to eradicate poverty, reduce inequality, and fulfill human rights. It has been estimated that between 2001 and 2010, developing countries lost US$5.86 trillion to illicit financial flows, from which corporate tax abuses accounted for 80% of those outflows (IBAHRI 2013: 7).

Thus, it is possible to argue that TNCs contribute to the establishment and support of harmful rules that form part of the global institutional order through their relations with government authorities and political channels. They can do this, for example, by influencing their national governments to support certain national rules with a broad impact or to represent their interest at the global level, either through legitimate or illegal mechanisms such as bribing. However, TNCs can also participate in the global institutional order by supporting and normalizing rules and practices that predictably and avoidably contribute to human rights deficits.

Transnational corporations in the private sphere

Transnational corporations can also contribute to shape the global institutional order within the private sphere, in which they enjoy certain leverage to conduct their day-do-day operations and to take decisions that mostly affect their business. Here, corporations may use particular attributes such as purchasing power, reputation, established networks, and size to influence common practices, conventions, and industry standards. They can do this through several mechanisms including establishing a corporate culture, launching voluntary initiatives, funding think-tanks, preventing, or enabling technology transfer, and so on.

One example can be found in the global food system, which is currently dominated by just a handful of TNCs that control the whole food process from production to distribution and retail (Clapp and Fuchs 2009: 1; Fuchs et al. 2009: 31). In the particular case of the agri-food industry, only five companies share 90% of the world grain trade, and just six (Syngenta, Bayer, Monsanto, BASF, Dow and DuPont) accounted for the 85% of the total sales of pesticides in 2006 (Madley 2008: 39). This large concentration of power has allowed corporations significantly to influence the rules that govern the global food system by creating a sort of price-fixing cartel (ActionAid 2005: 4; Madley 2008; 28; Clapp and Fuchs 2009: 1–2; Fuchs et al. 2009: 33–34).

Corporations can also make use of their leverage by creating and shifting standards of conduct, environment, welfare, quality, and safety. While corporations need to comply with minimal legal standards, they have capacity to comply with higher standards and enforce them in their business relations. Nowadays, for example, many supermarkets have their own supplementary quality-assurance and safety standards or endorse some common collective standards, such as the Global Food Safety Initiative (GFSI), the International Food Standard (IFS), or the Ethical Trading Initiative (ETI) (Fuchs et al. 2009: 35). These private standards can improve aspects of a particular industry, but they can also serve as instruments to cause discrimination in favor of certain companies in order to preserve the status quo (Clapp and Fuchs 2009: 14–15; Fuchs et al. 2009: 30, 34).

The privileged position of at least the largest TNCs allows them to improve standards within an industry, but also to maintain and to normalize existent practices. For instance, before the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997, bribery was a highly widespread phenomenon across international business transactions (OECD 2011a: 6). Indeed, prior to the Convention, in some countries including Australia, Austria, Belgium, France, Germany, Luxembourg, Netherlands, Portugal, New Zealand, and Switzerland bribes to government officials were tax-deductible due to being considered as expenses associated with earning taxable income (Milliet-Einbinder 1997). This case exemplifies how commonly accepted and extended behaviors of corporations that mostly belong to the private realm might affect expectations, influence public perception of key issues and normalize practices at the international level. In this case, although bribery to foreign officials was legalized in some countries, corporations as private actors had the choice to comply with

minimal requirements or to set higher standards to end this common practice.

While some corporate decisions mostly concern private affairs, such as their organizational structure and internal policies, they can nonetheless have public implications. The claim about the impact of transnational corporations does not only refer to the direct effects of an individual law or organization, but refers also to its contribution to the configuration of the global institutional order. Therefore, even if a specific rule does not directly harm human rights, it might contribute to configure or preserve a harmful institutional order. In such case, the specific rule or practice may be morally assessed for its direct effects and also for its foreseeable contribution to the maintenance of a wider structure.

Proposed alternative: Reformulating the concept of impact

Current accounts of corporate responsibility, in particular the UN Framework, have argued that corporations bear duties to respect, that is, to avoid impacting negatively on human rights. These accounts have tended to consider a narrow conceptualization of impact that only includes outcomes to which companies are somewhat directly related. In response, this chapter has proposed incorporating into the concept of 'impact' the harms that corporations contribute to produce by supporting a harmful global institutional order. Note, however, that the proposed conceptualization does not equate impact to leverage; rather, it considers the inclusion of unmediated and mediated exercise of corporate agency. For instance, if a given law produces human rights harms and a corporation has some leverage over the government that introduced it, then the company would not automatically be considered to exert impact, and therefore it would not be attributed moral responsibility. In contrast, corporations could be considered to bear some responsibility if they promoted or encouraged the creation of such law.

An example can be the inability of some people in developing countries to afford expensive HIV-AIDS treatment. Current accounts would argue that states bear responsibility to protect the right to health of their populations and would not attribute responsibility to corporations. In contrast, the proposed approach would add that at least some pharmaceutical companies also bear stringent responsibilities insofar as they contributed to produce human rights deficits by supporting rules to protect intellectual property rights, which incentivize soaring prices of certain essential drugs, effectively making them inaccessible to the

poorest. The companies cannot be blamed for directly violating the human right to health of people infected with HIV; however, they can be held responsible for their contribution to harm by participating in the configuration of a particular agreement that supports the creation of rules that foreseeably engender human rights deficits. Furthermore, even when such harmful effects are evident and their negative impact has been widely discussed, some corporations still continue to reinforce the current shape of the institutional arrangement by pressuring governments to introduce further policies to protect intellectual property or by accusing indigenous people of bio-piracy when they make use of traditional medicines (Drahos and Braithwaite 2002: 24, 29).

Another example is the use of sweatshops for clothing manufacturing. Interactional accounts would attribute responsibilities to the sweatshops and clothing retailers for the harmful conditions of these places, specifcially to managers and owners of factories where garments are produced. However, the proposed approach would also attribute some responsibility to them for the structural harms to which they contribute by supporting a global division of labor, thus helping perpetuating injustice. Here, it could be argued that sweatshops and retailers are not contributing to harm because they are in fact providing some needed sources of labor, which is more desirable than the alternative options that are available in some developing countries. While this might be true, the fact that part of the global population has very limited options in their impoverished countries, can partly be traced to the policies and institutions that developed countries have imposed in the global arena, frequently with the support of corporate elites and at the expense of other countries. The assymetries those policies and institutions engender are perverse as they reinforce the very inequality that enables the governments of the affluent countries to impose them in the first place (Pogge 2007: 35).

The duty to avoid doing harm, therefore, should not only entail for corporations refraining from directly causing or contributing to cause human rights harms, but also to avoid shaping and maintaining institutions and a global institutional order that foreseeably produces harm. This realization will thus significantly modify the duty of due diligence recognized under the UN Framework as it would require corporations to broaden the scope where they consider how they can negatively impact on human rights. They would need to assess foreseeable consequences of policies and agreements they support, of shared practices they incite, perpetuate, normalize, and so on. It would also modify the responsibility of corporations to provide remedy when they have negatively impact

on human rights, as it would include institutionally mediated impacts, which are not considered in current accounts of corporate responsibility.

Conclusion

Recent normative approaches, notably the UN Framework, attribute responsibilities to TNCs in cases when they exert impact on human rights. In turn, they define impact in relation to unmediated corporate agency. The problem with these approaches is that their definition of impact is very restricted and does not correspond to the way corporations operate in reality. They imply that all the cases in which TNCs contributed to human rights harms can be traced back to corporations' conduct, operations, or certain business relations. However, they do not consider the fact that corporations also contribute to human rights harms by shaping and supporting harmful global institutions and an institutional order that foreseeably engenders human rights harms. In consequence, these accounts tend to underestimate the real impact of corporations on human rights, and therefore the responsibility they may be allocated.

This chapter proposes an alternative account to the assessment of corporate impact that incorporates the moral institutional approach in order to reconcile the role of TNCs in the global institutional order. If we accept first that the global institutional order avoidably and foreseeably violates human rights, and second that transnational corporations play a significant role in shaping and maintaining it, then it therefore can be contended that corporations exert some impact on human rights through the global institutional order. Recognizing that corporations can do harm from a distance through institutional channels provides a basis for holding them responsible for the indirect impacts on human rights. Even if it is accepted that corporations only bear a negative duty to avoid doing harm, the inclusion of the role of corporations in the shape and maintenance of a harmful global institutional order significantly broadens the scope of what such a duty entails.

Note

1. For example, the revenues of Wal-Mart in 2011 (US$421,849 million) were larger than the GDP of medium-sized economies in the same year, including Austria (US$417,656 million) and South Africa (US$408,236 million), while the net profits of Exxon Mobil (US$30,460 million) were larger than Latvia's GDP (US$28,252 million) and more than twice those of Jamaica

(US$14,436 million) and Iceland (US$14,026 million) (all amounts in millions of US dollars) (Fortune 2011; World Bank 2013).

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9

Living Up to Human Rights Responsibilities: Lawyers and Law Firms in the Chinese Authoritarian Context

Nicola Macbean and Elisa Nesossi

Introduction

This chapter explores the responsibility of non-state actors – lawyers and law firms specifically – to protect human rights and examines the challenges and dilemmas they face when operating in an authoritarian context. The questions we explore in this chapter grew out of the authors' work in China[1] and collaborations with both Chinese lawyers and activists acting for the promotion and protection of human rights, and with the foreign legal community. Disappointed by the silence of foreign law firms at the detention of Chinese lawyers, we ask: what are the challenges law firms and lawyers face when they decide to 'go global,' particularly when operating in authoritarian countries with weak legal systems? We have sought to frame our concerns within the debate about the human rights obligations of non-state actors. As critical actors in the administration of justice, lawyers would seem to have an important role to play in the protection of human rights and in shaping domestic and international human rights discourses. In their quest for justice on behalf of their clients, lawyers have the potential to contribute to the creation of the legal tools and arguments against human rights abuses and their cases help shape public understanding of the law. Lawyers engage with the media and influence public opinion; they lobby governments and, importantly, have a deep impact on the way in which the business world operates.

Thus, as Mary Robinson asserted at the Inaugural World Conference of Barristers and Advocates in 2002:

> It has become part of the professional duty of judges, prosecutors and lawyers to explore the full potential of human rights law and to use their competence to ensure that the rule of law prevails as our guiding pillar in the democratic societies in which we live. Your work as lawyers must thus constitute the pillar of an effective legal protection of human rights, which alone can ensure the protection of the individual against the abuse of power by those in authority.... One way that legal practitioners – independent lawyers – can ensure respect for the law is for them to engage effectively with the challenge of promoting and protecting human rights, not only for their immediate clients but for the benefit of society at large. This requires better familiarization with the content of international human rights law.... In brief, then, I would remind you that your obligation to act to uphold nationally and internationally recognized human rights is clear. Like judges and prosecutors, you play a crucial role in the administration of justice and in the prevention of impunity for human rights violations.
>
> (Robinson 2002)

In this chapter we explore whether law firms and lawyers – as other non-state actors – are bound by the same human rights obligations irrespective of the socio-legal and cultural context they are operating in and, if so, what are the implications for practice in authoritarian polities. Or, if the socio-legal and political context can determine the scope of lawyers' and law firms' responsibilities toward their clients and peers, how are the tensions with human rights principles resolved. These questions have become particularly urgent as increasing numbers of Western law firms expand their businesses internationally and open offices in emerging and developing markets, such as China. As the 2008 financial crisis led Western businesses to seek opportunities in emerging markets and exacerbated competition among law firms, these issues have become critical.

Globally, China is considered a systematic violator of the human rights of its citizens. Although its legal system has developed very rapidly since 1979, China still legitimizes practices that conflict with international human rights law. In the absence of robust domestic legislation compliant with international standards, strong economic growth and increased foreign investment over the past two decades have given rise to many dubious or unethical business practices – both foreign and Chinese – that, while perhaps compliant with national laws, violate international standards.

Notwithstanding the number of systematic violations by the state against its citizens, existing norms of state sovereignty rule out any form of intervention by international actors. Thus, in countries where human rights are most at risk, only international and domestic non-state actors can play a role in the defense of human rights. However, the fact that non-state actors are not legally bound to protect human rights creates ambiguity about the significance and scope of their 'responsibilities.' Not codified, 'responsibilities' may be experienced by individual lawyers in terms of moral obligations or as professional duties derived from a set of customarily accepted principles that make the profession unique, notably neutrality, confidentiality, and advocacy.

As argued by Davies (2010:157–158), human rights norms and legal ethics provisions are strongly linked; thus:

> Human rights norms might be incorporated into domestic legal ethics codes, both as means and ends of legal representation. As means, legal ethics provisions could, in theory, structure lawyering relationships (between lawyers and clients, lawyers and courts, and lawyers and lawyers) in ways that are informed by concepts of human rights.... As ends, ethical codes could encourage lawyers to strive for results that accord with human rights principles, either through lawyers' general role in pursuing justice or more specifically in the context of meeting their pro bono obligations.

Lawyers, law firms, and human rights: The legal framework

Law firms and lawyers have only recently become part of the discourse on non-state actors and their business practices have begun to be questioned and assessed in the context of the debate over business and human rights. Much of the early literature on business and human rights examined what happened when businesses failed to live up to the negative principle of 'do no harm'; focusing on violations and remedies rather than prevention. In the more recent discourse on human rights, due diligence – 'by which business enterprises can identify, prevent, mitigate and account for the harms they may cause' (International Corporate Accountability Roundtable) – introduced positive obligations and is relevant to both lawyers and law firms. First, it matters in the context of their relation with clients to whom they should recommend human rights respectful actions. Second, it is also crucial to the in-house practice of law firms. There are a number of specific instruments that require lawyers and law firms to respect and, importantly, to protect

human rights. These documents have been drafted for multiple purposes and have very different legal nature; they nonetheless provide lawyers and law firms with a supplementary framework that may inform their human rights practice. The existing framework, however, falls short of providing specific guidance for lawyers in managing the multiple professional and ethical challenges they face.

The Basic Principles on the Role of Lawyers[2]

The 1990 Basic Principles on the Role of Lawyers is a not-binding legal document that explicitly requires lawyers to protect human rights. The Principles state that

> Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.
>
> (Principle 14)

Principle 23, among others, states that

> They [lawyers] shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights [...]. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

Codes of conduct

Codes of conduct have historically provided the main framework for addressing the ethical dilemmas faced by lawyers. The codes of most national, regional, or international bar associations[3] reinforce the distinctiveness of lawyers as independent professionals with special obligations toward their clients as well as to a more general public interest. The United Kingdom Solicitors' Regulation Authority (SRA) Code of Conduct (2011) says:

> No code can foresee or address every issue or ethical dilemma which may arise .... You should always have regard to the *Principles* and use them as your starting point when faced with an ethical dilemma. Where two or more *Principles* come into conflict the one which takes

> precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice.

The SRA Code requires lawyers to,

> uphold the rule of law and the proper administration of justice; act with integrity; not allow your independence to be compromised; act in the best interests of each client; provide a proper standard of service to your clients; behave in a way that maintains the trust the public places in you and in the provision of legal services ....

Similarly, the Law Society of England and Wales supports legal professionals in 'upholding the rule of law, advocating access to justice and promoting and protecting human rights' because 'it is in the common interests of the legal profession throughout the world to promote the public interest role lawyers can and should play' (Law Society of England and Wales).

The European Bar Code of Conduct for European Lawyers adopted by the Council of Bars and Law Societies in Europe in 1988 in its Preamble states that

> A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend.... A lawyer's function therefore lays on him or her a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) toward: the client; the courts and other authorities before whom the lawyer pleads the client's cause or acts on the client's behalf; the legal profession in general and each fellow member of it in particular; and the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.

Japan's Basic Rules on the Duties of Practicing Attorneys (2004) in Article 1 says, 'An attorney shall be aware that his or her basic mission is to protect fundamental human rights and realize social justice and shall strive to attain this mission.' The American Bar Association (ABA) Model Rules of Professional Conduct (2007), without making an explicit reference to human rights, state that a lawyer is 'a representative of clients, an officer of the legal system and a public citizen having special responsibility

for the quality of justice.' The Canadian Bar Association Code of Professional Conduct in Chapter XX (2009) admonishes that with respect to non-discrimination, 'lawyers shall respect the requirements of human rights and the constitutional laws of Canada.' The Preamble of the International Bar Association's Standards for the Independence of the Legal Profession (1990) states that 'The independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights and is necessary for effective and adequate access to legal services.' The codes of conduct for lawyers in liberal democratic jurisdictions underline the close relationship existing among lawyers' duties toward public interest, maintaining professional independence, and promoting and protecting human rights.

Corporate social responsibility commitments

Over the last decade, the practice of corporate social responsibility (CSR) has become increasingly important to law firms, with a significant number of legal practices devising CSR strategies and principles, and also advising clients on CSR matters. While CSR commitments do not necessarily address the respect or protection of human rights, their scope is broad enough to potentially include activities that have wider social impact and are also closely related to human rights concerns. CSR activities by law firms may include pro bono activities, philanthropy, environmental protection, diversity and workplace culture, learning and development.

The Guiding Principles for Business and Human Rights

The 'Guiding Principles for Business and Human Rights' (2011) were drafted by the Special Representative of the UN Secretary General for Business and Human Rights, John Ruggie, to make possible the implementation of the United Nations 'Protect, Respect and Remedy Policy Framework on Business and Human Rights' published in 2006. Unanimously endorsed by the UN Human Rights Council on 16 June 2011, the Guiding Principles set out to be a practical instrument, and a concrete step forward in informing business practice and providing a framework for human rights, that goes beyond individual business initiatives. The Guiding Principles have been endorsed by a number of international agencies and incorporated into ISO 26000 (the new Corporate Social Responsibility Standard promulgated by the International Organization for Standardization), the OECD Guidelines for multinational enterprises, and the updated Performance Standards of the International Finance Corporation.

The responsibilities identified in the Principles apply beyond national borders independently from the legal and political circumstances of the state in which the business operates (for example, whether the state has enacted or enforced laws that protect human rights) (Principles 23(a)). In this context, law firms have a responsibility to comply with the Principles, to respect and protect human rights. Law firms can respect human rights in-house in their employment policy and practices and in paying due attention to their supply chain, but, more critically, they may influence the way in which their clients operate. Relevant and problematic for law firms are Guiding Principles 17, 18, and 19, which respectively address the issue of human rights due diligence and the related legal and non-legal complicity with parties that engage in human rights abuses, and the issue of the direct or indirect negative human rights impact of the action of their clients.

In 2011, Advocates for International Development (A4ID) initiated a discussion among lawyers to explore how law firms should adapt their practices to comply with the Guiding Principles culminating in the 2013 document, 'The UN Guiding Principles on Business and Human Rights: A Guide for the Legal Profession.' The Guide interprets the Principles with respect to a law firm's relations with their clients. The Guide explains human rights due diligence with a particular focus on assessing actual and potential human rights impacts and taking appropriate action in response to clients' adverse impacts. Leverage, or the power to influence, is the main tool identified in the Principles to effect change in the wrongful practices of another party; for law firms this should be used, the Guide suggests, to influence a client. While law firms are likely to assess themselves as to be at low risk of causing adverse human rights impacts, and may be wary of the costs of implementation, the A4ID Guide argues that changing legal standards, new client expectations as well as staff recruitment and morale are all arguments in favor of adopting the Guiding Principles.

Law firms: Businesses and human rights protectors?

Any discussion of the responsibilities of law firms to protect human rights must address their twin features as professionals in the administration of justice and as businesses with duties to advocate for the interests of their clients. In an ideal world, these two elements would coincide and we could call law firms 'businesses for the promotion of justice.' As Nader (1999: 4) explains:

> Attorneys are expected to zealously represent their clients and to advance the system of justice, improve it etc. So there are two roles, and the tension between these two roles can be very intensive if they are allowed to tense. But if they're not allowed to tense, as is often the case, the role of the attorney becomes dominant. The larger part of the career of the average member of the bar is that of an attorney representing clients, rather than a lawyer defending justice.

At a time when most of the largest law firms in Western countries – particularly in the United States and United Kingdom – practice in multiple jurisdictions, it is their role in the global service industry rather than as independent professionals that is predominant. In recent decades, the international market of the legal profession has moved beyond its traditional borders, its expansion linked to the internationalization of the corporate business world. Companies establishing business relationships in foreign countries needed expert and trustworthy advice on legal matters; large-scale American and European law firms were able to offer such a service, pooling the expertise of their partners and associates. In the early days of global expansion, many multinationals established themselves in developing countries where they benefited from cheap manpower, a weak regulatory environment and rich resources; often the result of bargaining with corrupt governments at the expense of the local population. As widely documented, lawyers were an integral part of this corporate strategy. Mattei and Nader (2008) argue that lawyers contributed to exporting and abusing concepts such as the rule of law and human rights for the sake of great profit and favoring potentially illegal expansion into new remunerative markets.[4]

While lawyers may have helped disseminate a discourse of human rights, others have seen them as instrumental in imposing Western concepts in other parts of the world. Cummings and Trubek consider lawyers as the 'architects of the global system,' describing them as 'subject to praise or scorn depending on one's point of view, either as vanguard of change or the agents of imperialism' (2008: 3). The rationalization of law firms' operations along more business lines has not necessarily led to the abandonment of professional ethics or indeed the commitment to justice, which motivates so many people to take up the practice of law. But, while globalization offers law firms an opportunity to expand their business, it also brings new ethical challenges.

> Recurrent financial instability in global markets, threats to the sustainability of global capitalism and governance, pressure on

> international human rights and the rule of law itself, and global climate change with its unprecedented risks to the planet and its species, all combine to make it imperative that legal professionals advising and engaging in various ways with global business incorporate this larger practical and ethical context.
>
> (Pitts 2008: 479)

A law firm's culture, the mobility of lawyers, the advent of large in-house law departments and market competition will influence the way law firms and lawyers approach their work and their likely response to human rights issues. Law firm culture, like other examples of business culture, trickles down from top management to partners, associates, and other employees. It often incarnates in individual leadership, reflecting the professional values shared among senior and managing partners (Chambliss and Wilkins 2001: 708); the individual lawyer, working in a distant office, may have insufficient power or will to influence or change it. Rhode (1985: 590–591) notes that 'The attorney often is not an independent moral agent but an employee with circumscribed responsibility, organizational loyalty, and attenuated client contact .... Under such circumstances, professional ideals that presuppose personal autonomy and public responsibilities may prove difficult to reconcile with the internal dynamics of employing institutions.' Moreover, as explained by Parker et al. (2008: 165), an individual lawyer might be just one among many dealing with the same client, deprived of strong decisional power and with no real individual responsibility.

Against such a background, innovation may be difficult and lead to conflict among partners. In this context, introducing practices more aligned with human rights principles may prove difficult if not supported by senior management. Lawyers' increased mobility between law firms and the competition to acquire talents also militates against change in a company culture. Indeed, lawyers are unlikely to risk their job and reputation advocating for change or practices that may appear risky or problematic, a situation only exacerbated by the recent financial crisis. Yet, competition between law firms might also play a positive role in relation to innovation and integration of human rights principles. Indeed, the clients of many law firms now require human rights knowledge and expertise to counter public criticism of their business practices. Criticism of clients may mean loss of reputation for their law firms as well. A global practice creates the need for an 'ethical, socially conscious and environmentally aware lawyering, with the lawyers advocating business actions that make sense both for the business client or

counterparty and for the long-term, best interest of society and the environment' (Pitts 2008: 489). Advising corporate clients to respect human rights may not bring immediate benefits, but may pay in the long run.

Lawyers are not amoral social players and their professional ethics and training impose obligations to their clients and to the wider interests of justice. As international law firms move beyond the liberal democratic polities where the rule of law is well entrenched, complex new challenges emerge putting lawyers' loyalties and their professional commitments to the test. The interpretation of the Guiding Principles, with regard to the responsibilities of lawyers, focuses on the client relationship and the responsibilities that flow from the professional contract. But, what are a lawyer's broader responsibilities to human rights arising from her professional and ethical obligations to the promotion of justice? Is a 'bureaucratic' duty to respect human rights based on the lawyer–client relationship sufficient in a context in which notions of human rights and justice have shallow roots and many people experience rights violations? Do lawyers and the firms they work for have 'an "other" responsibility' (see Chapter 2 by Mitoma and Bystrom in this book) above and beyond that owed their clients, to the powerless 'others' whose government cannot protect them.

The Chinese challenge

As of 15 October 2012, there were 219 licensed foreign law offices in China (Department Directing Lawyers and Notarization 2011).[5] Foreign law firms practicing in China must be registered with and licensed by the Chinese Ministry of Justice (MoJ), which also acts as the regulatory body for both the domestic and foreign legal profession. Foreign law offices are regulated by the 2001 State Council Administrative Regulations on Representative Offices of Foreign Law Firms in China and the 2002 MoJ Rules for the Implementation of the Administrative Regulations on Representative Offices of Foreign Law Firms in China.

The 2001 State Council Regulations and the 2002 MoJ Rules establish that foreign law firms may 'provide advice to clients on the law of the country in which the lawyers of the law firm are permitted to practice and consultancy advice on international treaties and practice,' as well as 'provide information concerning the impact of the Chinese legal environment'; they should, however, refrain from providing specific views or conclusions on the application of the law of the People's Republic of China (PRC) (Art. 33, 2002 Implementing Rules). As specified by the 2002 MoJ Implementing Rules, foreign law firms cannot participate

in litigation proceedings in China in the capacity of lawyers, and cannot provide opinions or certification on specific issues concerning the application of Chinese law in contracts, agreements, articles of association or other written documents.[6] According to Article 3 of the 2001 Regulations, foreign law firms and their lawyers must follow the PRC's laws, rules, and regulations and strictly comply with the PRC's rules for lawyers' professional ethics and practice established by the MoJ.

Advising clients on human rights issues

Notwithstanding the limits set by Chinese legislation, foreign lawyers can play a role in advising their clients on how to operate legally within the Chinese context, and, as some lawyers say, on how to use Chinese law both as a 'sword and shield.' Codes of Conduct – the ABA Model Rules for example – allow lawyers both to provide careful advice on how not to violate the law – including the law of their home country, Chinese law and international law – and to comply with the duty to be honest – or to 'be candid' as the ABA Model Rule of Conduct prefers – about all the possible legal implications of a business decision.

Working within an authoritarian country and complying with its legal system create a number of concrete dilemmas. One is the issue of lawyer–client privilege – one of the main principles of the right to counsel – which prevents lawyers from disclosing communications with their clients. Chinese law does not have such a provision and, upon request by the court, lawyers could be compelled to testify about a client's private information during judicial proceedings. According to Chinese law, foreign lawyers are not exempted from these requirements and, should the case arise, they could be compelled to disclose their client's information in court. This is likely to place Chinese practice in conflict with both international standards and the laws of the country or countries in which lawyers are registered.

From reading blogs by foreign lawyers operating in China and from preliminary conversations with legal practitioners within the country, it emerges that one of the biggest challenges for lawyers is that of advising clients on issues that could result in potential breaches of international standards – internet censorship, labor, and environmental standards are among the most prominent areas of concern.

Freedom of speech and expression and related censorship measures, adopted by the Chinese government, became an international concern when big companies such as Yahoo!, Google, and Microsoft, decided to do business in the country on terms dictated by the Chinese government. The fact that Google in particular decided to create a

self-censoring search engine (www.google.cn) was seen by many as a defeat for the basic principle of freedom of speech and the 'Doing no evil' motto proposed by Google itself. However, it represented a specific choice by the company and its legal counsel, an ethical balance between protecting freedom of expression and speech against strict censorship and the business opportunities offered by this expanding market. It was a choice that was seen as unethical and in violation of basic human rights principles, but also – we assume – potentially profitable for both the company and its legal counsel. In 2010, Google decided to revise its China strategy and move out of the country after the Chinese government allegedly infringed some of Google's intellectual property rights and attempted to hack the emails of a number of activists. Google search queries were subsequently redirected from Google.cn to the Hong Kong based Google.com.hk.[7]

In 2005, Yahoo! faced a storm of criticism for cooperating with Chinese officials in the case of Shi Tao, a Chinese journalist who had used his email account to send information to a colleague in the United States saying that the Chinese government had warned his newspaper not to overplay the 15th anniversary of the Tiananmen Square massacre. Based on the information Yahoo! provided to the Chinese authorities, Mr. Shi was sentenced to ten years of imprisonment for 'illegally providing state secrets abroad.' Yahoo! claimed it was just following Chinese law. A similar case happened in 2003 when Yahoo! supplied data to Chinese authorities on the netizen Li Zhi who was sentenced to eight years' imprisonment for 'inciting subversion' after criticizing corruption by public officials using online discussion groups and articles. Microsoft was similarly criticized for censoring blog posts in accordance with Chinese law.

The experience of Internet companies in China raises the key question of how far should a company go in adhering to repressive legislation and, in such circumstances, what are the moral obligations on the company's lawyers. Do lawyers advise their clients to comply with local laws and, thus, violate international human rights law, or should they comply with international obligations and risk being legally liable domestically? As Hefferman (2006) asks, 'What should an attorney do when faced with the dilemma of advising the corporation to comply with a Chinese court order (or other local law) or advising the corporation to withhold information on international human rights grounds?'

Lawyers are obliged by their code of professional conduct to advise their client to follow the law, but most codes of conduct leave it unclear

as to which law should be followed where conflicts between international and domestic law arise. Lawyers are also allowed to provide their clients with advice on the legal consequences of an action and provide an assessment of all the circumstances – not strictly legal – related to the case. This may include collateral issues such as reputation and the image of the company, litigation costs that might arise, and, even, political and diplomatic implications.

The blogs of foreign lawyers in China reveal a preference for advising clients to play safe and always comply with domestic laws in order to avoid the risk of acting in any way illegally within the country. Indeed, the Chinese government at times sends clear messages to the international community when sentencing foreign business people for having violated Chinese law: Chinese law is harsh and must always be complied with. Foreign lawyers are well aware of this and are unlikely to see any clear advantage in discouraging their clients from following the local law, even if the human rights impact is negative. Foreign law firms and law associations have also come under pressure from their countries' political and diplomatic communities. Engaging with human rights actions that can hamper the pursuit of friendly diplomatic relationships with China may be more or less explicitly discouraged in official statements or through private communications.[8]

Denouncing human rights abuses

Among the numerous foreign law firms operating in China, only very few large and well-established law firms engage directly in human rights practice within their own jurisdiction. While being able to continue to advise corporate clients in China, some have also represented Chinese dissidents and activists abroad, particularly in the United States – the Nobel Peace Prize winner Liu Xiaobo is one example. These exceptional law firms have helped to build cases in defense of activists; they have spoken up openly against abuses and lobbied governments. However, the majority of law firms operating in China have remained silent on China's domestic human rights record, even when their Chinese peers were being persecuted and would have probably benefitted from the intervention of their international colleagues.

At the beginning of 2011, in connection with domestic calls for a Jasmine Revolution, a number of Chinese lawyers and activists were intimidated, harassed, and held incommunicado by governmental authorities. Their disappearance and the constant surveillance, threats, and restrictions they were subject to was reported in the Western media, denounced by Western diplomats, by Hong Kong and foreign

nongovernmental organizations, as well as by a number of foreign bar associations – the Taipei Lawyers Association issued various letters and statements on the matter; the Council of Bars and Law Societies of Europe protested the situation to the Chinese government; the New York City Bar issued a 'Lawyers' Statement of Principle Regarding China'; and the International Bar Association expressed its concern on the situation of lawyers in China. The statements by the bar associations allowed international lawyers and law firms in China to avoid the risk of adopting a direct and open position on the abuses suffered by their Chinese colleagues.

Indeed, as noted by Cohen (2011), an esteemed lawyer and expert on Chinese law, two critical voices were missing during the 2011 crackdown against lawyers. The first was that of the Chinese Bar – the All China Lawyers Association (ACLA) – whose silence could be understood in view of its lack of independence and affiliation with the Chinese MoJ. Foreign law firms and lawyers operating in China were also silent. Such silence was indicative of a general non-interference by foreign law firms in China, which prefer not to get involved in domestic human rights issues. As Cohen notes,

> Barring the slim possibility that all foreign law firms might band together to register their concerns, competitive considerations will probably continue to induce law firm indifference. One wonders how severe the oppression of China's rights lawyers will have to become in order to prick the conscience of foreign fellow professionals, especially those based in China.

CSR, human rights, and social stability

In recent years, the discourse linking business, human rights, and social stability, advanced by the PRC government, has provided both Chinese and international lawyers with an opportunity to raise human rights issues. There are well over 100,000 collective protests staged in China each year; citizens' frustration at their inability to secure social and economic rights in a society that has sharply bifurcated into the haves and have-nots has contributed to the dramatic increase in the scale of dissent over the last decade. A significant number of social incidents can be attributed to business investments, including real estate developments and chemical plants. Government and public recognition of the impact on livelihoods and rights of private, state-owned and foreign business investment has brought to the fore tensions between business development and human rights protection. In response to

this explosion of protests and dissent, the Chinese authorities established an agenda for a 'harmonious society' (*hexie shehui*) and lavishly funded nationwide 'stability maintenance' (*weiwen*) policing operations. More recently, they have also focused on strengthening companies' and investment projects' human rights due diligence with the aim of 'promoting scientific-decision making, democratic decision-making, as well as decision-making according to the law, so as to prevent and mitigate social contradictions' (Article 1, 2012 Interim Measures Concerning Social Stability Risk Assessment of Major Fixed Asset Investment Projects).

While it is still unknown as to the extent to which lawyers – domestic and foreign – will be involved in the due diligence procedures for major investment projects, this policy could potentially provide an opening for lawyers to encourage clients to adopt more human rights-oriented practice. The possibility that only projects with a low risk of inciting social instability will be officially approved could offer a powerful incentive for major companies to ensure that their lawyers strengthen their CSR operations and human-rights due diligence. Lawyers would need to be fully equipped with the knowledge of international human rights standards in order to properly address the needs of their clients and limit any potential liabilities resulting from practices in violation of human rights. Despite the opportunities this policy provides to improve practice, implementation of the *weiwen* agenda by local government has, nevertheless, been widely associated with human rights violations.

Engaging in human rights related issues in China is resisted by corporate lawyers and their law firms. Given the constraints under which foreign lawyers must operate in China, many see the added value of their services over domestic law firms in terms of the professional skills and shared language they can offer their clients. Thus, in their view, the Chinese government tolerates foreign lawyers, as long as their role is that of attracting foreign investment rather than 'creating troubles.' When this is no longer the case, the authorities may easily find 'legal' ways to 'discourage' foreign firms, adding to the challenges of operating within the country.

Conclusions

This chapter has attempted to open up discussion of the responsibilities of international law firms to protect human rights through a preliminary consideration of the challenges and opportunities of operating in China. There are sound business reasons for law firms to embrace

human rights. Law firms, like other businesses, are vulnerable to the reputational risk that arises from being complicit in actions that might bring negative social consequences. Law firms are also unlikely to be immune from the tendency for the brightest graduates to choose to work in companies that share their values. Today's law graduates are much more likely to be aware of international human rights law than earlier generations and will make more demands of their employers. As businesses whose 'product' is the law and justice, there are higher public and employee expectations of law firms; how they undertake to promote human rights in countries where they are most at risk is likely to come increasingly under the spotlight. Pro bono opportunities and a CSR program may not be sufficient to overcome the queasiness felt by many lawyers at the compromises their firms make to operate in countries such as China.

The Ruggie Principles establish new responsibilities for law firms, as businesses, to protect human rights. Although rights-based, the Guiding Principles for businesses set out by Ruggie lack the same imperative as international law. Instead, they seek to introduce new organizing principles to guide business behavior. Using the four-fold conceptual typology for responsibility proposed by Mitoma and Bystrom in Chapter 2, Ruggie's responsibility principles can be understood in terms of bureaucracy and duty and an 'attempt to professionalize and rationalize' the impact of business on the protection of human rights. Initial commentaries on the implications of the principles for law firms have focused on firms' responsibilities in relation to their clients. The 'leverage' of the law firm is interpreted wholly in terms of the influence the law firm enjoys over their client by virtue of their contractual relationship. Much less consideration has been given to the responsibilities of law firms to raise awareness of human rights and shape public understanding and respect for human rights.

The tensions that currently exist between international human rights standards, codified ethical responsibilities, personal ethical references, professional duties, corporate interests and local practices cannot be resolved by lawyers acting individually. There seems to be a clear need for law firms, at a global level, together with the various professional and representative bodies, to address the conflicts between international and domestic law that leave law firms potentially vulnerable to either violating international human rights law or being complicit in repressive domestic legislation. Since law firms operate in a highly competitive environment, they are unlikely to take the lead in actions that may antagonize the host country. It is, therefore, for bar associations to

open up discussion about how law firms and lawyers should conduct themselves in countries where human rights are routinely disregarded. The inclusion of more specific references to human rights in the codes of conduct established by bar associations around the world would represent an important tool 'for educating lawyers about these norms and for opening up significantly higher level of professional consciousness concerning the role of human rights in domestic legal practice, with long-term implications for the ethical practice of law' (Davies 2010–2011: 186).

Our initial research in China indicates that international law firms would welcome greater clarity in how to reconcile their human rights obligations with their professional duties to clients in China. A collective position imposed by bar associations would reduce the risks to the individual firm of taking a stance that may subject them to criticism or lose them clients. The initiative by the New York Bar, which represents a substantial number of American lawyers, to identify principles for firms operating in China, is a step forward and deserves emulation by other bar associations. Since codes of conduct are the main instrument for guiding the day-to-day practice of lawyers and law firms, they would benefit from revisions to ensure that they provide realistic and practical guidance for advising clients in situations where legal conflicts arise. The concept of an overriding public interest, which guides English and Welsh solicitors, may need to be expanded to accommodate the kinds of conflicts lawyers face when operating in other jurisdictions. To date, codes of conduct, though important guidance to practice, do not touch directly upon choices concerning human rights – indeed, very few directly mention human rights at all.

Globalization offers law firms huge opportunities, but it also brings with it knowledge of other countries' practices and increased responsibility. It may be a pious hope that individual lawyers or law firms will speak out against human rights violations in a country with such a tempting market as China offers, but the absence of public criticism suggests to observers in and outside China, that international law firms are, at best, ignorant of or, worse, collusive in, through their silence, systematic rights violations. Any serious commitment to protect and respect human rights should require law firms to be fully aware not only of international human rights law, but also of the extent to which it is protected and respected in every country in which they are operating. Lawyers operating in emerging markets with weak regulatory environments should also be expected to have some understanding of the processes by which the norms of international human rights law are

adopted and respected. For Western lawyers going to a country such as China, they may have little prior knowledge or experience of how far law and practice diverge and the extent to which the very idea of the rule of law is contested. Equally, some may be influenced by siren voices that argue people in China do not subscribe to the so-called Western human rights.

China is in a period of transition and the rule of law and human rights, in particular, are an area of contestation between the authorities and a growing civil society frustrated by the excesses of unchecked power. International law firms face significant ethical dilemmas working in countries such as China and clearer human rights compliant guidelines are needed to address the dilemmas posed by repressive legislation. Yet, international law firms could go further and endeavor to play a more positive role in building a culture of law and respect for human rights. Motivated, perhaps, by a sense of responsibility for the 'other,' one can hope that international lawyers and law firms would experience an 'undeclinable' sense of responsibility (Mitoma and Bystrom in Chapter 2) to use their collective power to leverage influence on behalf of those denied full protection of their rights. But, for foreign law firms in China, it may not be a sense of responsibility that prompts them, but a more hard headed realization that ensuring a long-term business relationship with China is the main interest of law firms. It is a brave – or foolhardy – corporate lawyer that will stand up for justice and human rights.

Notes

1. For the purpose of this chapter, the term 'China' and the People's Republic of China (PRC) are used interchangeably and they only refer to Mainland China, excluding Hong Kong and Macau.
2. The Basic Principles were adopted in 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and were welcomed by the General Assembly in its Resolution 45/121 (op para 3) of 14 December 1990. They contain 29 Principles.
3. In a number of jurisdictions, bar associations have set up human rights committees tasked with monitoring human rights violations and engaging with human rights issues internationally. Their approaches and mandates differ across jurisdictions and, most notably, between voluntary bar associations and 'official' ones.
4. A few decades ago, both Schwartz (1978) and Luban (1988) argued that the two key aspects of the dominant ideology in law firms are the extreme partisanship for the clients and moral nonaccountability or obligations other than to pursue the client's interests. As explained by Regan (2002: 363), since law firms have become big business, they increasingly resemble the corporations

they represent, thus, the ethical quandaries raised by giant corporations are equally faced by large law firms. Bartlett et al. (2010: 4) argued that 'the mega-firm with a national, and indeed international, presence has emerged to serve the legal needs of transnational corporations . . . lawyering is seen increasingly as a business pursued for profit – or, perhaps even more challenging, just a job rather than a calling.'

5. http://www.moj.gov.cn/lsgzgzzds/content/2012-10/15/content_3902857.htm?node=280.
6. Godwin (2009) clearly explains the limits of foreign law firms' practice in China.
7. On the latest development on the battle between Google and the Chinese government on censorship issues, see: http://www.economist.com/blogs/analects/2013/01/google-china.
8. Consider, for example, cases litigated in the United States involving Falun gong followers (Nesossi 2011), statements by the Canadian government explaining the possible balance to be reached in cases involving trade with China as well as human rights issues (CBC News 2006; Vancouver Sun 2009), or statements like the *Australia in the Asian Century White Paper*, which consider Asia and China simply as market opportunities, disregarding completely the human rights dimension.

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10

Fulfilling the Right to Education? Responsibilities of State and Non-State Actors in Myanmar's Education System

Maaike Matelski

Introduction

During nearly 50 years of military rule, Myanmar[1] was frequently singled out for its bad human rights record. Although international attention focused primarily on violations of civil and political rights, Myanmar is also a developing country in which many economic, social, and cultural rights remain unfulfilled. The importance of these rights and the interrelatedness with civil and political rights have been frequently emphasized in human rights theory and practice (see Chapter 4 by Whelan in this book). Education is one example of a right that is now considered universal and indispensable for a country's development.

In the international human rights framework, education is generally seen as a state responsibility (Rose 2010). Yet the military governments that ruled Myanmar between 1962 and 2010 have largely failed to fulfill the population's right to education.[2] This has created a situation in which various types of non-state actors have taken up responsibility for the provision of education to particular sections of society. The new 'nominally civilian' government established under President Thein Sein in 2011 has identified education as one of the areas in need of drastic reform, and international actors that are en masse entering the country have also sought to contribute to the development of the education sector.[3] In order to assess these changes, however, we must look at the legacy of previous governments' education policies.

In this chapter, I distinguish 'state education' from 'non-state education,' based on who runs the schools and determines the curriculum.

I further distinguish non-state education from non-formal education, which is provided outside the formal system (such as summer schools). In addition to literature review, information provided in this chapter is based on intermittent fieldwork in Myanmar and with the Burmese community in Thailand between 2010 and 2012. Interviews with young people who had recently completed their higher education provided valuable insights into daily experiences in Myanmar's education system. Additional information stems from participation in a British civil society project on teacher training standards in non-state education, which allowed for discussions with various non-state education providers on their perceived duties and responsibilities.

The chapter will start with a description of state responsibilities for the provision of education according to international human rights standards, and the extent to which the Myanmar government has been able to fulfill its obligations. It will then provide an overview of various non-state actors that have come to play a role in Myanmar's education system. These include Buddhist monks who have been providing education since before the existence of Burma as a state, as well as ethnic minority organizations that have set up their own schools in the various border areas. A final group of non-state actors involved in Myanmar's education system consists of international donors who, both through official development aid and through private initiatives, have sought to contribute to Myanmar's education sector in a variety of ways. It will be argued that the involvement of each type of actor brings about unique opportunities, but also carries risks in terms of content and continuity. Although the government carries primary responsibility for the provision of accessible and quality education to all, it should rely on the expertise that these non-state actors have built up in the past, and acknowledge the need for context-sensitive education, particularly with regard to ethnic and religious minorities.

Myanmar's state education system

Prior to British rule, Burma prided itself on having one of the best education systems in the region. The country had very high literacy rates, largely the result of educational services provided in Buddhist monasteries. Under British colonial rule (1886–1948), this quality education was partly maintained. Nevertheless, during this period a segregation developed between those educated in English language schools, who could go to university and serve in the British administration, and those educated in Burmese language schools, who had to resort to poorly paid jobs, or no jobs at all (Cheesman 2003).

The post-independence government, which took on a central role in the provision of education, tried to address this segregation by making education free of charge and available to a wide group of people (Khin Maung Kyi et al. 2000). As a result, enrolment increased but quality worsened, a pattern that has continued since (Thein Lwin 2008). The quality further worsened under the rule of the Burma Socialist Programme Party (BSPP), which nationalized the whole education system, and prohibited Buddhist monks and other non-state actors from providing education services (Khin Maung Kyi et al. 2000). The BSPP and later military governments also profoundly affected the school curriculum, as will be discussed later.

Over the past decades, Myanmar's education sector has suffered from continuous governmental neglect. The state education system today consists of five years of primary school, four years of middle school and two years of high school, the completion of which gives access to higher education. Since children start school at the age of five, they can theoretically enter university as young as 16 years of age (Han Tin 2008). In practice, Myanmar high school graduates need to compensate for their short period of schooling by taking extra training, especially if they want to attend university abroad. Moreover, official enrolment figures underestimate the detrimental effects that government policies have had on the country's education system.

State obligations

During the long period of military rule, Myanmar did not sign up to many human rights treaties. As one of only a few countries in the world, it has ratified neither the Convention on Economic, Social and Cultural Rights, nor the Convention on Civil and Political Rights. It did, however, ratify the Convention on the Rights of the Child (CRC), which is the most widely ratified international human rights treaty, in 1991. Article 28 of the CRC recognizes the right to education, stating that primary education must be compulsory and free to all; secondary education must be available and accessible to every child; and higher education must be made accessible to all on the basis of capacity. It further calls for the progressive realization of these rights on the basis of equal opportunity, and calls for international cooperation in order to achieve this, particularly in relation to developing countries.

Over the past decades, Myanmar's education budget was somewhere around 1.3% of the official GDP (Steinberg 2010). This ranks it among the lowest spenders on education in the world (UNESCO Institute for Statistics 2007). In the 2008 Constitution (Article 28c), the Myanmar government commits itself to implementing a free, compulsory primary

education system. According to the information the government has been providing to the Committee on the Rights of the Child and other relevant bodies, it aspires to make primary education free of charge and accessible to all. A wide range of enrolment figures for primary education is available, with some estimating it to be as high as 97% (European Union 2012). Yet it is not always clear how much of these figures is based on first-day attendance, since it is known that children regularly drop out soon after they start attending primary school (Lall 2011). UNICEF (2010) estimates that less than 55% of the children in Myanmar complete primary school, and many of those who do so need more than double the designated number of years to finish (Kirkwood 2009).

Access to state education

Myanmar expert David Steinberg (2010: 96) has argued that government statistics on the functioning of its education system 'are essentially inflated figures that mask the brutal reality of decay and neglect for most of the population.' Indeed, reliable information on population and budget has long been absent in Myanmar. Collignon (2001) describes how the Burmese government adjusted its estimated literacy rate from 60% to below 20% in 1987, in order to obtain 'least-developed country' status with the UN and receive the corresponding financial benefits. Moreover, estimates of the total population differ by several million (Scott Mathieson 2011), making it unlikely that the government would know exactly how many children live in its country. Children from certain minority groups such as the Rohingya are not counted as citizens at all (Steinberg 2010), while the status of the large number of children who are internally displaced or living abroad is also unclear.[4] This implies that official information regarding school attendance and literacy rates should be regarded as rough estimates only.

In practice, access to education is determined by children's place of residence, language and ethnicity, and the financial and citizenship status of their parents. Children in Myanmar's primary schools often drop out for economic reasons: because they are needed to supplement the family income, or because the family can no longer afford to send the child to school.[5] Children in poor families are needed to work on the land, or are sent to the cities to work in teashops and restaurants, often as bonded laborers. Transportation costs can be high, especially in rural areas, with some remote areas having only one primary school for up to 25 villages (Khin Maung Kyi et al. 2000). The number of high schools and higher education institutions is even lower (Child Rights Forum of Burma 2011).

The de facto absence of free, compulsory primary education for all is directly related to the government's economic policy, which leads to 'hidden' costs for the children's parents. In primary schools run by the government, parents are expected to contribute to the costs of the school building and supplies (Lall 2011). As government teachers' salaries are estimated to be as low as 50 US dollar per month (Child Rights Forum of Burma 2011), parents are often expected to supplement the teachers' meagre income by contributing to their costs for transportation and food (Thein Lwin 2008). My contacts estimated that access to the most popular schools can cost up to 1000 US dollar on 'informal' fees per year, which prevents most children from accessing these schools.

Another common practice to supplement teachers' income is offering 'tuition' classes: out-of-school lessons in which the school curriculum is taught on an individual basis (Fink 2009). This practice can hardly be avoided by parents who want their children to succeed in school. The government has announced at some occasions that it will target corruption in government schools (Mizzima News 2011), but such practices are likely to persist as long as teacher salaries remain low. In the meantime, children whose parents cannot afford to pay these hidden education costs sooner or later leave the formal education system. Consequently, children from poorer households are much less likely to complete their schooling or attend university (Fink 2009).

It is estimated that, taking into account drop-out rates in all levels of schooling, less than 2% of the children who enter primary school manage to finish high school by passing the matriculation exam, a requirement for access to university (Khin Maung Kyi et al. 2000). The results of this exam determine not only access, but also which subject one can study in university. Since socialist times, university subjects are valued based on a strict hierarchy, with social sciences and humanities being the least prestigious subjects, primarily chosen by those who fail to get into a more prestigious program. As a result, one may, for example, encounter a disproportionately large number of zoologists. Moreover, until recently, potentially 'sensitive' subjects such as political science were not taught at all.

Language, content, and quality of state education

In addition to financial obstacles to attending school, other significant problems in Myanmar's state education system relate to the language, content, and quality of the curriculum. The socialist government banned the use of minority languages in the state school system

in the 1970s, even though a significant part of the population does not speak Burmese as their first language. The military government that ruled from 1988 onwards continued to discourage the development of ethnic minority schools and education in ethnic minority languages. Not only does this go against UNESCO recommendations that children receive primary education in their native language, but it also aggravates existing feelings of marginalization among ethnic minority groups. Moreover, some ethnic minorities are also religious minorities, whereas the state education system is strongly biased toward Buddhist teachings (Cheesman 2003). As discussed below, ethnic and religious minorities often set up their own (summer) schools in order to complement the formal curriculum.

Moreover, various actors from inside and outside the country have criticized the teaching style in Myanmar schools, which is very much focused on 'rote learning': memorization by repetition, without much attention for underlying understanding and learning processes (Lall 2011). Some argue that this is a deliberate strategy to 'prevent children from learning how to think' and create 'obedient citizens' (Thein Lwin 2008), thereby keeping the population submissive. Over the past decades, many Burmese have been thus taught not to question their elders, teachers, or parents (Fink 2009).

In addition to problems with language of instruction and teaching style, the government has had a pervasive influence on the content of the curriculum and the background of the teachers. From the socialist era onwards, any aspect of education that could possibly produce critical citizens has been censored by the military government, as it was determined to prevent student-initiated popular uprisings, which previously took place on numerous occasions (most notably in 1988). According to the 2008 Constitution (article 28d), 'the union shall implement a modern education system that will promote all-around correct thinking and a good moral character contributing towards the building of the Nation.' Naturally, the government has been determining the parameters of this 'correct thinking.' School curriculums that are still in use are not only outdated, but they deliberately exclude any information that the government disapproves of. The role of independence fighter General Aung San, for example, was marginalized in the history curriculum after he became associated with the struggle for democracy through the activities of his daughter Aung San Suu Kyi, the main opposition leader from 1989 onwards (Salem-Gervais and Metro 2012). Most references to the historical achievements or political demands of ethnic minority groups and the country's long history of internal conflicts were also

removed from textbooks during military rule (Fink 2009; Salem-Gervais and Metro 2012).

Under the previous military government, universities were closed several times for periods of up to three years in reaction to students' involvement in demonstrations against the government (Fink 2009; Steinberg 2010). When they reopened, campuses were moved out of the city center. The government also increased the number of regional education centers and actively promoted distance education, in order to prevent students from coming together and being able to form opposition groups (Fink 2009).[6] University teachers are often primarily selected based on their loyalty, rather than their qualifications. During an interview, one IT graduate described his frustration when he asked his teacher a simple technical question that she could not answer. He wanted to learn all about computers, but she was not able to explain anything other than what was written in the books. The student said he found it embarrassing that he had graduated in computer science without being able to solve even the simplest of computer issues. He therefore decided to switch to a non-state higher education institute to study additional topics that were not covered in university.

Many graduates from the state system conveyed similar stories. Even if the teachers are motivated, the absence (or poor quality) of supplies and laboratories limit students' opportunities to acquire skills and knowledge. Education available to military personnel and their families such as at the Defence Services Academy appears to be of somewhat better quality, but is obviously only accessible to political elites (Fink 2009). Given the limited opportunities for acquiring valuable knowledge in the state education system, many ambitious students eventually try to continue their studies abroad. Others have turned to various non-state education providers inside the country.

Non-state education providers

In many developing countries, problems with access and quality of social services lead to the development of non-state initiatives to fill the gaps (Rose 2010). Although non-state actors often act parallel to the state system, their involvement does not usually originate from an externally imposed obligation. Rather, they act out of a sense of personal responsibility, duty to the community, or out of financial motivations (see Chapter 9 by Macbean and Nesossi in this book). This has also been the case in Myanmar's education system. Such situations raise questions about non-state actors' obligations, and the desirability of the existence

of parallel systems. This chapter focuses on the role of non-commercial education providers, particularly (Buddhist) monastic schools and ethnic minority schools. It does not cover private schools that cater to the richer section of society, although these too might fulfill needs that are poorly addressed by the state.

Monastic education

The most prominent group of non-state education providers in Myanmar are Buddhist monks. It has been estimated that there are about 1,300–1,500 registered monastic schools throughout the country (Achilles in Lall 2011). This is hardly surprising, given the fact that Buddhist monks have been the first and foremost education providers since pre-colonial times. As mentioned, state education has only gained prominence since the colonial period, and gained a monopolized position during the socialist period, which lasted until 1988. Since the 1990s, the government has officially allowed Buddhist monasteries to offer education up to the start of middle school (Cheesman 2003). This monastic education should be distinguished from religious education, which is also provided by Buddhist monks. While religious education prepares pupils for monkhood (and sometimes nunhood), accredited monastic education follows the state curriculum, and pupils can take part in government examinations. This is important for children who want to continue to middle school and high school, sectors for which monasteries are not officially allowed to provide education (even though some monasteries appear to find ways around this).

Monastic education serves disadvantaged families by providing free education, including school supplies and sometimes even free meals. Unsurprisingly, this comes at a cost, and monastic schools struggle with several issues of their own. Most of them have a hard time securing funding to carry out their activities, and they often have trouble attracting or retaining qualified teachers. Teachers can earn a higher salary working in state schools, particularly since this allows them to offer private tuition, an option they do not have at monastic schools. Monastic schools often lack funding for teacher training, and inexperienced teachers might be faced with large class sizes of up to 100 pupils at a time (Lall 2011).

Government policy toward monastic schools has been ambivalent. While monasteries can officially register as primary education providers, this does not necessarily mean that they receive substantial financial assistance from the government (Lall and South 2014). This way the government benefits from the activities of non-state education providers without sharing in the costs. Nevertheless, certain monasteries stand out

in terms of quality and accessibility. Such high-profile non-state educators might attract jealousy from the side of local authorities, who fear competition with their state schools. Various local education providers mentioned that they were not allowed to open their facilities until after the nearby state school had opened, in order to reduce the risk of pupils switching from the state school to non-state schools. One non-state education provider described how he was approached by a local government representative who asked him to make a donation to a state school, which (like many other schools) had received insufficient funds from the government. Such examples show that the opportunities for non-state education providers often depend on personal relationships and other accidental factors.

Monastic schools offer truly free education by covering expenses that parents are otherwise required to pay, and taking away the hidden costs such as private tuition. From an international human rights perspective, it might appear as if these monasteries are taking over a role that should be fulfilled by the government. However, monastic education providers primarily engage in their activities out of a sense of duty to provide basic services for the poor, a role they have been fulfilling for centuries (Cheesman 2003). They do not necessarily see themselves as substitutes for state education. Nowadays, some refer to this as 'socially engaged Buddhism,' a shared sense of responsibility for their fellow human beings, which they derive from their religion. In modern terminology, one monastic education provider explained that monks 'are acting as a social security net.' In order to secure enough donations to fulfill their role in society, they must motivate people to donate to monasteries 'as a form of meditation.' The monks might be used to their role of service providers, but they feel that they still need to convince the Buddhist communities that 'you can serve yourself by serving others,' according to the same monastic education provider.

In several ways, the monks' ability to provide these services is directly related to societal developments and government policy: the more the country faces economic hardship, the more people will rely on monastic services, including education. However, the more the economic hardship, the less people will be able to donate to the monks. This was the situation that preceded the large-scale demonstrations in September 2007, in which Buddhist monks played a prominent role (Lorch 2008). Thus, although Buddhist monks are not explicit duty holders in the international human rights system and have no formal responsibilities according to this framework, they have for centuries played an important role in the provision of social services such as education. Moreover,

they are in many ways embedded in local communities. Community members rely on Buddhist monks for the provision of free education, while these monks in turn rely on donations from the community for their living costs. Despite their ability to contribute to the government's education targets, they have been subject to ambivalent and sometimes hostile governmental policies.

Schools run by ethnic minority organizations

The other main group of non-state actors providing educational services in Myanmar can be found in the so-called 'ethnic' states in the border areas of Myanmar. These areas host a large section of the ethnic minority groups, which comprise about 30% of the population, as well as a sizeable part of the approximately 10% religious minorities. Schools in areas that have been influenced by Christian missionaries tend to be church-based, although they do not necessarily confine their services to Christian children (Lorch 2007). Although Christian churches provide important education services in various parts of the country, this section will focus on other types of education undertaken in ethnic minority areas.

Since Burma became independent from British colonialism, various ethnic minority groups have been involved in political and armed struggles for independence or autonomy from the central government, which is dominated by the Burman majority. The military government has been partially successful in its attempts to reach ceasefires with these armed groups. In some ethnic minority areas, armed groups and their political counterparts have created more or less autonomous regions, where they provide education to children of their own ethnicity (Lorch 2007; Lall and South 2014). Not only are these ethnic-based organizations able to provide education to pupils who might otherwise be left out due to financial or geographical constraints, but they also adapt their curriculum to provide more context sensitive education, for example by including instruction in their own ethnic language. Mon state is an example where local initiatives to run non-state schools have been particularly successful (Fink 2009). In some of the ceasefire areas, so-called 'mixed schools' have been set up: a cooperation between the government and the ethnic armed groups with which the government has reached a ceasefire (Lall and South 2014). Some of these schools have included instruction in their ethnic language as part of the regular curriculum. In other regions, ethnic minority groups organize 'summer schools' in the official school vacation (March–May), in order to teach their own language and other culturally specific topics.

Many of the ethnic areas have been the sites of decades of internal conflict, with ethnic minorities fighting for autonomy and equal rights (Smith 1999). Fighting in several ethnic states has caused many ethnic minority people to cross the border as refugees into Thailand, Bangladesh, and elsewhere. As a result, there is an intensive exchange between education provided in the ethnic states, and education provided in the refugee camps across the border. Salem-Gervais and Metro (2012) estimate that the curriculum developed by the Karen National Union (one of the larger armed ethnic groups) alone is used by at least 38,000 refugee children in Thailand, and in up to 2,000 schools in Myanmar's Karen state. Although schools in the refugee camps primarily target refugee children, some children living in Myanmar are sent to schools across the border, especially in Thai refugee camps, which are considered to be of better quality and in some cases more accessible. Schools run in autonomous regions and schools targeting refugee populations are often not included in official statistics about the country's education system.

Although ethnic minority organizations in some cases provide indispensable educational services for children who would otherwise be left out altogether, researchers have pointed to the risk that these systems might contribute to the reinforcement of a 'separatist identity' (Lall and South 2014). Textbooks written for ethnic minority schools, including the ones used in cross-border refugee camps, tend to be 'nationalistic.' They focus strongly on the plight of their specific group, which is depicted as overly homogenous (thereby ignoring important intra-ethnic differences, for example among the Karen), while the military government (often equated to the Burman majority) is depicted as the historical enemy (Thein Lwin 2008; Salem-Gervais and Metro 2012). Some of these ethnic minority groups, most notably the Karen, have also used English as a second language rather than Burmese (Fink 2009). This has contributed to the establishment of two different types of students: one Karen- and English-speaking group, qualified to work for internationally oriented organizations but unqualified to enter the state higher education system, and one Burmese-speaking group qualified to continue their education in the state system, but with few internationally recognized skills (Lall and South 2014). There is also a risk of brain drain, with those with a relatively good education and English language skills being most likely to resettle elsewhere. Lall and South contrast the 'separatist' Karen education system with the more accommodating system in Mon state, which combines a focus on Mon language and culture on the primary level with a shift to the state system in

high school that facilitates the transition to the state higher education system.

While this is not the place to elaborate on the history of conflict between the government and ethnic minority groups, it is important to keep in mind that many of the ethnic tensions precede the formation of Burma as a state. The presence of schools run by ethnic minorities in the border areas can be seen both as an indication that government facilities do not reach the whole population, and as a way of contesting the power of the state to determine the type of education that ethnic minority children receive. As ethnic minority groups have been fighting for more rather than less autonomy from the state, they might see their role as education providers not (just) as the result of an undesirable gap left by the government, but rather (or also) as a matter of self-governance.

These examples show that various non-state actors in Myanmar have been of vital importance for the provision of accessible education to certain sectors of the population. However, non-state education is not only provided in order to fill a quantitative gap, but also to steer the content in a desired direction. This carries certain risks, such as increasing disparity and animosity between children educated in the state system and those educated in non-state systems. Rose (2010) also warns that expectations of the government might be lowered when non-state actors provide similar or even more adequate facilities. This might encourage the government to tolerate non-state education, without providing financial assistance or other forms of support that would be expected based on its international human rights obligations. However, given the historically tense relationship between non-state education providers and the state, it is questionable whether they would prefer to become reliant on the government for monitoring, coordination, and funding. In many cases, non-state education providers might prefer to rely on support from outside the country.

Foreign assistance for education in Myanmar

According to the Convention on the Rights of the Child, which has been ratified by nearly every country in the world, it is not only the government, but also the international community that has a responsibility in helping a country achieve its educational targets. Article 28(3) of the Convention calls on all states parties 'to promote and encourage international cooperation in matters relating to education,' in which 'particular account shall be taken of the needs of developing countries.' In terms of assistance to Myanmar's education system, the international

community has been somewhat ambivalent. Until recently, Canada, the United States, and the European Union imposed sanctions on Myanmar which prohibited or discouraged any funding that would be channeled through the government. However, the United Nations has never imposed sanctions on Myanmar, and some of the individual countries' sanctions (most notably the European ones) included exemptions for the education sector.

Despite the absence of internationally coordinated sanctions, locally based development workers suggest that the education sector has suffered negative consequences of these sanction policies. They feel that the sanctions have created a general sense that development aid should not be spent on Myanmar, because it would benefit the government and not the local population. For many years, international donor involvement in Myanmar's education system has been on a much smaller scale than in other countries with similar poverty levels. In fact, estimated per capita Official Development Assistance (ODA) to Myanmar in recent decades ranked among the lowest in the world (U Myint 2006). It must be noted that this is not only the result of donor wariness, but also of the government's distrust of foreign involvement in its education system (Lorch 2008). Nevertheless, over the years some international donor organizations (both governmental and nongovernmental) have become involved in Myanmar's education sector, not only out of a sense of obligation, but also with the expectation that it would contribute to development and democratization of the country (cf. Tabulawa 2003).

Multilateral assistance

Despite sanctions imposed on the Myanmar government by individual countries, UN agencies involved in education have been working predominantly with government schools. Western donors active in Myanmar joined forces in the Multi-Donor Education Fund, which is overseen by UNICEF. This fund, to which donors such as the European Union, the United Kingdom, Denmark, Norway, and Australia contribute, aims at 'increasing equitable access and outcome in quality early childhood development and basic education, with extended learning opportunities for all children, especially in disadvantaged and hard to reach communities' (European Union 2012). Together with organizations such as JICA (Japan International Cooperation Agency), UNICEF has tried to fulfill a broker role between the government and the international community. Due to its intergovernmental nature, it is uniquely positioned to work with both state and non-state schools. However, its

efficacy is conditional on good relations with key government officials, which in some cases has caused significant mistrust among non-state actors.

Unlike non-state education providers that operate locally, UNICEF is very much restricted in terms of criticizing or challenging governmental policy, which in practice can create the impression of siding with the government. In 2011 a closed-door meeting took place in Yangon, where UNICEF invited non-state education providers to share experiences and provide input for UNICEF's future work in the country. In this meeting, UNICEF expressed its intention to expand its role in the non-state education system. During the meeting, local non-state education providers criticized UN officials for making use of government facilities and engaging primarily in high-level meetings, instead of supporting small-scale non-state initiatives, which they argued were more cost-effective. UNICEF representatives, on the other hand, responded that they could only work with one or two centralized education providers as local partners, in order to shorten communication channels and minimize overhead costs. In this case, it seemed that UNICEF's intended political neutrality as well as the scale of its activities limited the organization's opportunity to establish relationships with non-state education providers on the local level.

While UNICEF faces some obstacles in expanding its assistance to non-state schools, individual (groups of) countries have had more freedom in supporting non-state education providers in Myanmar. For example, in 2012 the EU reported bilateral assistance to 400 monastic schools throughout the country to improve teaching quality by training 1,000 teachers in child-centered teaching and learning approaches (European Union 2012). Many non-state education institutions are not registered with the Ministry of Education, which means that they are not allowed to receive foreign funding. However, in recent years donors have found ways to engage with the non-state education sector. As mentioned, a number of Buddhist monasteries are registered as primary education providers. Some of the larger ones are led by well-known monks with broad personal networks, who are able to organize foreign visits or funding (Lorch 2007). In the ethnic minority areas, assistance has often been provided through cross-border activities, for example by donor agencies that are providing funding to refugees and internally displaced people on the border with Thailand.

Individual donor agendas

A small number of foreign donors and NGOs have focused specifically on the higher education sector, thereby trying to counter a

general donor tendency to dismiss higher education as a low priority. These donors are convinced that the limitations in Myanmar's higher education system form a serious obstacle to further development, peace-building and capacity building inside the country. A number of initiatives have sprung up in recent years that seek to prepare students for study abroad by providing post-high school education.[7] They also try to reach international higher education standards by focusing on social and political sciences, and bringing in foreign guest lecturers. Those with good relationships with the government have been able to do this rather publicly, while others choose to maintain a low profile. Although these types of trainings do not result in any formally acknowledged diploma, some programs have gained international recognition and receive substantial donor attention. Completion of these programs is acknowledged as educational achievement by international universities. In addition, donors provide scholarships for students from Myanmar to study abroad, preferably close to home, with the hope that they will return and contribute to the development of their country. Given the limited job opportunities at home, this does not always happen. As a result, donors might unintentionally contribute to the brain drain mentioned earlier.

Recent announcements of educational reforms by the new government have further added to international interest in supporting this sector. However, there are a number of risks associated with external involvement in the local education system. Apart from the risk of brain drain, donor involvement in the education sector might lead to dependency in terms of funding or agenda setting. Once non-state schools develop financial relationships with foreign donors, they may be less inclined to search after local funding sources. Donors on the other hand are known for their relatively short project cycles; they can shift priorities, or simply reduce their overall funding to a specific country or group of actors, based on developments inside or outside the target country.

In addition, most donors come with their own agendas, creating the risk of supply-driven rather than demand-driven activities. While in some cases supply and demand might be closely related, there are also instances when recipients of donor funding shape their activities based on the donor's agenda, instead of prioritizing the needs of their beneficiaries. When funding is limited, for example, it might be difficult to balance the wish to accommodate all children with the aim to increase the quality of education, or reduce teachers' workload. Moreover, the focus of certain donors on specific ethnic minority groups can inadvertently contribute to the maintenance of differences and tensions between the various ethnic groups. To counter this, some

donors have made deliberate efforts to promote inter-ethnic and inter-religious dialogue in education (which in itself might also be considered an externally imposed agenda by some).

In some cases, agendas of foreign donors clash with local traditions, reducing teachers' and parents' feelings of ownership over the education process of their children. Lall (2011) describes how the Child Centred Approach (CCA), a form of modernizing teacher–pupil relations, which stems from Western thinking, was perceived as problematic by certain local actors in the Myanmar education system, even though it was in principle supported by both the government and monastic education providers. Lall also argues that donors and consultants who push for CCA to be implemented benefit financially by sending expensive staff to implement this approach. As a consequence, they present CCA as a desirable end-goal, rather than as a specific teaching style with its own advantages and disadvantages. Tabulawa (2003: 9–10) also warns against donors presenting learner-centered teaching styles 'in benign and apolitical terms,' as a 'universal pedagogy, one that works with equal effectiveness irrespective of the context.' In fact, he argues, 'it reflects the norms of a liberal Western subculture.'

Although these agendas might not be inherently problematic, this criticism reminds us that education styles as promoted by international donors are based on subjective norms that are not always received favorably on the local level. First of all, there is increasing consensus that donors must adhere to the 'do no harm' principle in their interventions (see also Chapters 1, 2, 7, 8 and 11 of this book). The question then is to what extent it would be desirable for the government to oversee foreign assistance, and to intervene if necessary. Rose (2010) warns that donor involvement in a country's education can lead to the emergence of parallel, fragmented systems, in which larger policies and oversight are absent and the capacity of the government to provide social services is undermined. Now that the new Myanmar government is showing increased interest in improving the education sector, it might be time to reassess such questions.

Conclusion

This chapter has detailed how the former military governments of Myanmar have dealt with their international human rights responsibilities to provide accessible education to all. It has described the gaps in the state education system, and the role taken up by various non-state actors. Those actors get involved not only to fill these gaps, but also

to provide the type of education that they consider suitable for their own communities. While these non-state education providers fulfill the educational needs of certain sections of the population, they have also been facing certain challenges. These include limitations in terms of resources and the ability to attract qualified personnel, as well as obstruction by and competition with certain state actors. Moreover, non-state education initiatives have developed largely parallel to the state education system, with little room for mutual coordination or oversight by the government. As a result, differences in teaching methods can create problems when students switch from one system to the other, while competing narratives in the curriculum might reinforce communal tensions.

According to international human rights standards, the government is primarily responsible for the ultimate accessibility, quality, and content of education for all children in the country. However, it also needs to be sensitive to differences in language, religion, geographical location, and economic position of the children that fall under its responsibility. Therefore, it should allow room for non-state actors to contribute to educational needs, as long as they meet certain basic criteria. This dual responsibility requires a lot of capacity and willingness to cooperate on the part of the government, and arguably also on the part of non-state actors. Decades of military rule have had a detrimental effect on the trust relationship between state and non-state actors, and it will take time to reverse this process. It must be kept in mind that the primary responsibility attributed to the state is a relatively new development, compared to the role that certain non-state education providers have been playing for centuries. Moreover, as with other economic, social, and cultural rights, the state's international obligations are mainly progressive, and immediate full realization of the right to education might be unrealistic (Chapter 3 by Bódig in this book).

Since the end of 2011, the Myanmar government has announced a number of initiatives to improve the education sector. It has increased its education budget and has announced a raise in civil servant salaries, which will also affect teachers. In 2012, it launched a Comprehensive Education Sector Review in cooperation with several international development agencies (UNICEF 2012). Plans for reform include an expansion from 11 to 12 years of primary and secondary education (Sandar Lwin and Win Ko Ko Latt 2012). Meanwhile, ethnic minority representatives have raised the issue of minority languages in parliament, and have called for a better integration in the formal education system (Lall and South 2014). Now that the new Myanmar government

is taking increasing responsibility for improvements in the education sector, there might be an opportunity to bring the state and non-state education systems more in line with each other.

The international community has reacted to the political liberalization in Myanmar by lifting sanctions and increasing engagement in the form of development assistance and capacity building on the ground. The government has also announced plans to improve the level of higher education with foreign assistance. Although investment in higher education is long overdue, local actors fear that the establishment of foreign-led universities will further increase the gap between rich and poor, and that these universities will draw valuable resources from the state system by competing with local salaries. In addition, the political liberalization in Myanmar has encouraged a shift in donor funding away from the migrant and refugee populations in the border areas. This decision has been criticized by many as premature, as it could have a negative impact on existing education systems that have been built up over many years and are benefiting significant numbers of people from Myanmar.

Given the consistent under-funding of the state education system over the past decades, the new Myanmar government will likely require external expertise and funding in order to successfully fulfill its responsibilities. As in other developing countries, foreign assistance can be an important contribution to the development of quality education in Myanmar. The international community has both a moral and a legal responsibility to help developing countries live up to their human rights responsibilities. However, foreign actors intervening in a country's education sector need to make sure that their contributions are coordinated with the needs and activities of existing education providers, rather than imposing their own priorities. As the new government takes on a coordinating role in developing its education system, it should incorporate the experience and expertise of non-state actors inside the country. It should also make use of foreign expertise, while maintaining a critical view of foreign interests that might influence their involvement. By taking into account all relevant advice and experiences, the government can work toward the progressive realization of its responsibility to provide accessible quality education to its population on the basis of equal opportunity.

Notes

1. I use Myanmar to speak about the current situation, Burma to speak about the pre-1989 era, and Burmese to refer to the population and the official language, while acknowledging that none of these terms is uncontested.

2. The country was ruled by the Burma Socialist Programme Party from 1962 to 1988, after which the State Law and Order Restoration Council (later State Peace and Development Council) took power, which changed the country's name to Myanmar.
3. After national elections were held in 2010, a parliament was installed in 2011. The new government is often referred to as 'nominally civilian' due to the continuing influence of the army, which among other things automatically takes up 25% of the seats in parliament.
4. The new government conducted a highly contested census in April 2014. The results of this census, which was the first since 1983, were unknown at the time of writing.
5. In 2011, Myanmar ranked 149 on the UNDP Human Development Index. Steinberg (2010) estimates that up to half the population lives below the poverty line.
6. Although distance education can be a cost-effective way of transferring knowledge, in Myanmar it is perceived primarily as a way to limit interaction among students.
7. According to Thein Lwin (2008), Myanmar students lack at least one year of education compared to students in most other countries.

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Part IV
The Responsibility to Protect

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11

What Responsibilities Does the International Community Have in Complex Humanitarian Crises and Mass Atrocity Situations?[1]

Kurt Mills

Introduction

This book is about what human rights responsibilities states and other actors have and how these responsibilities have been conceptualized and implemented (or not). One other significant question is how various responsibilities interact – and how does one choose among several, sometimes conflicting, responsibilities. Nowhere is this more relevant than in the debate over how to respond to mass atrocities and associated humanitarian crises. Certainly when a Somalia or Darfur or Syria appears, there are cries of 'never again' and calls to do 'something,' although what that 'something' is is frequently not specified. The choices facing policy makers may be unpalatable and the 'something' that is done is frequently not what is required. This raises further questions about political will to stop such atrocities.

Indeed, the 'somethings' that are available to global political elites are wide-ranging and the decisions complex and difficult. In the end, however, the international community has developed three types of responses that respond in some manner to the human rights issues raised by genocide, the 'lesser' crimes of crimes against humanity and war crimes, and the vast humanitarian crises that accompany almost all contemporary conflict. These responses correspond to three responsibilities the international community has acquired over the last decades.

The responsibility to provide humanitarian aid to people affected by conflict created by the crimes mentioned above – what I call the responsibility to palliate – seeks to provide the displaced and other victims of conflict with food, water, shelter, and medical assistance so that they can continue to live at the most basic level. It takes conflict for granted and tries to ameliorate – palliate – the effects of conflict. In theory it has no grand political project like the other two responsibilities, although frequently this is a convenient – and not always convincing – fiction. Many times the actors involved – in particular nongovernmental organizations – may be on the ground carrying out this responsibility before the invocation of 'never again.'

International criminal justice – what I call the responsibility to prosecute – holds people to account after the fact for these same crimes. While in one sense this is *post facto* punishment, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was created while the war in the Former Yugoslavia was still raging, and most of the cases being prosecuted by the International Criminal Court (ICC) are occurring in the midst of ongoing conflicts. So an additional motive for these activities is to affect the behavior of people who are or may engage in these human rights violations – either by arresting them, creating inducements for them to stop or deterring such individuals from carrying out these violations in the first place. While this prosecution impulse ties into well-developed human rights norms – it is certainly the most normatively and legally grounded of the three responsibilities – it may take rhetorical invocation of the final responsibility to activate this responsibility.

The most discussed responsibility – and indeed the one which provides the 'responsibility' framework – is the responsibility to protect (R2P). While it incorporates a wide variety of actions, the one which most concerns us is taking forceful military action to stop genocide and other mass atrocities. It is, in some situations, the potentially most effective response. However, while it has become the most talked about responsibility, it is also the least used. While there may frequently be good prudential reasons for this, it cannot be denied that in some situations the international community has utterly failed in following through with this responsibility – which of course raises questions about how seriously this responsibility is taken. Yet, in addition to providing the idea of responsibility, it also provides a context for the other two responsibilities to be invoked. Indeed, the responsibility to palliate and prosecute may sometimes only be activated if R2P is invoked, and may be used as substitutes for R2P. R2P acts as a marker of global concern which may then activate the other responsibilities.

All three of these responsibilities – protection, prosecution, and palliation ($R2P^3$) – come from the same human urge to stop suffering, and they are all heavily embedded within the 20th-century human rights project, but can also be traced back to the 19th-century project to constrain states in their conduct of war. But, frequently different foundational bases are asserted – legal claims for human rights and moral ones for humanitarianism. And there are frequently different perspectives on agency – in human rights, individuals may be seen as asserting their rights whereas with humanitarianism, the recipient is frequently passive. And, while human rights is a political project to defend rights, humanitarianism has much narrower goals.[2] Thus, what we are talking about is not one single set of norms and principles – not one regime, in other words – but interrelated sets of norms and principles. These include not only what we call human rights – as found, for example, in the Universal Declaration of Human Rights – but also *humanitarian* norms that have to do with regulating the conduct of armed conflict and assisting those affected by armed conflict. Those involved in *humanitarian* activities will sometimes argue that they are involved in *human rights*, and this is a distinction that does not always hold up in practice. Yet, as we will see, this distinction can create dilemmas for those seeking to respond to mass atrocity situations.

The relationships between them are complex. This chapter seeks to disentangle and make clear these complexities. In the following sections, I look more deeply at each of the responsibilities and associated norms and practices, briefly tracing their development and interrogating the concrete meanings of these responsibilities. I then turn to a discussion of the various modalities of protection and the claims each of these sets of practices makes to contribute to civilian protection in the midst of conflict. Finally, I develop a framework for understanding how these responsibilities interact and the main conundrums faced by those deciding which responses to implement.

Humanitarianism: The responsibility to palliate

As Michael Barnett (2011) observes, 'We live in a world of humanitarianisms, not humanitarianism.' Indeed, humanitarianism has many different ideational and practical strands. This plurality of theory and practice creates a variety of dilemmas for humanitarian practitioners.

What do we mean by humanitarianism? While some use the term to denote a wide variety of human rights supporting activities (Kennedy 2004), humanitarianism is distinct from human rights, even if they have overlapping ideational bases. Human rights is about making sure that all

humans have access to the same protections from human-induced suffering and discrimination and ensure that all people have what they need to live in dignity. It is a political project that aims to order polities in such a way that individuals have access to the political process and their other rights are protected. Humanitarianism, while it may have broader social goals, is, in the end, about making sure that people can continue to live on a day-to-day basis, in the most horrible and extreme circumstances. While we frequently use the term 'humanitarian' to describe an individual who is attempting to do good in the world, the ambit and practice of humanitarianism as an 'ism' is much more circumscribed. Humanitarian organizations – as opposed to development organizations, which focus on longer term economic and social progress throughout society – are focused on providing assistance – food, water, medicine, shelter – to individuals caught in the midst of conflict. They help refugees, internally displaced persons, and other war-affected individuals gain access to what they need to survive on a daily basis – a 'bed for the night' (Rieff 2002). This so-called 'classical' humanitarianism does not deal with the broader political context in which it operates. It is all about saving lives. It is apolitical. However, this 'pure' humanitarianism is under pressure to go beyond this remit and become embedded in politics. As this occurs, life becomes much more complicated for humanitarians, and the choices faced by them – and by the international community more generally – more difficult.

Barnett and Snyder (2008) identify four types of humanitarianism, characterized by where humanitarians stand on two issues – whether or not they accept that they are political and whether or not they accept constraints on what they can accomplish. These are – bed for the night, do no harm, back a decent winner, and peace-building. The first is the ICRC approach, and has been expounded by David Rieff (2002). It is only emergency relief. It does not claim any goals or import beyond saving lives from one day to the next. Do no harm is essentially bed for the night with more reflection. While adhering to the previous goals, humanitarians will consider the consequences of their actions and whether or not their actions are doing more good than harm (Terry 2002). Such issues came to the fore in 1990s, as questions were raised about whether aid actually prolonged conflicts by providing resources or safe spaces in the form of refugee camps to combatants. Until then, there was an uncontested assumption that good intentions resulted in good outcomes (Barnett and Weiss 2008). Rwanda was one such situation where some organizations decided to withdraw because they felt they were doing more harm than good. This perspective still

claims to be non-political, but once one starts deciding who should or should not receive aid, one is making political as well as ethical judgments. Back a decent winner recognizes the constraints of humanitarian action while having a willingness to engage politically. It essentially looks for a 'better' partner who can create a better peace even if this does not mean a broad-based liberal peace. When engaging with comprehensive peace-building, humanitarians look to the root causes of a conflict, including human rights abuses, and advocate the creation of a more just society that provides a basis for peace. It is avowedly political and it rejects the limited mission for humanitarianism advocated in the first strategy. This is related to the so-called rights-based humanitarianism, which has developed over the last 20–30 years, and which calls for humanitarian actors to analyze situations from an explicitly human rights perspective to see how a *humanitarian* situation might be more permanently addressed by *human rights* action, including denouncing human rights abusers and, at times, calling for military intervention.

Advocating one version of humanitarianism over another will lead to different trade-offs and conundrums for humanitarians and policy makers. The more you advocate political solutions, the less able you are to claim the classical humanitarian label, which, theoretically, protects you in the field. Further, you may end up supporting activities and outcomes that are at odds with your intended goals as a humanitarian.

From palliation to politics

At its core, humanitarianism is palliation. According to the World Health Organization (WHO),

> Palliative care is an approach that improves the quality of life of patients and their families facing the problems associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual (WHO).

In the medical sense, palliative care, according to the WHO, 'intends neither to hasten or prolong death.' It 'provides relief from pain and other distressing symptoms' and 'offers a support system to help patients live as actively as possible until death.' The 'illness,' the symptoms of which humanitarians treat, is not the malnutrition and diseases from which those affected suffer; rather, it is war and violent conflict itself.

Thus, whereas palliative care 'affirms life and regards dying as a normal process,' humanitarianism as palliation affirms life but also regards war as a normal process. It takes the world and its illness (war) as they are and helps those affected by the illness – refugees, IDPs, and others – to stay alive, hopefully until the war ends and any localized illness is cured, or until the illness ultimately kills them. It treats the symptoms rather than effecting a cure. While many millions of people have been saved by humanitarianism, it must seem for some caught in the midst of conflict that the refugee camp is akin to a hospice, with humanitarians keeping refugees alive and comfortable until the war – either directly through an attack by armed forces or indirectly through malnutrition and war-associated diseases – kills them.

Yet, humanitarianism as palliation engages with many different interests and perspectives. The International Committee of the Red Cross (ICRC) may see palliation as the ultimate expression of humanity – you are keeping people alive for this one day, and hopefully the next, and the one after that, and so on.[3] And many other international humanitarian organizations (IHOs) also see this as their humane goal, while others want to go beyond palliation and find a cure – that is, address the root causes that are leading to the disease of war that is killing so many people. As will be seen, this creates operational problems. It also brings them into conflict with others who may prefer palliation as state policy. That is, while states – especially rich, Western states with enough resources to put into stopping conflict – may want to see a particular conflict stop and prevent people from being killed – they do not necessarily want to invest the resources – i.e., troops – to do so. Palliation thus becomes the preferred course of action, and a substitute for more robust action. Thus, to bring the medical analogy to a close, instead of bringing in surgeons (troops) to excise the tumor of war and genocide, states bring in hospice workers (humanitarians) to keep people alive until the war ultimately kills them – the so-called well-fed dead.

As a result of the changing nature of conflict (Kaldor 2007), humanitarianism has become embedded within contemporary conflict (Mills 2005). The white Toyota Landcruisers of the IHO have become a representation of the international community's response to conflict – more evocative than the armored tank – taking humanitarians into a realm of high politics, which conflicts with their humane palliation (Mills 2006). As Barnett and Weiss (2008) argue,

> Humanitarianism has become institutionalized, internationalized, and prominent on the global agenda. It is an orienting feature of

> global social life that is used to justify, legitimate, and galvanize action.

Of the three responsibilities that are at the core of international responses to mass atrocities, humanitarianism has the most well defined set of principles and longest practice. Although it may have different interpretations and meanings, it is recognized and accepted as a good thing, an expression of our ultimate humanity. It is, in fact, recognized as a duty or responsibility of the international community.[4] This makes it a very powerful tool, not only for humanitarians themselves but also for other actors who may want to use it for purposes other than what its supporters and practitioners wish.

International criminal justice: The responsibility to prosecute

The modern international criminal justice regime, too, has its roots in the attempts from the mid-19th century onwards to regulate how war is fought. While perhaps only successful at the margins in limiting the death and destruction of war, international humanitarian law laid the groundwork for the criminalization of certain practices of war. The introduction of crimes into international law that are theoretically punishable on individuals changes the calculus of decision makers – both those waging war and those attempting to stop a war. However, its broader positive effects – including deterring individuals from undertaking certain outlawed activities – will likely be a long time coming. But, of three responsibilities laid out here, it is in some ways the most legalized and embedded within international law (Leonard and Roach 2009: 59–63), which has implications for its practice.

While there were previous instances of individuals being prosecuted for committing atrocities in war and violating the norms of the day (Ratner et al. 2009: 6), we must look to the aftermath of World War II and the Holocaust, and in particular the Nuremberg and Tokyo war crimes trials (Schiff 2008: 24–25; Ratner et al. 2009: 6), for the true roots of the international criminal justice regime and the evolving 'responsibility to prosecute.' The Nuremburg trials and the idea of 'never again' laid the foundation for the development of what has become the vast edifice of international human rights and humanitarian law. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948. Since then, genocide has become the über crime – the worst of all imaginable things one can do in war.

The 1949 Geneva Conventions represented a significant point in the history of the attempt to 'humanize' war. In addition to providing a basis for humanitarian action, it also further elaborated what states could and could not do during war and created a legal basis for individual responsibility for violations of the laws of war – war crimes – although the Cold War prevented institutionalization in the form of a war crimes court (Schabas 2011: 8–11). This changed in the 1990s when, in the aftermath of the Cold War, the international community was faced with a number of conflicts that seemed to defy adequate UN involvement to properly address and stop the conflict. The first of these situations was the conflict in the former Yugoslavia. The Genocide Convention and the 'never again' norm would conspire to put pressure on the UN, and especially Western states, to intervene militarily to stop the killing and protect those being targeted. It took three years for NATO to take robust military action, which eventually led to an end to the fighting (Power 2002: 391–441). Before that, however, the UN Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY) to try individuals from all sides in the conflict. It was the first time since the end of World War II that an international court had been set up to hold individuals accountable for crimes during war. It served to resurrect the principles of Nuremberg, and because it was created by the Security Council, it firmly put international criminal justice on the international agenda. Given that the court was set up to prosecute individuals who were involved in an ongoing conflict, the ICTY created problems for those attempting to bring the fighting to an end. Indeed, it created incentives to continue fighting rather than come to an accommodation to end the war. If the war ended, it might be more likely that those with outstanding arrest warrants might be arrested.

The next phase in the reinvigoration of the international criminal justice regime came in 1994, when the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR) in the wake of a genocide that killed 800,000 people. The UN utterly failed to prevent or stop the genocide. Nor did it adequately address the humanitarian crisis following the genocide when more than two million refugees fled to neighboring countries, setting the stage for an even bigger conflict in Zaire. However, the ICTR did allow some small measure of attention to be diverted from the failure of the international community to act. Yet, the very fact that there was a felt need to cover up the failure to respond illustrated the effect of the 'never again' norm, which would culminate in the responsibility to protect. Why try to cover up inaction unless

there was an expectation that the UN, the Security Council, states – somebody – should respond?

The International Criminal Court: Institutionalizing the responsibility to prosecute

In 1998 the pinnacle of the modern international criminal justice regime was created with the passing of the Rome Statute of the International Criminal Court. It came into existence in 2002 when the required number of states had ratified the statute. The creation of the ICC was, it seemed, a sign of the times – a culmination of post–Cold War democratization, expansion of global governance and global institutions, and widespread recognition, and implementation, of human rights standards. It was a partial implementation of the 'never again' norm which, until Bosnia and Rwanda, had lain dormant since the end of the Holocaust.[5]

The Rome Statute enshrines in international law individual criminal responsibility for genocide, crimes against humanity, war crimes, and aggression.[6] Further, it created responsibilities for states parties. They accept the jurisdiction of the Court (Art. 12), are required to arrest and surrender to the Court individuals for whom an arrest warrant has been issued (Art. 89), and must provide other cooperation the Court may request (Art. 93). And while the ICC is an independent entity, accountable to the States Parties, it also has a relationship with the UN Security Council, with the Security Council having the ability to refer situations to the ICC for investigation and to temporarily defer proceedings.

The ICC has had a somewhat rocky early history. None of the major global powers – the United States, Russia, or China – is a member. The United States was one of its early supporters, but turned against it during the George W. Bush administration. The United States softened its stance in 2005 when it allowed the UN Security Council to refer the situation in Darfur to the ICC, and has gradually further engaged with the court in the ensuing years. US wariness and opposition to the ICC has both domestic ideational and international *realpolitik* roots (Mills and Lott 2007), which have not been resolved, although the United States has become more open to the ICC during the Obama administration.

Although an expression of global support for human rights – which are frequently seen as in opposition to, or free from, politics – the ICC is intimately bound up in global politics. It was created through a global political process, it has ties to the most powerful global political body – the UN Security Council – and it touches on the most sensitive global political issues. It threatens presidents and prime ministers as well as

those lower down on the political food chain, as evidenced by the arrest warrants for President Omar al Bashir of Sudan and Muammar Gaddafi of Libya. It is embedded within contemporary conflict as those who are engaging in violent conflict and carrying out some of the world's worst atrocities are subject to being arrested and sent to The Hague, and it has been invoked as a conflict management tool with, it must be admitted, little degree of success in actually managing or bringing conflict to an end. One hope of its supporters is that it will deter leaders and individuals from initiating conflict and engaging in atrocities in the first place, although that hope seems far off. Although it is impossible to prove the negative, there is not a lot of evidence that the ICC has deterred individuals from doing unspeakable things. It will likely require a concerted record of numerous successful prosecutions before that hope might be realized. Further, the ICC is at the core of accusations of neocolonialism since all of the investigations and active cases are in the developing world while some of the most powerful countries in the world are exempted from its reach.

Indeed, all of the active cases the ICC is prosecuting are in Africa – Uganda, Democratic Republic of Congo, Central African Republic, Darfur, Kenya, Libya, and Côte d'Ivoire. Mali is also under investigation. Other potential situations for investigation include Afghanistan, Colombia, Georgia, Guinea, Honduras, Nigeria, the Republic of Korea, and Palestine, although these are only at the preliminary stages (United Nations General Assembly 2011: 3). It is the focus on Africa, however, which has raised the ire of many African leaders, raising accusations of neocolonialism and calling into question the support of some African countries for the ICC (Mills 2012).

The international criminal justice problematique

The world thus has a functioning, if still developing, institution to try individuals accused of committing the worst atrocities. Criminal justice is, by its very nature, *retrospective*, but the ICC is embedded within contemporary global political realities and has been called to perform a *prospective* function – deterrence. It has also been deployed in the midst of conflict to perform a conflict *management* role – induce leaders to stop their atrocities or force them to step down. All three of these functions are highly problematic. It cannot deter until there is enough evidence to convince potential war criminals that there is a high likelihood that they will eventually get caught and be taken to The Hague to stand trial. The 16 years it took to capture Ratko Mladic and bring him before the ICTY is unlikely to give an al Bashir or Gaddafi pause.

The conflict management role is problematic at least partially because issuing an arrest warrant for a president or a general in the midst of an ongoing conflict is just as likely to create an incentive to continue fighting as it is to induce them to stop. If one sees only the possibility of being arrested once a conflict ends, it is not likely that a president or a general would just give up and end the conflict. The Security Council might use an ICC arrest warrant as a bargaining chip, but even if this was done in good faith by the Security Council, it does not control the ICC. It can temporarily suspend proceedings for up to a year – indefinitely renewable – but it cannot permanently end an investigation or withdraw an arrest warrant – only the ICC can do that. And given the varying global political agendas of members of the Security Council, there is no guarantee that it would vote to suspend proceedings – a leader would do well not to base his or her future on the vagaries of global political will and expediency. Further, declaring an individual a war criminal and then withdrawing an arrest warrant does little to further the global human rights project embodied in the ICC. It would undermine the potential deterrent aspect of the ICC and signal that the ICC was nothing more than a global political tool of the great powers, having little to do with protecting human rights.

Finally, its retrospective nature, while laudable and a significant incarnation of the global human rights project, is rendered problematic as it may interfere with domestic peace efforts. Such concerns arise in Uganda where the government has instituted an amnesty law to induce members of the Lord's Resistance Army (LRA) to leave the LRA and be re-integrated into society.

Invoking the ICC may seem like a rational choice for members of the Security Council who are attempting to manage a conflict. It provides further evidence to a world demanding action that it is addressing a situation when humanitarianism, inevitably, fails to end a conflict – or even keep it off the front page of major newspapers. Unfortunately, there is little evidence at this point that the ICC can address a situation any better than humanitarianism.

International criminal justice, as embodied in the ICC and other institutions, is the most legalized and legally recognized of the three responsibilities, which makes it in some ways the safest legally – and morally – to invoke. Yet, since international law itself is a highly political realm, it should come as no surprise that the ICC can become highly embedded within global and domestic political processes, raising questions about how and when the ICC is – and should be – invoked. The failure of the UN Security Council to refer the situation in Syria to the

ICC, even in the face of clear and ongoing atrocities, demonstrates the varying support for international criminal justice.

The responsibility to protect

The most recently recognized responsibility, but the one which also provides the conceptual justification for the prior responsibilities *qua* responsibilities, is firmly embedded within, but also challenges, the contemporary state system. By labeling it a responsibility, the international community recognizes changes in the relationship between state sovereignty and human rights while also taking on board the necessity of international action at times. However, the responsibility to protect (R2P) comes with many caveats, and its status as international law is less than certain. R2P is frequently equated with humanitarian intervention, a concept also with uncertain legal qualities and which is frequently deployed by critics to imply neocolonialism. The concept as originally put forth under its current name goes far beyond humanitarian intervention. Yet, it is precisely the interventionary aspects that are most salient in many situations, and are also the most unique from a normative perspective. Prevention may also come under the heading of R2P, and is important in managing crises or potential crises. Stopping mass atrocities before they begin is obviously better than trying to stop them after they begin and contain the damage. But once a crisis gets to a point where atrocities are occurring or are imminent, the potential tools and logics of action change. The issue, as with the other two responsibilities, is of response to an ongoing situation when prevention has failed (or not even been attempted).

There is not space here to review the historical development of the doctrine and practice of humanitarian intervention.[7] Suffice it to say, however, that it was not until after the Cold War that the conditions were ripe for its further development into international practice. The post–Cold War world of the 1990s brought about conceptual and practical challenges to understandings of sovereignty and non-intervention. A raft of 'new wars' (Kaldor 2007) erupted in the aftermath of the Cold War as the Soviet Union fell apart and developing states lost their patrons, and the international community through the UN and other bodies undertook interventions to address conflicts, including the human rights dimensions. Human rights and humanitarian concerns were cited as threats to international peace and security, thus initiating an ideational change in Security Council practice (Mills 1998b), even if the interventions were not always successful. The failure to protect

civilians in Bosnia and the deaths of 800,000 in Rwanda called into question the interest and ability of the international community to address complex humanitarian emergencies. The intervention in Kosovo in 1999 seemed to indicate renewed interest on the part of the West to intervene for human rights, but also highlighted many dilemmas, the most important being that it was done without Security Council approval.

Recognizing responsibilities

During the 1990s, and in the context of changing ideas about human rights and the above-mentioned interventions (or non-interventions), a number of authors addressed the balance between sovereignty and human rights, treating sovereignty as a function of human rights (Weiss and Chopra 1992; Deng 1996; Mills 1998a; Annan 1999). They argued that rather than being in opposition, human rights were constitutive of state sovereignty. If a government abused its people, it could lose legitimacy and the state might lose its immunity to intervention. Further, there was discussion about whether there was a right or a duty to intervene, and under what conditions. The developing norm of a right and, indeed, a duty to intervene to protect gross violations of human rights was given voice in 2001 by the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS 2001) in a report entitled *The Responsibility to Protect*. It recognized a shift in the human rights versus state sovereignty discourse by arguing that claims to sovereignty entailed responsibilities. It also moved the debate away from discussing a right to intervene to a responsibility to protect those who might be threatened by gross violations of human rights or humanitarian crises. The ICISS noted three main responsibilities: the responsibility to prevent genocide and other humanitarian catastrophes, the responsibility to react when such situations occur, and the responsibility to rebuild after a complex humanitarian emergency has ended.

This norm was endorsed by the UN Secretary-General's High-level Panel on Threats, Challenges and Change (2004), and the UN-Secretary General, Kofi Annan, highlighted and affirmed this developing norm intended to set the agenda for the 2005 World Summit (Annan 2005). He also called on the Security Council to develop principles for the use of force. The 2005 World Summit Outcome document stated that the international community has a responsibility to address widespread gross violations of human rights, even if it means using force. However, the World Summit endorsed a somewhat different and watered down

version of the ICISS proposal (United Nations General Assembly 2005). Further, neither included in any substantial way the previously mentioned responsibility to prosecute. The norm has been more forcefully recognized by the African Union in its Constitutive Act, Article 4(h) of which states the following principle: 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.' While there is ongoing rhetoric in Africa regarding the neocolonial character of humanitarian intervention, and much debate about the proper balance between human rights and sovereignty, this was still a stunning reversal – three years before the World Summit – of the unflinching support for absolute sovereignty and non-intervention, and indicates continuing global normative development.

While the original conception of R2P as put forth by the ICISS, and partly endorsed by the World Summit, was very wide-ranging, and while all three elements of the responsibility to protect identified by the ICISS – prevention, reaction, and rebuilding – are important, if one is interested in effective, long-term protection of people caught in complex humanitarian emergencies, the potentially most important element is the commitment to use Chapter VII enforcement mechanisms. This is because in some situations this may be the only way to protect people from being slaughtered. Further, it is a significant, if still somewhat ambiguous, affirmation of evolving normative and practical developments away from strict adherence to sovereignty. This is not to say that such actions may be appropriate in all instances, or that there may not be genuine disagreement about the relevant course of action. And, it certainly does not mean that such tools will be used in all, or even many, situations where large number of people are being killed. Indeed, as we have seen, there are two other main responses the international community uses, which are conceptually distinct from military intervention, are possibly less effective, and may actually impede the use of more effective measures.

Complementary or conflicting responsibilities?

I have outlined above the main human rights and humanitarian tools and concepts the international community has to respond to mass atrocities and associated humanitarian crises. They all in one sense derive from the conceptual and practical developments in the human rights regime over perhaps the last 150 years, but in particular the last 60 years. They all have the same goal – to protect lives. One might

assume, then, that they are mutually supporting. That is, the implementation of one would support the implementation of another. As we will see, however, this is not necessarily the case. Indeed, applying one or more of these responses may, in fact, conflict with, or undermine, other responses. Further, having recourse to one may provide an excuse to diplomats and policy makers not to implement another response that may be more effective. In this section, I will briefly outline some of the conundrums faced by practitioners and advocates of these approaches (see Table 11.1).

Humanitarianism, even in its most basic palliative form, can save lives. There is no question of this, even though, as we have seen, it may not be enough. Humanitarianism cannot end the conflicts that lead

Table 11.1 Responsibility conundrums

	Protectors	**Prosecutors**	**Palliators**
Protection	+ protect people + end fighting – civilian casualties – create incentive to prolong conflict	+ deter abuses – reduce prospects of humanitarian intervention	+ protect palliative efforts + highlight abuses – create illusion of protection – contribute to continuation of conflict
Prosecution	+ increase pressure to surrender – undermine efforts to apprehend	+ punish perpetrators + uphold idea of human rights/ rule of law – undermine peace processes – prolong conflict – use as weapon	+ support human rights – endanger humanitarian activities
Palliation	+ support humanitarian assistance – endanger humanitarian assistance	+ protect humanitarians – endanger humanitarian assistance	+ keep people alive – well-fed dead

to atrocities. This requires political action. Nor can humanitarianism save lives in all circumstances – particularly when parties to a conflict have as their goal – or significant tactic – to kill civilians or drive them out of their territory. Yet, the presence of humanitarians on the ground can give the illusion of adequate response when, in fact, the response is far from adequate. More robust action may be required, but the mere presence of humanitarians may reduce pressure on states to act. Thus, palliation reduces the prospects for protection. However, with rights-based humanitarianism, humanitarian actors themselves may be highlighting human rights abuses and calling for further action. This can put pressure on states to take further action, but it can also make their positions as humanitarian actors more precarious. They may either be targeted by parties to the conflict or kicked out of the country by the government, thus reducing or eliminating their ability to provide food and other resources to victims of conflict. As a result, people may die of malnutrition or lack of medical care. The question thus becomes whether the greater good of a possible (if unlikely) humanitarian intervention to stop a conflict or more robustly protect civilians from attack is outweighed by the almost certain death of more people because of a lack of humanitarian assistance. This is a rather difficult decision to make, since you may be condemning people who are in your care to death in the faint hope that more lives will be saved in the end. Most NGOs, because of their innate humanitarian ethos and mission, will choose to stay, although on certain occasions they inferred that they were doing more harm than good, thus violating the 'do no harm' principle outlined above. UNHCR attempted to suspend its activities in Bosnia for this reason, but was prevented from doing so. NGOs will also sometimes pull out because the situation is too dangerous. There is thus a negative symbiotic relationship between palliation and protection (notwithstanding humanitarian claims to protection). Palliation saves lives, but it is also significantly limited in what it can actually achieve in protecting people from violence (Dubois 2009; Ferris 2011). It can, at times, contribute to the continuation of a conflict, and it also provides a smokescreen for states who do not want to intervene. Calling for intervention might bring further long-term protection, although that is far from certain; it is more likely to reduce the humanitarian assistance available to victims of conflict.

Prosecution can punish people for their crimes. However, inserting prosecution into the middle of a conflict can have unforeseen

consequences and require difficult trade-offs. The most obvious, as mentioned above, is that potential prosecution can have an impact on peace negotiations, with the very unhumanitarian impact of prolonging the conflict. Combatants with arrest warrants against them may be less likely to come to an accommodation, knowing what possible fate might await them. Such international action might also interfere with domestic efforts to institute amnesty laws, which might contribute to peace processes and post-conflict reconciliation. States that have become a party to the ICC no longer have complete autonomy in their domestic criminal affairs. At the same time, they may try to use the ICC for their own domestic purposes as a weapon in the conflict.

Further, however, the ICC poses difficult questions and danger for both palliators and protectors. For palliators, who may have significant information which could be of use to prosecutors, they are posed with the same question vis-à-vis intervention. Do they release the information, exposing the crimes, or pass it on to the prosecutors, thus helping to ensure that perpetrators face justice – an outcome that pretty much all palliators would support[8] – or do they keep silent? The former action might further one *human rights* goal, but it could also imperil their activities, as they are branded as informers and targeted or kicked out of the country, thus undermining their *humanitarian* mission. Most IHOs will follow the latter course of action for this reason, although they may quietly pass information to human rights organizations, which can thus use it for their advocacy activities. This creates a division of labor, which could have positive outcomes – the information gets out, while humanitarian organizations are not recognized as the source of the information.

In addition, ICC action might negatively affect humanitarians, even when they have no connection to the action. They can be tarred with the same brush as *human rights* actors. Some parties to a conflict might see them as all part of the group of *internationals*, and blame *humanitarians* for the actions of their *human rights* brethren, thus imperiling their actions. More generally, with the development of individual criminal responsibility, combatants have an interest in ensuring that there are no witnesses to their atrocities, including humanitarians, and thus may want to deny them access to protect themselves (Dachy 2004: 318). The ICRC has been granted a specific exemption from being called to provide evidence in the Rome Statute (Rona 2002), although NGOs have not. During the Rome Statute preparatory meetings, Médecins sans Frontièrs (MSF) specifically did not request such an exemption, seeing

such action as part of its *témoignage*. At the same time, it did not want to be one of 'informal auxiliaries to the justice process' where it participated in a formal evidence-gathering function (leaving that, instead, to human rights NGOs) (Dachy 2004: 322–323). Or, they can be used as pawns in other ways; when Sudanese President Omar al-Bashir had an arrest warrant issued against him by the ICC, 13 international humanitarian NGOs were kicked out of the country. Although attempts were made to connect them to the ICC, it was, as much as anything, a show of force. The palliators were used as a tool to make a point to the prosecutors and interveners.

Also, as with palliation, prosecution can create an excuse not to intervene and protect. It is one more action that can demonstrate that states are doing 'something' while not necessarily taking the action required to protect people and stop fighting. While this should certainly not deter the prosecutors from doing their jobs, the mere fact of the existence of the ICC and other international criminal justice mechanisms can contribute to a more complex global geopolitical context in which decisions on how to respond to mass atrocities are taken. Although, in some cases, such as Syria, which lies at the heart of extremely complicated global geopolitical dynamics and which engages directly with conflicting great power interests, there is no appetite for even the ICC.

Finally, to come full circle, R2P protection activities can have multiple possible outcomes, which may have positive or negative consequences for humanitarianism and human rights. A military intervention might end the fighting, which in turn creates space for a political settlement and end to the killing. We have seen precious few of these cases. It might provide a presence, for a time, which has a significant protective effect. These situations are slightly more numerous, but the issue always becomes the will to continue the action, particularly if the interveners take increasing numbers of casualties.[9] The intervention might also provide space for the humanitarians to do their job and deliver humanitarian assistance. These are all possible positive effects. But an intervention might have negative consequences. It might imperil the humanitarian mission. This has certainly been a concern in Darfur. It might create incentives for certain parties, in particular rebel groups, to become more intransigent or otherwise encourage them, thus prolonging a conflict (Kuperman 2005; Belloni 2006). Again, this has been a concern in Darfur, was a dilemma for allied forces in Libya,[10] and has likely been a factor in Syria. It can also lead to civilian casualties. Humanitarians thus need to keep this in mind when advocating for intervention.

Conclusion

We thus have a very complicated relationship between these three sets of responsibilities and associated practices. The choices made by decision-makers and actors on the ground are difficult and complex. While the three responsibilities – protection, prosecution, and palliation – all come from the same broad human rights and humanitarian project, their efficacy and eventual impacts are such that they are not necessarily mutually reinforcing. Rather, they may at times undermine each other – either intentionally or unintentionally.

Further, the question of how best to protect those affected by mass atrocity situations and associated humanitarian crises is difficult to answer. Palliation saves lives; yet, in the most extreme circumstances it cannot protect individuals from government troops, warlords, paramilitaries, or rebel forces. Prosecution punishes criminals; yet it can also make peace negotiations more difficult. And, absent evidence of a significant deterrent effect, it cannot be claimed to protect people in harm's way. Robust R2P activities can physically protect people, but it can also endanger them. There is also little appetite on the part of those who could protect to actually do so in most situations. It is thus a very unsure route to protection. All three of these responsibilities have a role to play in assisting and protecting those affected by widespread violent conflict and human rights abuses. The issue comes down to political will to choose and implement the most appropriate response(s). This will is in little evidence in too many situations.

Notes

1. This chapter is adapted from Kurt Mills (2013) 'R2P^3: Protecting, Prosecuting or Palliating in Mass Atrocity Situations?' *Journal of Human Rights* 12, 333–356. Reprinted by permission of the publisher (Taylor & Francis Ltd., http://www.tandfonline.com).
2. For a more in-depth discussion of the convergent and divergent roots of human rights and humanitarianism, see Ashby and Brown (2009).
3. Berry (1997) argues that the ICRC actually works to undermine the institution of war itself, although Forsythe (2005) denies that there is any evidence of such a policy on the part of the ICRC.
4. The French government asserts that 'emergency humanitarian aid is a new duty incumbent upon the international community . . . . It obeys the principle that it is a moral duty to help civilians in distress wherever they may be.' Cited in Barnett and Snyder (2008).
5. For more on the creation of the ICC, see Schiff (2008), Schabas (2011), Leonard (2005), and Roach (2009).

6. While the crime of aggression was included in the Rome Statute, the Court's jurisdiction was suspended until the States Parties agreed to a definition and the scope of application of the crime. The States Parties agreed to a definition at the Review Conference of the Rome Statute in June 2010, but it actual application has been suspended until at least 2017 (International Criminal Court 2010).
7. For an overview, see Mills and O'Driscoll (2010). See also Bass (2008) and Weiss (2007).
8. Some of the biggest supporters of the ICC were humanitarian organizations.
9. As was the case with the United States in Somalia, or Belgium in Rwanda.
10. Although the goal for the allied forces became the overthrow of the regime by the rebels. Mission creep thus also becomes a concern.

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12

Grappling with Double Manifest Failure: R2P and the Civilian Protection Conundrum[1]

Melissa T. Labonte

Introduction

Civilian protection is a vexing issue facing humanitarian practitioners and policy makers, particularly in settings where host states engage in or allow mass atrocity crimes to be perpetrated against their populations.[2] International humanitarian law asserts a defense of the legal status and rights of civilians in situations of armed conflict. Individuals not actively involved in hostilities either by laying down their arms or owing to civilian status, sickness, injury, or detention shall be treated humanely in all circumstances, without 'adverse distinction,' and be protected from violence to life and person; hostage-taking; outrages upon personal dignity; and extrajudicial procedures or summary executions.[3] International human rights law complements these provisions, emphasizing that host states bear a primary responsibility to protect their populations from violations of a wide range of universal rights, including crimes such as genocide, war crimes, ethnic cleansing, and crimes against humanity (UNGA 2009: para. 3).

The Responsibility to Protect (R2P) reaffirms these principles and stipulates that the international community holds a secondary responsibility to use peaceful, diplomatic, and humanitarian means to protect populations from mass atrocity crimes. Where such measures prove inadequate and national authorities manifestly fail to uphold their primary responsibility, the international community should be prepared to take collective action, in a timely and decisive manner, through the Security Council (UNGA 2005: paras. 138–139). R2P has been touted both as a catalyst for generating political will (Stamnes 2009) and a

framework to 'actually change the behavior of key policy actors' (Evans 2008: 42), in part because it is predicated on preventive measures and capacity-building, and accords central importance to civilian protection through graduated response.

Realizing civilian protection, however, has proved troublesome in a number of settings, rendering humanitarian access and civilian protection conspicuous by their absence and leaving populations vulnerable to the very crimes R2P should prevent and/or halt. This disjuncture carries important normative, legal, and political implications for the international political community's ability to hold perpetrators accountable and counter cultures of impunity.[4] It also affects efforts to foster cultures of protection, denigrates established tenets of international humanitarian law, and may erode the aspirational appeal of R2P, particularly where national authorities impede other duty-holders from attempting protection activities.

Such cases also represent a cautionary tale for the international humanitarian community.[5] While normatively ambitious, R2P in practice remains highly politicized and uneven (Marks and Cooper 2010; Labonte 2013). In many mass atrocity crises, *both* host states and the international community have failed to marshal the necessary political will to protect civilians. In such *double manifest failure* situations, the actors to whom a disproportionate civilian protection responsibility is most likely to fall are humanitarian actors.

While not all humanitarian actors engage in protection activities, many increasingly do (O'Callaghan and Pantuliano 2007; DuBois 2010). Whereas their capacity to protect civilians varies tremendously in most response environments, it is severely constrained in these types of cases. Indeed, the operational landscape of civilian protection is highly contingent upon the very factors that are missing in double manifest failure settings: consent of the host state and support of the international community. Moreover, the type of protection vulnerable groups urgently need in mass atrocity settings, ensuring physical safety via threat reduction, is precisely the one thing most humanitarian actors are ill-equipped to provide (Bonwick 2006: 274). This raises a series of questions about how humanitarian actors can or should fulfill *tertiary* civilian protection responsibilities under R2P, which is the focus of this chapter.

Civilian protection and R2P: A tale of two communities

The protected status of civilians in armed conflict is a well-established concept that predates the emergence of the UN's protection of civilians

(POC) agenda and adoption of R2P. During the early 1990s, humanitarian actors grew steadily aware of the urgent protection needs of civilians in armed conflict. Many questioned the intrinsic value of relief and assistance in settings where the full spectrum of universal rights were being trampled by belligerents. This was particularly true in light of the calamitous outcomes experienced by humanitarian actors in places like Rwanda and Srebrenica. From that soul-searching, a plethora of humanitarian codes of conduct were developed (Red Cross Code 1994; Sphere 1997; 2004; 2011; People in Aid 1997; 2003), along with the collection and dissemination of best practices to improve civilian protection and coordination (ICRC 2009; UNHCR 2010; InterAction Protection Working Group 2005).

The evolution of the POC agenda within the international political community shares some roots with the emergence of civilian protection within the broader international humanitarian community, but has since diverged in a number of important ways. Civilian protection became a priority in the late 1990s as the international political community revisited its own failures earlier in the decade and embarked on a series of multilateral initiatives designed to realize civilian protection in all its forms. The POC agenda now centers on five core challenges, including compliance by parties to conflict with international law; compliance by non-state armed groups with international law; protection through more effective and better resourced United Nations peacekeeping and other missions; enhancing humanitarian access; and accountability for violations (UNSC 2009a; 2010). Civilian protection also features within the UN's Cluster Approach for humanitarian response at both the global and country levels.

While no universally agreed upon definition of the term exits, the international humanitarian community considers civilian protection as including activities designed to achieve full respect for individual human rights in accordance with the letter and spirit of international human rights law, humanitarian law, and refugee law (ICRC 1999). Premised on the 'egg framework,'[6] this broad conception of civilian protection has had mixed effects on the international humanitarian and political communities. It has facilitated considerable expansion in the range of actors engaged in protection, something the complexity of humanitarian operating environments demands. Yet it has also impeded coordination, particularly at field level. Many but certainly not all civilian protection activities carried out by humanitarian actors align closely to assistance designed to mitigate risk and reduce vulnerabilities; monitoring and reporting; and advocacy (OCHA/IRIN 2003; Bonwick 2006). However, as more humanitarian organizations embrace

protection without seriously scrutinizing their ability to overcome the so-called 'protection gap,' difficulties have arisen in enforcing accountability through collective political or legal response among actors perpetuating protection crises.

The international political community's definition of civilian protection focuses mainly on armed conflict situations but encompasses a wider repertoire of protection activities, many of which can be implemented *only* by states or intergovernmental bodies. It includes mechanisms to protect civilians from the effects of armed conflict, including the immediate goal of minimizing civilian casualties as well as longer-term goals including promoting the rule of law and security (OCHA 2004: 26). These separate but related approaches to civilian protection reflect the different goals of the international humanitarian and political communities.

In armed conflict situations, operationalizing the POC agenda has become highly relevant to the Security Council, and its activities overlap in a number of ways with the egg framework. The Council has collaborated with UN system actors in the development of policy frameworks to achieve protection goals related to environment-building by transforming the 'security, political, and legal environment' in which humanitarian and other actors carry out their work (UNSC 2007b: 2–3; UNSC 2009a; UNSC 2010). Its work also includes responsive protection activities, including ensuring physical security by facilitating humanitarian access; fulfilling basic human needs; disarmament, demobilization, rehabilitation, and reintegration of combatants; mine action; and small arms and light weapons regulation. Remedial civilian protection objectives include fostering accountability and compliance with rule of law; security sector reform; mitigating gender-based violence; and transitional justice. Like the international humanitarian community, the international political community has commissioned multiple works designed to distill and disseminate best practices in the field (IASC 2002; GPCWG 2010; OCHA 2011).[7]

Similarly, in 2006 the Council agreed that armed conflict situations involving the deliberate targeting of civilians and systematic violations of international human rights and humanitarian law could constitute threats to international peace and security.[8] It has issued Presidential Statements and resolutions addressing the protection of vulnerable groups, journalists, and UN staff and humanitarian workers[9] In 2009, the Security Council Expert Group on the Protection of Civilians was convened for the first time.[10] And, since 2000, civilian protection norms

have been codified in the mandates of all multilateral peacekeeping operations.[11]

Alongside these efforts, UN Member States in 2005 endorsed the Responsibility to Protect, affirming the principle that they each bear a primary and enduring responsibility to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity (UNGA 2005: para. 138). Member States also committed to assisting each other to fulfill this responsibility. Where states manifestly fail in upholding their primary responsibility, the international community agreed to stand prepared to fulfill its residual, secondary responsibility to protect (UNGA 2005: para. 139), through the Security Council and in accordance with UN Charter principles. Such measures include preventive diplomacy, confidence-building measures, humanitarian assistance, and targeted financial and economic sanctions, as well as military intervention for civilian protection purposes.

While states are the primary and secondary responsibility-bearers under R2P for civilian protection, humanitarian actors have also been hailed as vital implementing partners (Evans 2008: 198). Yet the manifold challenges facing humanitarian actors, in settings where national authorities actively impede civilian protection efforts and/or where the international community's efforts to protect are inadequate or failing, remain under-analyzed given their policy importance. Gaps remain between the expectations deriving from the POC agenda and the capacity of humanitarian actors to deliver on them. The civilian protection frameworks developed by the international humanitarian community are unlikely to meet acute protection needs and may, in fact, put civilians at greater risk by destroying coping mechanisms or exacerbating vulnerabilities.

Exploring manifest failure under R2P

A key factor in triggering the international community's secondary responsibility under R2P is making an *a priori* determination that national authorities have manifestly failed in upholding their primary responsibility to protect their populations from mass atrocities. The principal arbiter of manifest failure is the Security Council, which is authorized under Article 39 to determine threats to or breaches of international peace and security. This complementarity arrangement does little, however, to resolve the dilemmas inherent in determining or measuring the scope and parameters of what, exactly manifest failure is. Subject as they are to politicization, such processes can strengthen

'domestic ownership' of an R2P case by interested stakeholders or obstruct the business of managing international peace and security (Stahn 2007: 117).

Research on the concept of manifest failure is relatively new, even within the burgeoning literature that exists on R2P itself. Two recent contributions (Rosenberg 2009; Glanville 2010) stand out in terms of their focus on key lines of inquiry, including how, exactly, manifest failure should or can be identified and which authorities are legitimate arbiters of it. I review these works briefly and build on that discussion by introducing the concept of double manifest failure to explore its impact on civilian protection by humanitarian actors.

R2P, national authorities, and the international community

Recent research suggests that manifest failure can be primarily and reasonably determined through international legal frameworks, including humanitarian and human rights law, but also the emerging law of prevention (Rosenberg 2009: 447). This trend is reflected in the practice of international commissions of inquiry and panels of experts established to help determine whether and to what degree conflict parties are complicit in or directly responsible for the perpetration of mass atrocities, and whether they have failed to protect civilians from these transgressions.[12] The formula used includes reviewing evidence and documenting crimes or alleged crimes that constitute grave breaches of international human rights and/or humanitarian law, and applying requisite legal standards to determine the nature and scope of actual or possible breaches. Assignment of responsibility is made in accordance with findings of law as well as legal principles such as due diligence (Rosenberg 2009: 453–454; 470). Conclusions are offered concerning whether the national authorities or other groups violated their civilian protection obligations under international human rights and humanitarian law.

As thorny as it may be to determine state manifest failure, judging whether and to what degree the international community's secondary responsibility under R2P has been fulfilled is thornier still. During the World Summit negotiations, the United States opposed conflating the nature of a host state's responsibilities to protect with those of the international community (Bolton 2005). The resulting language on R2P thus identified different levels of responsibility that would be bridged through the concept of manifest failure. Yet while the assignment of a secondary protection responsibility is perhaps R2P's most innovative element, the World Summit Outcome Document language does not suggest how to realize and/or fulfill it.

International legal judgments rendered in mass atrocity cases predating R2P may, however, serve as precedents in determining the nature and scope of the international community's obligations. For example, justices in the 2007 International Court of Justice decision concerning claims of genocide by Bosnia and Herzegovina against Serbia and Montenegro (ICJ 2007) found Serbia not guilty of committing genocide, but determined that it had failed to uphold its responsibility to prevent genocide under Article I of the Genocide Convention. In other words, while Serbia had not committed an international crime per se, it had breached an international obligation. Such judgments could have far-reaching effects on institutionalizing the legal strength of R2P. States are obligated under international human rights law to prevent acts they likewise seek to prohibit (Rosenberg 2009). Because the crime of genocide violates a peremptory norm (triggering universal jurisdiction), legal logic stipulates that congruent obligations and a legal basis for robust response by states could possibly apply to similar peremptory norms, including grave breaches of crimes against humanity and war crimes (Heinze 2004). In relation to this, under Articles 40 and 41(1) of the International Legal Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts* (UNGA 2001; ILC 2008), states have a 'tentative' positive obligation to cooperate and coordinate responses to halt grave breaches of international legal norms. These include violations of peremptory or *jus cogens* norms such as the crime of genocide, and grave breaches of war crimes and crimes against humanity (Rosenberg 2009: 471).

However, no 'substantive rule' of international law exists obliging states to act extraterritorially to prevent other states from committing mass atrocity crimes (Rosenberg 2009: 461, 474–476). Moreover, the accountability or redress measures vested in international legal frameworks apply to individual states (and in some cases, individuals) rather than the international community as a collective actor (Stahn 2007: 117–118). Not surprisingly, these factors shape how the Security Council approaches its secondary responsibility to protect in recent mass atrocity cases.

R2P and the Security Council

R2P is not, as some have claimed, a fundamental truth (Bellamy 2009: 6). Rather, it is a declaratory, normative statement crafted well within political boundaries and constraints of the current international system (Chandler 2009: 27). From this perspective, the Council has a

right to take action in response to R2P cases. However, unless Council members agree voluntarily to accept specific duties and obligations related to their secondary responsibility, their approach to implementing this aspect of R2P is likely to remain inconsistent and selective, despite vocal criticism.[13] Moreover, and because enacting its secondary responsibility constitutes an imperfect duty, it does not 'belong' to any specific actor in the international system (Pattison 2010: 10). The duty is 'imperfect' because while it embodies the ethics of virtue (protecting universal rights of civilians), it is one of wide obligation, and permits flexibility in compliance (UNGA 2009: paras. 49–66).

Security Council fulfillment of its secondary responsibility under Pillar three of the Secretary-General's 2009 proposed R2P implementation strategy reflects this reality. It has taken three main approaches: permissive, conservative, and satisficing (Table 12.1). Each is discussed below. The conservative and satisficing approaches appear to create a new dilemma under R2P, namely that of double manifest failure. Double manifest failure occurs when national authorities *and* the international community fail to uphold their respective responsibilities to protect civilians from mass atrocity crimes in line with the POC agenda. In such scenarios, humanitarian actors engaging in civilian protection are left to fill a critical gap they cannot sufficiently remedy and to shoulder a responsibility they cannot possibly fulfill.

Permissive approach

By adopting a permissive approach in discharging its secondary responsibility under R2P, the Council could well build justificatory support for timely and decisive action in mass atrocity cases. However, this may spur criticism that R2P masks a new form of interventionism by the strong against the weak. Under this approach, Council members set the bar quite low in determining manifest failure, and take the requisite actions to deliver effective civilian protection in a timely and decisive manner to stem mass atrocities. This approach may be more likely where national authorities are 'determined to commit' mass atrocities, rendering other R2P assistance measures moot (UNGA 2009: para. 29). Security Council responses would be guided by Pillar three of the Secretary-General's implementation strategy (UNGA 2009: paras. 49–66) and in particularly urgent cases where mass atrocities are imminent, would avoid 'following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results' (UNGA 2009: para. 50).

To date, this approach has only been realized in the 2011 case of Libya. Within a span of some three weeks, the Council determined that

Table 12.1 Security Council approaches to gauging manifest failure

	Permissive	**Conservative**	**Satisficing**
Manifest failure threshold	Low	High	High
Nature of the response	• Early, tailored, graduated, flexible • Congruent with Charter provisions • Modified as civilian protection needs are (re)assessed and in light of effectiveness	• Extreme caution, hesitance • Strict interpretation of Charter provisions • Reassessment rare and conditioned on changes in Council member material interests	• Constrained by what is adequate rather than fashioned by what is needed to be effective • Reassessment made according to what is possible at a given moment
Factors or resources guiding the response	• Full range of Pillar three response options • Findings of international commissions of inquiry, special envoys, and/or special rapporteurs • Special Adviser to the S-G on the Prevention of Genocide and the Security Council Expert Group on the Protection of Civilians • Regional or sub-regional organizations • National authority response to Council outreach • *Aide Memoire*	• National interests of key Council members and/or their close allies • Regional or sub-regional organizations	• Pillar three response options may apply, but only if prejudged to be possible under the limits of existing political and financial resources and commitments • Findings of international commissions of inquiry, special envoys, and/or special rapporteurs • Special Adviser to the S-G on the Prevention of Genocide and the Security Council Expert Group on the Protection of Civilians • Regional or sub-regional organizations

Table 12.1 (Continued)

	Permissive	**Conservative**	**Satisficing**
Range of possible responses	• Fact-finding or investigatory measures • Diplomatic measures clearly communicating unacceptability of host state behavior • Diplomatic sanctions • Bar host state nationals from serving in leadership posts of intergovernmental bodies • Actively seek robust measures when quiet diplomacy fails or is used as a delaying tactic • Targeted sanctions (financial, travel, luxury items, arms), sufficiently enforced • Collective action	• Crisis framed as domestic/internal • Emphasis on host state responsibility/ accountability • *Post-hoc* actions as crisis abates or ends • Support national civilian protection responses without requisite follow-up to ensure effectiveness • Willful disregard of substantive evidence of mass atrocities directly linking perpetrators and victims	• Fact-finding or investigatory measures • Diplomatic measures communicating unacceptability of host state behavior but with little follow-through • Minimum diplomatic sanctions • Consider barring host state nationals from serving in leadership posts of intergovernmental bodies • Avoid seeking robust measures if they pose high risks or costs • Targeted sanctions (financial, travel, luxury items, arms), insufficiently enforcement
Working methods of the Council	• Mutual understanding reached concerning veto use • Cooperation to prevent/halt mass atrocities congruent with international legal standards and obligations	• Council members use veto threat in keeping with national interests • Contestation among Council members concerning fulfillment of international obligations	• Council members may use veto threat in keeping with national interests • Limited cooperation among Council members concerning fulfillment of international obligations

Libyan authorities had failed to protect civilians from mass atrocities, and that large-scale massacres were imminent (BBC 2011). It implemented successive measures ranging from quiet to loud diplomacy, targeted financial sanctions, a travel ban and arms embargo (UNSC 2011b), and authorized the North Atlantic Treaty Organization to establish and enforce a no-fly zone in Libya (UNSC 2011a). The approach appears to have been effective in delivering on civilian protection as envisioned by R2P and as stipulated in the POC agenda. The state's capacity to perpetrate mass atrocities was steadily eroded between March and September 2011, when the Gaddafi regime abandoned the capital. While critics of the invasion point to ulterior motives on the part of some Council members, it is difficult to argue that lives were not saved by the actions taken under R2P in this case (Pattison 2011; Weiss 2011).

Conservative approach

Taking a conservative approach can lead to a range of outcomes, none of which holds promise in delivering effective civilian protection. A central element in this approach, therefore, involves raising the standards for gauging manifest failure so high that they are never reached, thereby lowering pressure on the Council to act. This could include classifying mass atrocity violence as an internal rather than an international matter – precluding Council consideration and providing states with political cover for inaction. Similarly, ignoring the additive effects of mass atrocities also characterizes this approach. The political imperative for caution trumps urgent and effective action, and broader considerations of geopolitics dictate the parameters of Council consideration.

The Council has adopted the conservative approach in a number of R2P cases, including during the final months of the Sri Lankan civil war (and at the time of this writing, Syria). Even amid incontrovertible evidence that national authorities knowingly committed war crimes and crimes against humanity (OCHA 2009), the Council manifestly failed to take timely and decisive action under R2P. The Colombo government reassured Council members that it was fighting an internal war of terror, not perpetrating atrocities (UNEOSG 2011). Despite being briefed several times by then OCHA head, John Holmes, the Council only issued a press statement (UNSC 2009b) and held not a single official meeting on Sri Lanka as tens of thousands of civilians were killed by indiscriminate aerial bombardment and shelling across a series of 'no-fire' zones.

The government also provided a convenient cover for inaction, insisting that it was adhering strictly to a 'zero civilian casualty' policy in

battling the Liberation Tigers of Tamil Eelam (LTTE).[14] Indeed, officials framed the military campaign as the largest humanitarian rescue mission in world history (ReliefWeb 2009). Under this formulation, authorities legitimated its atrocities as the unfortunate by-product of defending the nation against a domestic terrorist threat – not as the result of the government's manifest failure to protect.

When the war ended in May 2009, the international community remained largely disengaged from civilian protection through environment-building in Sri Lanka. The Council has avoided pursuing international criminal accountability among the conflict parties, instead allowing the government to pursue its own investigation. The release of the final report of the Secretary-General's Panel of Experts on Sri Lanka (UNEOSG 2011) brought swift condemnation from Colombo authorities, and there is little chance the Council will remand the case to the International Criminal Court (ICC).

Satisficing approach

Council members have, in a number of R2P cases, simply delimited their response parameters to those which the international community can actually succeed in carrying out, rather than taking the kinds of actions necessary to ensure protection. Akin to satisficing (Simon 1956: 136), this approach entails pursuing strategies of adequacy rather than optimal solutions. As Holmes argued before the Council in 2007,

> [i]t is hard not to conclude that for all our advocacy on behalf of civilians in need of protection, and for all the resources that are now devoted to all aspects of protection by the humanitarian and peacekeeping communities, we are still failing to make a real and timely difference for the victims on the ground . . . . Lip service is easy; effective action is much harder.
>
> (UNSC 2007b: 2)

The Council's actions in the case of Darfur illustrate the satisficing approach. It has remained 'seized' of the matter and marshaled support for a number of responses, all of which have fallen well short of ensuring civilian protection (UNSC 2004b: op. para. 6; UNSC 2004a: op. para. 14). Instead, Council actions have been almost entirely bounded by considerations of what is feasible given sociopolitical realities. As one observer noted, it has 'vetoed meaningful sanctions and diluted resolutions to such a degree that Bashir's government is able to dictate peacekeeper mandates, resist Western ground troops, and restrict access largely as

he desires' (Bridges 2010: 1265). The Council has largely distanced itself from its own International Commission of Inquiry's findings of war crimes and crimes against humanity and that they were centrally planned and ordered by Khartoum authorities (UNSC 2004a; UN 2005: 3–5; 133–143). The African Union Mission in Sudan and the African Union/UN Hybrid Operation in Darfur have been highly ineffective in protecting civilians as well (Benjamin 2010). And, while the Council referred the Darfur case to the ICC (UNSC 2005b) and President Omar al-Bashir was indicted by the Court, to date no Sudanese officials have been held to account for the mass atrocities perpetrated against civilians in Darfur.

Implications of double manifest failure for civilian protection

The absence of agreed upon criteria to guide the realization of the international community's secondary responsibility under R2P allows the Security Council to 'continue to prioritize their self-interest behind the fig leaf of the World Summit Outcome, and remain unaccountable to the intended beneficiaries' (Marks and Cooper 2010: 120). In such circumstances, humanitarian actors may be left with a *tertiary* responsibility to protect. I discuss below how two of the three approaches taken by the Council in responding to manifest failure affect civilian protection by humanitarian actors, paying particular attention to the gaps in protection created by each approach. In theory, double manifest failure should not be a defining feature in R2P cases where the Council uses a permissive approach. This does not necessarily mean that civilian protection in such settings will be unproblematic. Humanitarian actors would have global and country-level support in such cases, however – something that is missing in the two other approaches.

The conservative approach and civilian protection: Sri Lanka

The Security Council's conservative approach in response to the R2P case of Sri Lanka left humanitarian actors to manage a highly challenging *tertiary* responsibility to protect civilians. This responsibility was nearly impossible to implement during the final stages of the war and in its immediate aftermath. Even mandated organizations like the ICRC were unable to ensure the physical safety and security of civilians, and received only a modicum of international backing that would allow them to be effective in carrying out their protection work.

Following the conflict's end, national authorities continued levying considerable restrictions on humanitarian access to displaced populations, some 200,000 of whom had been separated from their families and forcibly detained in internment camps. Allegations of widespread sexual abuse against women, forced disappearances, and summary executions surfaced. Colombo authorities expressly prohibited humanitarian actors from implementing protection programming, including for vulnerable groups such as women and children, the elderly and infirm (UNEOSG 2011: paras. 154–158). All humanitarian actors seeking to work in the internment camps were required to obtain prior clearance from the Ministry of Defence, which was rarely given. The government initially allowed the ICRC access to civilians at Menik Farm but quickly reversed its decision and suspended the organization from entering those camps. Humanitarian actors were also prohibited from bringing cell phones or vehicles into the camps, which, given their sheer physical expanse, effectively prevented humanitarian protection and assistance activities (Labonte and Edgerton 2013).

Restricting physical access was coupled with other measures designed to deter humanitarian actors from protection through bearing witness. For example, the military strictly curtailed humanitarian monitoring and reporting on conditions in the camps, many of which were severely overcrowded and operating in violation of Sphere humanitarian standards (IRIN 2009). National authorities required aid workers seeking to operate in the north to sign a memorandum of understanding containing a confidentiality clause that prohibited them from making public comments without government approval (AI 2009: 13–14). Still other government-issued directives, enforced by the military, prohibited humanitarian actors from speaking with civilians being held in the internment camps (IDMC/NRC 2009).

All of these measures severely impeded *responsive* and *remedial* protection efforts. Faced with the inability to protect civilians, humanitarian actors shifted focus to the poor living conditions in the camps to get the attention of the broader international community. Aid workers could do little more than feed civilians, some of whom they knew remained highly vulnerable to violence by national authorities even though war was officially over (Harriss 2010: 9). Despite attempts to restore humanitarian access (HRW 2009) and visits to Sri Lanka by high-level UN officials, government restrictions on civilian protection by humanitarian actors remained in place until late 2009. The internment camps were

officially closed and restrictions on humanitarian access eased only after national authorities had separated out suspected insurgents and cleared former LTTE strongholds (ICG 2010: 16).

The satisficing approach and civilian protection: Darfur

Darfur has been described as a crisis of protection (Bridges 2010: 1256). As such, much of the civilian protection in Darfur has been carried out through Protection Working Groups, the country-level Protection Cluster, and the Khartoum Protection Steering Group. These coordination mechanisms, however, operate under insecure and politicized circumstances and are particularly vulnerable to the whims of the government. Likewise, most humanitarian actors in Darfur operate in a profoundly fearful and uncertain climate as far as civilian protection is concerned. Indeed, Khartoum's 2009 decision to expel 13 international and three national humanitarian organizations was based on claims that these actors conspired with and provided evidence of mass atrocities to the ICC, which subsequently issued an international arrest warrant for President al-Bashir. It left some 1.5 million bereft of assistance and precipitated the near-collapse of humanitarian protection activities, which constituted the central programming of ten of the expelled organizations (Pantuliano et al. 2009).

The displacement of and atrocities committed against children, including sexual violence and forced abductions also promulgated an acute sense of urgency on the part of humanitarian actors operating in Darfur. Yet the sheer magnitude of this population of concern to humanitarian actors impeded coordination and, in some cases, limited protection monitoring and assessments only to those constituting major protection violations (Ager et al. 2009: 554–556). Importantly, the international community has failed to commit sufficient resources to effectively assess child protection needs. The number of trained child protection personnel remains deficient, and the risks associated with information-sharing have not been mitigated by regional or international actors tasked with civilian protection mandates.

In settings like Darfur, the Council's satisficing approach effectively transforms humanitarian actors into little more than bystanders to mass atrocities. It also potentially raises expectations on the part of civilians, who have only humanitarian actors to turn to for protection. But the acute protection needs in Darfur are mainly *responsive* and involve physical security, something humanitarian actors are ill-equipped to provide. Certainly, *remedial* protection can and is offered, but these activities are

carefully monitored by national authorities and armed groups. There is enormous pressure on humanitarian actors in Darfur to 'do something' but the protection decisions within their remit are often suboptimal and not reinforced by other measures at the regional or international levels. Perhaps most importantly as it relates to the Council's satisficing approach, the risks of reprisal that humanitarian actors accrue for taking on a *tertiary* responsibility to protect are far greater than those that would accrue to the international community (Bridges 2010: 1261).

Conclusion

Mass atrocity cases persist in an era where the international humanitarian community is more knowledgeable than ever before about how to incorporate civilian protection into its programming, and the international political community has solemnly committed through R2P to protect civilians from these crimes. It remains the case, however, that the promise of civilian protection as envisioned under R2P and the POC agenda is entirely contingent on marshalling the political will to deliver on it (Labonte 2013). What lessons can we draw from situations of double manifest failure?

Context matters

Civilian protection is always context specific, regardless of whether it falls under the international humanitarian community's broad framework of protection or the international political community's POC agenda. Adherence to an overly principled and politics-free approach to civilian protection is both unwise and risky for humanitarian actors as well as its intended beneficiaries (Slim 2002; Dubois 2010). This may be attributable to the 'fog' of humanitarianism (Weiss and Hoffman 2007) or the willful aversion to politicization, including how some humanitarian actors interpret and respond to failure on the part of national authorities and the international community to honor their respective civilian protection responsibilities.

Humanitarian actors would do well to re-conceptualize civilian protection more in terms of military science and less in terms of 'doing good.' This could include re-examining core ethical challenges and sociopolitical dynamics posed by double manifest failure, including developing acuity in detecting when populations are left with few alternatives but to press for their civilian protection rights through humanitarian actors. Reflection and policy analysis that includes national and community-level attitudes, capacities, risks, and expectations could also be useful in fleshing out the sociopolitical context in which

protection is being attempted. In a range of settings, humanitarian actors have begun to study the utility of viewing their work through 'sense-making' frameworks (Weick 1995), polycentricity (Stephenson and Schnitzer 2009), and complexity theory (Prigogine 1980). These approaches can help guide decision-making and bring coherence to otherwise disparate civilian protection agendas and actors in strategic environments.

Be pragmatic, but avoid satisficing

Because protection is a political act, humanitarian actors may find their operational neutrality or independence constrained by national authorities. Other actors, such as Médecins sans Frontières, have publicly opposed R2P, arguing that serving as protection agents under its framework compromises neutrality and curtails rather than expands the humanitarian space critical for protection (Weissman 2010). In relation to this, the rush by inexperienced or unprepared humanitarian organizations to fill the protection gap left by double manifest failure cases may actually create greater risks for civilians and exacerbate rather than resolve protection crises (DuBois 2010: 3).

Humanitarian actors must both ask and answer honestly whether they can actually deliver the kind of protection civilians urgently need in double manifest failure settings. Moreover, they must ask themselves which, if any, of their organizational protection capabilities are transferrable to the goals of the POC agenda. In cases where overcoming the gap between the scope of civilian protection needs and what humanitarian actors can provide is not possible, humanitarian actors must make difficult decisions that reflect the limits of their ability to do good. This may mean adopting civilian protection strategies that focus on 'soft' rather than 'hard' law (Laegreid 2008: 14), or enhancing self-protection capacities and livelihoods strategies (Bonwick 2006).

Where possible, non-mandated or inexperienced humanitarian actors should avoid activities that overlap significantly with the specific mandates of organizations like the ICRC, UNHCR, and UNICEF. These organizations are far more adept in operating in situations of double manifest failure than other actors. The protection responsibilities of these institutions are, while not identical in character to those of host states, enduring. Moreover, their protection programming is grounded within international humanitarian, human rights and refugee law. This does not mean humanitarian actors cannot link their protection advocacy viz. national authorities to international humanitarian and human rights norms – they should (Slim 2002). However, they must first build core competencies in these areas to be effective.

Foster accountability and cultivate duty

Civilian protection is most likely to be effective when all actors bearing responsibilities uphold and remain accountable through them (Henry 2006: 4–5). This requires engagement with national authorities, non-state parties to an R2P crisis, donor governments, local communities, and regional and international authorities. Each and every one of these actors holds different stakes and duties in civilian protection and the notion of humanity in war (Slim 2002). Wide consultation, as time consuming as it may be, is absolutely critical to increase the likelihood of delivering on effective protection.

Where congruent with an organization's mandate and propensity for risk, humanitarian actors can cultivate duty among national authorities by leveraging soft power or moral authority, or encouraging the adoption of 'deconflicting arrangements' (UNSC 2009a: para. 60) that establish communications channels with all parties to coordinate the time and location of humanitarian activities. Such incremental strategies may help to expand humanitarian access to vulnerable groups and make protection less contentious.

R2P has raised expectations about civilian protection in many quarters, including among members of the international political and humanitarian communities, host states, and civilian populations. Delivering on those expectations remains an urgent challenge that is exacerbated in double manifest failure cases. It is essential to remind ourselves that civilian protection can have little meaningful impact in the absence of sufficient political will among host states to uphold their primary responsibilities under R2P. In its absence, and when other peaceful means fail, the international community should forthrightly label such situations as manifest failure and authorize timely and decisive action. This would be in keeping with the Secretary-General's admonition that decision-makers must 'remain focused on saving lives' through R2P responses (UNGA 2009: para. 50). And, while humanitarian actors can examine new ways to become more effective in filling the protection gap in double manifest failure settings, the civilian protection they can offer is a pale substitute by comparison.

Notes

1. An expanded version of this chapter was published previously as Melissa Labonte (2012) 'Whose Responsibility to Protect?: The Implications of Double Manifest Failure for Civilian Protection,' *International Journal of Human*

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2. The terms 'mass atrocities' and 'mass atrocity crimes' denote any or all of the classes of R2P crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity.
3. Geneva Conventions of 1949, Common Article 3, http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp.
4. The term 'international political community' includes states and intergovernmental organizations such as the UN, and non-operational organizations with humanitarian mandates (for example, the Office for the Coordination of Humanitarian Affairs [OCHA]). It is used interchangeably with the term 'international community.'
5. The term 'international humanitarian community' includes actors with an operational focus in the field of humanitarian action and assistance, UN bodies with operational humanitarian mandates (for example, UNHCR, UNICEF), human rights organizations, INGOs, and NNGOs.
6. The egg framework comprises three protection approaches. Responsive protection prevents the recurrence of patterns of violence or provides assistance in the immediate aftermath of threatened or actual violence against civilians. Remedial protection assists victims living with legacies of violence by restoring human dignity and adequate living conditions. Environment-building protection facilitates normative and institutional structures to reduce future human rights violations. See ICRC (2009).
7. See also http://protection.unsudanig.org/index.php.
8. UN Security Council Resolution 1674 (28 April 2006), para. 26.
9. See, for example, UN Security Council Resolutions 1265 (17 September 1999), 1296 (19 April 2000), 1888 (30 September 2009), 1894 (11 November 2009), and 1960 (16 December 2010).
10. UNSC 2009a: paras. 12–13. OCHA uses this mechanism to brief Council members on protection matters and facilitate the integration of civilian protection concerns in Council actions.
11. See paragraph 10(e) of Security Council Resolution 1289 (S/RES/1289), 7 February 2000, authorizing all necessary action to protect civilians from imminent threat of physical violence.
12. See Report of the International Commission of Inquiry on Darfur (UN 2005); Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (UNEOSG 2011); and Report of the International Commission of Inquiry in the Libyan Arab Jamahiriya (UNHRC 2011).
13. See, for example, the UK delegate's description of the Council's 'collective failure' to protect civilians in situations armed conflict (UNSC 2005a, 12–13); the Lebanon delegate's comments on the failure of the Council to protect Lebanese civilians against Israeli attacks (UNSC 2006, 18); and the Panamanian delegate's critique of the UN's and the Council's failure to protect civilians in cases of sexual abuse and rape in armed conflict (UNSC 2007a, 11).
14. The LTTE also failed to protect civilians; its members killed civilians fleeing areas under its control, recruited child soldiers, and used civilians as human shields (UNEOSG 2011, 65–66).

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13

Prevention Cascade: The United States and the Diffusion of R2P

Michael Galchinsky

Introduction

In 2004, Sudan won a third term on the Human Rights Commission at the very moment its government was carrying out a genocide in Darfur. The juxtaposition exposed the abysmal job the global governance system has done of living up to its responsibilities under the Genocide Convention (1948), which requires states both to prevent genocide and punish perpetrators (Convention on Genocide, 1948). Despite continuing failures, however, over the past two decades, the duty to punish has begun to be fulfilled. The establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the International Criminal Court, and other post-conflict and transitional justice processes have given institutional power to a new norm of international criminal accountability, which has spread across the globe, rapidly albeit unevenly, in what Kathryn Sikkink has called a 'justice cascade' (Sikkink 2011).

Until recently, one could not point to a comparable 'prevention cascade.' Virtually nothing was done on prevention until the past two decades, due to flaws in the Genocide Convention's definition of genocide, the treaty's lack of a monitoring mechanism, inadequate political will, and the controversial legal status of humanitarian interventions. Moreover, in terms developed by Toni Erskine, prevention is a form of prospective responsibility, and measuring the degree to which the state has fulfilled such obligations is difficult (Erskine 2004: 33, 37). The International Law Commission has commented that 'Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not

occur' (Crawford ed. 2002: 140). Requiring a certain standard of effort ('reasonable and necessary measures') rather than certain outcomes, prevention is what Melissa Labonte calls in her chapter 'an imperfect duty.' Finally, as Mark Gibney points out, states, not individuals, bear preventive responsibility, which means that responsibility is dispersed across a bureaucracy and may be hard to pinpoint.

Nonetheless, preventive capacity has progressed in the first decade of the 21st century, and especially since the 2005 World Summit when the international community endorsed the Responsibility to Protect (R2P). New prevention efforts have begun at the UN, in regional and subregional organizations, and in many states. The United States, under President Barack Obama, declared atrocity prevention a 'core national security interest' in August, 2010, and formed its own Atrocities Prevention Board on 23 April 2012. Regional organizations have begun to develop preventive capacities (Office of the Special Adviser, 'Engaging with Partners'; Ban, *Implementing* 2009). UN Secretary-General Ban Ki-Moon called for 2012 to be 'The Year of Prevention' (Office of the Special Adviser, *Anniversary*, 6 December 2012). It would seem that prevention has reached its tipping point.

The recent efforts to establish and disseminate preventive policies provide a critical opportunity to study the process of norm diffusion. This chapter offers a legal framework for understanding the norm of atrocity prevention, a structuralist framework for analyzing diffusion processes, and an empirical comparison of the preventive efforts of the international community and the United States. Concerned with the particular relations that give local expression to universal aspirations, the chapter is situated at the juncture 'between facts and norms' (Habermas, 1998).

The chapter finds that, although the United States and international efforts are analogous, they are founded on different assumptions about the content and process of prevention. The UN efforts, grounded in the collective ethos of R2P, envision prevention as a multilateral act, rooted in Security Council decisions and Secretariat-level coordination. By contrast, the United States has so far largely established its own preventive capacities through a process that has ignored or skirted the UN's R2P apparatus. The exceptionalist approach undertaken by the United States has generated international skepticism and some domestic pushback, and if continued may compromise the US government's capacity to fulfill its prevention aims. That would be a missed opportunity, because the world needs US leadership to ensure that people are protected from the states that fail to prevent mass atrocities.

Legal framework: Prevention as obligation

Until recently, progress on prevention has been impeded by the weak legal framework in which it was ensconced. Flaws in the Genocide Convention's definition of the crime have made it notoriously easy for states to avoid taking prospective responsibility (Mennecke 2009). Also, unlike later treaties, the Convention did not form a treaty body to monitor states' compliance: as a result, although acts that could contribute to genocide were monitored by the Covenants and other treaties, genocide as such was not formally monitored by any UN agency. The only attempt to incorporate genocide in the six major human rights treaties is in Art. 6 (3) of the International Covenant on Civil and Political Rights, which mentions genocide primarily as a limit on the death penalty. The ICCPR's reticence with respect to genocide has minimized the ability of the Human Rights Committee to monitor genocidal activity, and its periodic reporting system is not geared toward the ongoing monitoring that early warning requires. Without monitoring, no early warning capacity could be developed. Without early warning, no early diplomacy was possible. Without early warning and diplomacy, the world has had little recourse but costly late interventions after mass killings have already escalated.

Since 2000, the international community has rewritten prevention into a stronger legal framework, bypassing the definitional traps, reconceiving interventions, and establishing monitoring mechanisms. In addition to genocide, prevention now focuses on war crimes, crimes against humanity, and ethnic cleansing. Together these are referred to as 'mass atrocities' as a matter of policy at the UN (Mennecke 2009). New prevention efforts have sought to end the controversy over the legality of humanitarian interventions, justifying them via the doctrine of R2P. The R2P requirement that states *prevent* atrocities (to their own or others' civilians), *react* when atrocities are committed, and *rebuild* after atrocities have ended takes prevention out of its isolated and ignored condition in the Genocide Convention and resituates it in what the Secretary-General has called a 'continuum of steps' (Ban, *Five-Point Action Plan*, 2008). That is, prevention is understood to be part of a broader system designed to prevent human rights violations in general, on the theory that, while the causes of genocide and mass atrocities are disparate, states that handle domestic disputes well and protect human rights in general 'are unlikely to follow such a destructive path' (Ban, 2009: paras. 15–16). Much of the Secretary-General's emphasis has been

on non-coercive measures under chapters VI and VIII of the UN Charter. Prevention now belongs to the broad effort to create stable states.

Some commentators assert that R2P is an ethical and political norm rather than a legal one (Hehir 2012: 85; Patrick 2012). On the contrary, prevention is rooted in the legal concept of *erga omnes* obligations – obligations owed to the international community as a whole. The International Court of Justice initiated this line of thinking in 1970, in its opinion in the landmark Barcelona Traction case (ICJ 1970: paras. 33–34). It listed examples of *erga omnes* obligations as 'the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.' An *erga omnes* obligation, like a peremptory human rights norm (*jus cogens*), is one that is recognized as universal and undeniable (ICJ 1970: paras. 33–34). The court said that any state has the right to complain of a breach of an *erga omnes* obligation, even if that state has not itself been injured. At this point, complaint to the ICJ was the sole remedy envisioned. The court has since invoked *erga omnes* obligations in opinions on breaches of the Genocide Convention and the Convention on the Elimination of Racial Discrimination (ICJ, *Application* 1996: paras. 31–32; Song and Kong 2011; Mennecke).

The language of R2P in the World Summit Outcome was the General Assembly's attempt to operationalize the doctrine of *erga omnes* obligations. The Outcome document gives the cover of law to efforts to prevent and intervene in internationally wrongful acts; indeed, the lawfulness of humanitarian interventions under R2P is what distinguishes them from similar interventions prior to 2005. In keeping with the International Law Commission's 'Articles on Responsibility of States for Internationally Wrongful Acts,' (2001) the World Summit Outcome ensured that when there is a breach of an *erga omnes* obligation, a non-injured state can go beyond the ICJ's complaint mechanism to call for collective countermeasures against the violating state with the object of preventing further civilian suffering (ILC, *Draft Articles on Responsibility* 2001).

That is not to say that R2P has the force of treaty law. At present, its legal status is anomalous – more than a declaration but less than positive law. It is less than positive law because the Summit Outcome document is not a codified treaty with measures of implementation, monitoring, and enforcement. Yet it is not a discretionary entitlement for SC members (or a right to intervene if they choose). The term 'responsibility' specifies a duty, not a right. R2P recognizes that upon a state's manifest

failure, international action of some kind is not only lawful but also obliged.

Structuralist framework: Diffusion vectors

The spread of a prevention cascade is an issue of norm diffusion. How and why has the norm of prevention – mentioned in the Genocide Convention but then routinely ignored – come to the forefront at this time? How has it spread? In what forms has it been practiced? Where the United States is concerned, to what extent are prevention efforts homegrown or results of the larger diffusion of the international norm of R2P? Can the United States efforts help shape the international prevention response?

Diffusion has been studied using a variety of colorful metaphors such as clusters, waves, cascades, contagions, dominoes, tipping points, thresholds, magnetic attractions, spirals, and boomerang effects – and the metaphor of diffusion itself (Risse et al. 1999; Elkins and Simmons 2005; Cao et al. 2006). Such terms capture the dynamic, relational quality between the sending and receiving entities, and describe the mechanism for spreading a norm from one jurisdiction to another. Much attention has addressed the transfer of norms across different levels of governance (global, regional, and domestic). Solingen has shown that multi-level diffusion analyses must account for diffusion's stimulus, medium, obstacles, agents, and outcomes (Solingen 2012).

In addition to these factors, many analyses attend to the direction of the diffusion. For example, Plümper and Neumayer have studied diffusion's horizontal vector: the spread of norms from state to state. They find that the spread of policies on the horizontal vector is often due to spatial or cultural dependence, that is, the geographical neighborhood effects resulting from a common linguistic or colonial history or proximate country 'peer pressure' between sending and receiving states (Plümper and Neumayer 2010). In addition to spatial dependence, Neumayer and his colleagues Cho and Dreher have suggested that horizontal diffusion can often be predicted by finding similar voting patterns by a cluster of states at the General Assembly. In such cases, the process of diffusion is probably learning or emulation (Cho et al. 2012). In other cases, Elkins and Simmons suggest, there is a process of adaptation by which the norm is altered to take account of national differences (Elkins and Simmons 2005).

Others have studied the vertical direction of diffusion, either from the top down or the bottom up. Greenhill describes the 'socialization effects' that IGOs can have on the national participants in international institutions, demonstrating that membership in IGOs significantly improves states' human rights behavior with respect to personal integrity rights (Greenhil 2010; also cf. Brysk 1993). He posits that officials from states with less respect for human rights learn respect through participation in the IGO and internalizing its monitoring, education, and adjudication practices. In other words, such officials are 'socialized' by the IGO.

While this type of socialization captures a top-down process, some scholars describe a 'bottom-up' vector. For example, Sikkink has described a process by which civil society 'norm entrepreneurs' (such as activists, NGOs, academics, or business leaders) exerted an impact on states and IGOs with respect to the spread of international criminal justice (Finnemore and Sikkink 1998: 898; Cao et al. 2006; Greenhill 2010; Sikkink 2011: 24, 124; Sugiyama 2012).

In special cases, some states can themselves socialize the international community. One would expect that at least the world's most powerful states would exert an influence on the IGOs themselves. For example, there is evidence that the United States' tiered approach to monitoring and combatting human trafficking in its annual Trafficking in Persons Report has diffused both to other states and to the UN itself (*Trafficking* 2012; Tiefenbrun 2007). In such a case, it is hard to know whether to describe the diffusion vector as up or down. The United States is in a special position vis-à-vis the international system because it is a member of the P5 with veto power in the Security Council, serves as the home base of the United Nations, and largely funds the UN's activities. It is thus poised to reject international initiatives it perceives as against its interests, and is also in the curious (hegemonic) position of a state that can diffuse a norm *down* to the international community.

One well-developed and influential diffusion theory that proposes a combination of vectors is the model developed by Risse, Sikkink, and Ropp in *The Power of Human Rights* (1999). These authors trace a 'boomerang effect' in which domestic advocacy networks look outside the state for aid from international advocacy networks, the latter then raise awareness and convince the international community of states to pressure the norm-violating state, which opens political space for the domestic advocates to make their voices heard in their national arena. The boomerang effect has only limited explanatory power in the case at hand. The theory emphasizes that change comes from non-state actors, but the primary entity pushing prevention in the United States

has been the state itself. Moreover, the cases that this model addresses are those in which a norm-violating state changes its behavior as part of a liberalization process, but the United States sees itself as a founding member of the international community of liberal states and a net norm exporter (Risse et al. 1999: 3–4). The American self-image as non-violating and liberal is only partially accurate, and we will see that a limited boomerang effect did occur after the US government initiated its prevention efforts.

As in other areas of international relations, atrocity prevention scholars have developed both normative and realist approaches (Kuperman 2009; Hirsch et al. 2011; Strauss 2009). For realists like Kuperman, mass atrocities are too complex, with too many different causes and consequences to enable the predictability of any normative model. The political dimension depends on fickle alliances among states. SC members might not target an ally committing genocide with the same countermeasures as those used on an enemy state. The degree to which a norm can be diffused, in this view, depends less on IGO socialization effects or other kinds of subtle pressure than on instrumentally exerted power. This chapter attempts to occupy the middle ground between realist and normative accounts – the ground of pragmatic idealism – following Jacques Sémelin, editor of the Encyclopedia of Mass Violence. While criticizing the 'wishful thinking' of many genocide prevention efforts, Sémelin equally criticizes those who argue that 'because we can never be sure of the outcome, it is futile to intervene,' and declares his assumptions that 'genocide is preventable' and that scholarship on mass violence can help identify patterns that might lead to constructive policy prescriptions (Sémelin 2009).

By paying attention to diffusion's vector, we can see that norm influence is not a simple question of transferring a fixed policy from one environment to another. The norm is operationalized in local ways, often resulting in uneven expression across jurisdictions (Neumayer and Perkins 2005; Gertler 2001). Heterogeneity is typical because, in Solingen's terms, national or regional political 'firewalls' often become 'sedimented' and 'defy determinism, automaticity, or teleology' in diffusion (Solingen 2012; also Finnemore and Sikkink 1998: 893). Power dynamics between the sending and receiving entities, along with the internal political relations operating inside both entities, will influence whether and how the norm is diffused. State capacity to implement norms varies widely. The dynamic that sender and receiver have with third parties, such as allies, neighbors, or civil society actors, may also shape the norm's expression (Cao et al. 2006). Thus, in diffusion studies,

the norm in question should not be treated as static and independent, but as variable and dependent. The institutional expression results from the interaction between the ideal–typical policy and the facts on the ground. Put concisely: *The operational form of a diffused norm is the product of contingent relations*.

The UN model of prevention differs from the state-based model in the United States, making the norm uneven in its expression (Sikkink 2011: 247). Can the two institutions partner with each other in such a case? Are the UN efforts having an 'IGO socialization effect' on state officials, in particular on US officials on its Atrocities Prevention Board? What efforts has the United States made to socialize other states and IGOs to its model of prevention, and how successful have its efforts been to date? Finally, to what extent do the UN and US efforts share an understanding of what constitutes prevention, and what firewalls might impede the IGO and the state from finding a consensus approach?

Prevention at the UN

We have seen that the UN approach to prevention since 2000 has four unique conceptual and institutional features. First, the crimes to be prevented have been expanded from 'genocide' to 'mass atrocities' so as to move beyond the definitional confines of the Genocide Convention. Second, prevention has become integrated into the larger R2P process, which sees the *duty to prevent* as the first in a 'continuum of steps.' Third, the R2P orientation enables genocide to be the subject of sustained monitoring and early detection by UN bodies, something not previously possible because the Genocide Convention did not establish its own monitoring body and the other treaty bodies did not see genocide as within their purview. Fourth, R2P replaces the older, legally questionable model of humanitarian intervention: now, counter-measures are considered lawful and necessary as long as they originate when a sovereign fails to protect its own citizens, breaching its obligation to the international community as a whole, and are undertaken as part of a multilateral effort rooted in the Security Council to prevent and stop atrocities.

This approach, in development since the late 1990s, began to crystallize at the Stockholm International Forum on Preventing Genocide held on 26 January 2004, where the Secretary-General called for an Action Plan to Prevent Genocide (Akhavan 2006; Ban 2008). To carry out the plan, he appointed Juan E. Mendez as the first Special Adviser on the Prevention of Genocide, in July, 2004. The Special Adviser's job was to collect existing information on massive rights violations of ethnic and

racial origin that might lead to genocide; act as a mechanism of early warning to the Secretary-General and the Security Council; make recommendations on action to prevent or halt genocides in progress; and liaise with other members of the UN system. He was to be a 'focal point' in the UN system for gathering, filtering, analyzing, and fast-tracking information related to genocide prevention (Akhavan 2006). Supporters of the position have praised the Special Adviser's ability to give mass atrocities the visibility formerly only accorded to war crimes (Ban 2008, 2009).

The Special Adviser's office grew slowly: two years into his appointment, Mendez, who was hired part-time, had only two part-time staff and an administrative assistant. Given limited resources, he focused on identifying threatening situations and making recommendations, ranging from strengthening peacekeeping, preventing ethnic incitement by interceding with officials, and publicly expressing concern (Ban 2008, 2009). The office faced significant bureaucratic obstacles to its effectiveness from the beginning, and there was no system at all for collecting information from states and NGOs. Developing an early warning system necessitated consultations and verification of facts, far more work than the resources of the office could support (Akhavan 2006).

Over time, some of these problems were overcome while others continue to weaken the Special Adviser. The Special Adviser has succeeded in developing methodology, identifying crisis situations, and finding compatible areas for work with other R2P entities, and is now a full-time position (UN High Commissioner for Human Rights 2009). By 2007, the Special Adviser had begun to go on country visits; send notes to the Secretary-General informing him of high-risk situations; consult with Member States as well as regional IGOs, NGOs, and academics; develop a 'framework of analysis' to aid in selecting the proper response in a given case; and compile a 'package' of international law beyond the Genocide Convention to guide states (see OSAPG, 'Analysis Framework,' n.d.; Jacob Blaustein Institute 2011). These efforts began to bear fruit when election violence began to escalate in Kenya in December, 2007: the Special Adviser's actions were widely credited with helping to tamp down the violence before it escalated, and he has since worked in similar ways on a range of issues.

The Office of the Special Adviser on the Prevention of Genocide (OSAPG) has had its share of critics. Even many prevention supporters have objected to the ways the norm has been institutionalized – a significant obstacle if the UN hopes to diffuse its model down to states (Hehir 2010). Critics have faulted the Special Adviser for being symbolic,

redundant, too beholden to the Secretary-General, and either not loud enough as a whistle-blower, or too loud to engage in behind-the-scenes diplomacy. The bifurcation between public advocate and backstage manager became controversial when Francis Deng was appointed the second Special Adviser in August, 2007. Rights NGOs thought Deng should be a voice of conscience first, a diplomat second; Deng thought the order should be reversed (Hehir 2010). Aid groups thought the Special Adviser's mandate to raise public awareness had a reverse effect, alienating relevant government officials at critical moments and preventing the aid groups from getting in, as Kurt Mills discusses in his chapter (Akhavan 2006).

Critics, including the Secretary-General himself, criticized the prevention measures for focusing too much on developing an early warning system, suggesting that the real problem was how to share existing information (Grünfeld and Vermeulen 2009; Ban 2009; Ban 2010; Hirsch 2009). Critics claimed that the Secretary-General exercised a filtering function over the Special Adviser's information, which compromised the Special Adviser's independence and authority with the Security Council. This perception was reinforced each time the P5 blocked the Special Adviser's request to address the Security Council directly rather than sending his report through the Secretary-General. The Special Adviser faces a reactive, not preventive, culture, and was often therefore seen as meddling or alarmist (Hehir 2010). Finally, OSAPG does not address what some see as the central issue in genocide prevention: the absence of political will (Hehir 2010). All of these obstacles have stood in the way of successful diffusion of prevention via OSAPG.

Despite the obstacles, the office has grown more effective. The Secretariat institutionally expresses the close relationship between prevention and R2P in that, until both retired in 2012, Edward C. Luck, the Special Adviser on the Responsibility to Protect since 2008, and Francis Deng shared office space and worked together on many issues (Ban 2009). Before their retirement, Deng and Luck worked together to diffuse the prevention norm to regional and sub-regional IGOs and states, recognizing that while states often do not want to be singled out in this arena, regional bodies can often work effectively, have local expertise, are more deeply invested in and effected by the outcome of any preventive measures, and can provide political support for intervention, if necessary (Ban 2011). As will become clear below, many other individual states and regional IGOs have begun to cooperate with the Special Adviser's mandate (OSAPG, 'Engaging,' n.d.). The succeeding Special Advisers, Adama Dieng (appointed as the SA for Genocide Prevention

on 17 July 2012) and Jennifer Welsh (appointed as the SA for the Responsibility to Protect on 12 July 2013), share these commitments.

Prevention in the United States

The growing list of the Special Advisers' partners so far does not include the United States. The UN model of collective action based on Security Council decisions and coordinated by OSPAG seems to run up against American exceptionalism, the belief that the United States serves as a beacon to other states and thus cannot be expected to place itself under the same monitoring regimes. Under this view, the United States participates in the international human rights system in creating and modeling the norms for which the system strives. Such an attitude precludes the emulation of much of the UN's prevention approach by the United States.

The United States has a long history of opting to operate outside of international institutions, in particular on human rights issues. The US refusal to join the International Criminal Court is only a recent example of a trend that began in the 1950s (Henkin 1995; Korey 2001: 44; Galchinsky 2008: 93–94). This history constitutes a significant ideological firewall impeding diffusion from the global to the state level. So it will not be surprising that the prevention norm in the United States developed, for the most part, independently of the analogous norm at the UN. Like the UN effort, the American genocide prevention initiative grew out of a sense of failure in Rwanda and Bosnia. Madeleine Albright and William Cohen, President Clinton's Secretaries of State and Defense during those crises, worked during President George W. Bush's second term to convene a Genocide Prevention Task Force, under the auspices of the US Holocaust Memorial Museum's Committee on Conscience, to come up with a prevention proposal. The Task Force issued its report, *Preventing Genocide: a Blueprint for US Policymakers,* in 2008, at the start of President Obama's term (Albright and Cohen 2008).

It was good timing. Candidate Obama had promised to pay more attention to genocide prevention and, for this purpose, had made Samantha Power, a well-known genocide scholar, one of his senior advisors. The Task Force report analyzed America's readiness to undertake genocide prevention and recommended the creation of an interagency prevention mechanism, with members drawn from pertinent areas throughout the government. It called for the establishment of a National Intelligence Estimate on worldwide risks of genocide and mass atrocities – essentially an early warning mechanism. It recommended

strengthening partnerships with the UN and the African Union on military deployment options and information-sharing, and promoted engagement with at-risk states by preventively working with their leaders, strengthening their institutions, and promoting their civil society.

The final section of the *Blueprint* is dedicated to 'International Action: Norms and Institutions.' The report affirms that with R2P, the norm of prevention has been taking hold globally (98). It goes on to characterize R2P as a 'revolution in conscience' among regional organizations and UN officials, mentioning the Special Advisers and the High Commissioner for Human Rights. Nevertheless, it identifies challenges to international action to prevent genocide: lack of political will, difficulty of effective response, competing national interests, and the veto power of the Permanent Five. While recognizing R2P's call for 'effective action' by the international community to prevent and halt atrocities, it nonetheless stops short of recognizing that under R2P effective and lawful action is coordinated by the UN. In fact, a number of scholarly critics suggested that Albright-Cohen's recommendation to form a network of like-minded governments, IGOs, and NGOs may have been aimed at bypassing the UN (Üngör 2011; Theriault 2009). If so, the call for international action was another example of US exceptionalism at work.

While genocide scholars noted the report's mention of R2P, they criticized it as US-centric. It identifies the United States, they asserted, as a moral preventive force without acknowledging US complicity in past atrocities or addressing the US decision not to join the ICC. How can the United States claim it is serious about genocide prevention, they asked, much less be a leader of the effort, if it refuses to join a court dedicated to punishing genocide? (Üngör 2011; Theriault 2009). The report fails, they said, to wrap its policy framework tightly enough within international law and R2P, and does a poor job of integrating valuable information that has already emerged from international efforts (Hirsch 2009). In sum, they accused the *Blueprint* of adhering to the American habit of go-it-alone bravura.

Has the Obama administration's outlook been more global than the *Blueprint*'s? So far the evidence is mixed. Although the APB only came formally into being in April, 2012, a preventive response to atrocity crimes had been in the works in many US agencies since the start of the administration's first term. In April 2008, the Department of Homeland Security's Immigration and Customs Enforcement division had established a Human Rights Violators and War Crimes Unit to target individuals associated with atrocity crimes who have entered the country fraudulently (Forman 2009). Despite the US resistance to joining the

ICC, President Obama referred the situation in Libya to the court. He has supported regional efforts to apprehend Joseph Kony, worked to facilitate the transition to independence of South Sudan, and helped create the truth commissions in Cote d'Ivoire, Kyrgyzstan, Libya, and Syria, among other things (White House, 'Fact Sheet,' 2012). On the day before the administration formed the APB, the president issued an Executive Order proclaiming new, targeted sanctions for governments and corporations that engage in so-called 'GHRAVITY' offenses – Grave Human Rights Abuses Via Information Technology (Obama, 'Blocking the Property,' 22 April 2012).

These programs underscore a remark President Obama made in the speech, 'Honoring the Pledge of "Never Again",' in which he announced the APB's establishment: 'atrocities prevention,' he said, 'is not an afterthought. This is not a sideline in our foreign policy' (Obama, 'Honoring the Pledge,' 23 April 2012). Rather, as he had put it in Presidential Study Directive 10, in August, 2011:

> Preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States.
>
> (Obama 2011)

With high-level representatives from 11 government departments and agencies, the APB is tasked with pooling information on mass atrocities generated from throughout the government, turning the information into actionable recommendations, and developing prevention training materials specialized to each department's or agency's needs. In this, it sounds very much like a national version of the OSAPG. The APB is helping each of its constituents develop its prevention capacity: State is developing preventive diplomatic 'surges' during crisis situations. USAID now offers awards for technological innovation in early warning systems, and also development aid. Treasury is developing tools to block the flow of money to abusive regimes. Defense is developing doctrine, planning, training, and exercises for Mass Atrocity Response Operations. In the area of intelligence, the APB is monitoring the National Intelligence Council's preparation of the first-ever National Intelligence Estimate on the global risk of mass atrocities and genocide (White House, 'Fact Sheet,' 2012). It is fair to say that Obama is the first president to place atrocities prevention on the US government's front burner.

However, as the *Blueprint* presaged, the APB's goals were somewhat thinner with regard to America's international partners. To be sure,

an extensive White House fact sheet, published the day the APB was founded, asserted that 'Our diplomats will encourage more robust multilateral efforts to prevent and respond to atrocities.' It described plans to aid a UN Peacekeeper training program for preventing sexual and gender-based violence, which was one of the Special Advisers' initiatives. However, its global plans were generally short on detail, and did not designate which of its partners it would work with or how. It did not mention either the UN's Special Advisers or the R2P initiative when it described its aim to 'strengthen UN system capacity.' Similarly, no details were offered about how the APB 'will also work with our partners to build the capacity of regionally based organizations to prevent and respond to atrocities.' Perhaps the most telling lacuna was in the section on 'Denying Impunity Abroad,' which went to great lengths not to mention the ICC. The United States would support 'mechanisms . . . that seek to hold accountable perpetrators of atrocities when doing so advances US interests and values . . . ' (White House, "Fact Sheet," 2012). The caveat ('when doing so . . . ') recalled the language that both the Bush and Obama administrations used in rejecting calls to join the ICC – that the court does not advance US interests because it theoretically puts US personnel at risk of prosecution.

The absence of a stronger commitment to the UN prevention system was not due to US officials' lack of knowledge about international efforts. In the preparation for the APB, senior US officials attended a number of symposia on international prevention efforts. At an October, 2010, conference sponsored by the Stanley Foundation, on 'Atrocity Prevention and US National Security: Implementing the Responsibility to Protect,' they interacted with Special Advisers Deng and Luck, and the discussion centered on how to 'enhance US government communication and coordination with the UN System, and increase support for UN institutional developments such as the anticipated "joint office" on genocide prevention and R2P' (Thaler 2010; Woocher and Stares 2010). One of the participants was Lawrence Woocher, who also served on the Genocide Prevention Task Force that had drafted the *Blueprint*. The APB's exceptionalist path to date is an informed policy choice.

The fear that the APB 's work would be too unilateral could be heard underneath the diplomatic language the Special Advisers adopted in their joint statement the day after the APB was formed (OSAPG, 'Launch,' 2012). While welcoming the US initiative, the Advisers called on UN Member States to 'share their best practices and lessons learned, so that the collective effort can be more than the sum of its parts.' The balance of the statement focused, not on the American effort, but

on 'the growing series of partnerships established by Member States under a Responsibility to Protect framework' (OSAPG, 'Launch,' 2012). While praising the APB because 'innovative and sustained measures at the national level are essential for the full operationalization of the Responsibility to Protect,' the Advisers emphasized the global, regional, and above all *collective* nature of the prevention cascade, and their own role as UN liaisons and coordinators of the broader R2P effort. This exchange is evidence of a struggle over ownership of the norm of atrocity prevention and the heterogeneous forms by which it might be expressed.

It was not long after the APB's establishment that some members of the public were beginning to wonder when the APB would act, especially once the Syrian civil war heated up during the summer of 2012 (Patrick 2012; Spetalnick 2012; Thaler 2012). The international community's unwillingness to prevent the Syrian government from killing thousands of its own civilians raised the question of whether R2P had lost ground or was even practicable (Thaler 2012). The rivalries within the P5 represented a firewall against the application of R2P in the Syrian case and threatened the SC's consistent adoption of preventive measures. With the SC paralyzed, the world looked to the United States for leadership.

Reacting to international inaction on Syria, then-Secretary of State Hilary Clinton spoke to a symposium on genocide prevention held at the US Holocaust Memorial Museum in cooperation with CNN and the Council on Foreign Relations, on 24 July 2012 (Clinton 2012). Clinton reiterated the steps the administration was taking on 'prevention and partnership.' She reiterated the APB's 'whole of government response' on prevention. With respect to expanding partnerships, she mentioned the intention to work with the AU and ECOWAS. She also mentioned working to strengthen the 'UN's core peace and security tools,' but once again she made no reference to R2P or the Special Advisers. Finally, she acknowledged that 'a small group of nations' obstruction can derail our efforts . . . in the Security Council.' Clinton's address was well received, but it did not stop opinion bloggers like John Bradshaw of Freedom House from wondering whether it was possible to 'convert rhetoric to reality on atrocity prevention' (Bradshaw 2012).

Such questions continued to the point that, on the anniversary of the APB's establishment, the White House felt the need to publish a second fact sheet detailing the administration's 'comprehensive efforts' to prevent mass atrocities during the board's first year (White House, 'Fact Sheet,' 2013). This may have been an attempt to pre-empt a report

by Madeleine K. Albright and Richard S. Williamson, who had in the interim formed a Working Group on the Responsibility to Protect, comprised of members of the United States Institute of Peace, the Holocaust Museum, and the Brookings Institution. Their report, released in May, 2013, gauged US and international efforts on a range of R2P case studies, from the full use of R2P (Libya) to failure to use R2P effectively (Syria) (Albright and Williamson, 2013). The Working Group commented that the APB 'might well serve as an appropriate model for others' (23), but the report's recommendations indicate that the United States was not doing enough to support international efforts. Recognizing that 'No country acting alone has the resources, information, or authority to fulfill more than a modest portion of what R2P requires' (23), it agreed with the Special Advisers that the UN should be the central organization in preventive efforts and argued that 'the more capable the United Nations is, the less often US troops and taxpayer dollars will be summoned to cope with emergencies' (24). Accordingly, the report urged the United States to strengthen the preventive capacity of the UN by increasing funding for OSAPG, as well as by adopting a 'more positive engagement' with the ICC by funding investigations and prosecutions arising from SC referrals to the court. Here the 'boomerang effect' – by which domestic advocates adopt the language of international actors to persuade their own government – did come into play.

The APB proclaims the US government's intention to socialize other states and the UN system itself to its own expression of the prevention norm. Yet it has met resistance when attempting to export American-style prevention because it has not, at the same time, accepted both the limits that R2P places on US action in the absence of SC approval, and the authority of the ICC. Perhaps now that Samantha Power has become US ambassador to the UN, the United States will embrace multilateralism as essential to the success of the prevention cascade. By doing so, American leaders will legitimate the emerging legal norm that a state's breach of an *erga omnes* obligation is an internationally wrongful act to which the world is obliged to respond. Until such time as there is an R2P treaty or the customary behavior of states becomes more consistent, SC members will be able to dodge their secondary responsibility. But Americans' commitment to prevention as a collective legal obligation will demonstrate to the world that having the capacity to dodge is different from having the right to dodge. When a state fails to prevent atrocities to its citizens, it not only devastates them but threatens the fundamental principles on which the world order rests. Both for the citizens' sake and the defense of that order, the world must react.

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14

Argumentation and the Responsibility to Protect: The Case of Libya

Tim Dunne and Katharine Gelber

Introduction

On 18 March 2001, UN Security Council Res. 1973 enabled NATO forces to implement a protection of civilians mandate to limit the harm Muammar Gaddafi's military could inflict on the armed uprising against his rule. After seven months of bombardment from sea and air, forces loyal to the National Transitional Council were able to topple the Gaddafi regime and install a new government. This short empirical description of the Libyan case just about exhausts the degree of consensus that exists about the intervention. The UN and its leading Member States were criticized before the authorized action for not responding quickly enough, for changing the mandate to the need to remove Gaddafi, and subsequently for turning a blind eye to atrocities performed by the anti-Gaddafi revolutionaries (Milne 2011; UN OHCHR 2012). This kind of contestation around interventions for humanitarian purposes flows directly from the tension between the legitimacy attributed to universal human rights and the relative weaknesses associated with their legal protection and redress (Habermas 1999), a topic widely canvassed in other chapters of this book.

The understanding of R2P used in this chapter is the three-pillar framework, which is derived from the 2005 World Summit Outcome Document. Pillar one holds that states have an obligation to protect their populations from mass atrocity crimes (genocide, war crimes, ethnic cleansing, and crimes against humanity). Pillar two obligates the international community to assist states in fulfilling their obligations. Pillar three holds that when states are 'manifestly failing' to protect their

populations and are not asking for assistance, the international community has a responsibility to respond in a 'timely and decisive manner.' The actions that are permissible under this third pillar of the framework can include noncoercive means such as diplomacy and humanitarian assistance, and, as a last resort, coercive measures involving the use of force (which require Security Council authorization).

In this chapter, we focus on the third-pillar dimension of how agreement within the United Nations Security Council was reached on the need for protective intervention, and the lessons that can be learned from this case for the future of responsible sovereignty. We demonstrate that the Libyan intervention can be conceived of both as a 'high point' of R2P implementation (with the passage of Res. 1973), and subsequently as heralding a sharp decline in the legitimacy of the R2P regime. We provide an explanation for these antagonistic viewpoints by analyzing the conduct of the debate in the UN Security Council and other key regional fora in relation to moral argumentation. To the extent that argumentation mattered, what does this tell us about the manner in which intervention in Libya was enabled, and then subsequently broke down after the implementation of Res. 1973?

To address these questions, we first examine the broader debate over arguing and bargaining in the realm of international politics. We argue that, despite being 'hard cases' for moral deliberation neither the international realm nor the Security Council is a stranger to moral argumentation. Then we move to analyze the debates over intervention in Libya from the perspective of the claimed facts and the normative frames within which arguments were put.[1] The final part of the chapter focusses on the implications of the failure of actors who supported the intervention norm to continue to engage in sincere argumentation in the aftermath of the implementation of Res. 1973.

This analysis tells us much about the establishment of the consensus in relation to intervention in Libya that was embodied by Res. 1973. It shows first that a range of factors point to the likely presence of moral argumentation, in concert with bargaining, at the time agreement to intervene was reached. We show the range of actors whose language-use was influential, and how countries that were initially skeptical about the legitimacy of armed intervention shifted their position from outright opposition to agreement with Res. 1973. We also show that, despite their reservations about the strategy being advocated by the 'P3' (US/UK/France), China and Russia chose not to exercise their right of veto: instead, they adopted a position of constructive acquiescence that enabled a lawful intervention to occur.

The empirical part of the chapter shows that these conditions within which arguing mattered were marked by temporal brevity. Within days of the bombing of Libyan military assets, several powerful actors such as China, Russia, India, and South Africa began to question the alignment of means and ends, and the supporters of R2P failed to maintain consistent argumentation around it. This leads us to advance an original argument about how the legitimacy of a coercive intervention to protect human rights needs to be constantly reaffirmed; in failing to do this, those who made the running in the Security Council debates failed to bolster the validity of the norm of protecting populations from a mass atrocity crime. The problem of a lack of sustained support in the form of ongoing argumentation on the part of the friends of R2P has seriously undermined the support for the coercive implementation of R2P by the international community in cases where the host state has not consented to the proposed action.

The limits and possibilities of moral argumentation in world politics

There is a healthy debate concerning the applicability – or otherwise – of a moral argumentation framework to the practices of international institutions. This reflects the broader debate between constructivist approaches to IR that emphasize the role of norms, and rationalist approaches that argue that actors are motivated by self-interest. While some argue that the international arena is typically absent of the conditions required to render moral argumentation possible (e.g., Mulligan 2004; Krebs and Jackson 2007: 36; Grobe 2010; Hanrieder 2011), others claim that there are factors in international negotiations and sites of discourse that justify the application of a moral argumentation framework to international relations (e.g., Risse 2000, 2004; Steffek 2003; Müller 2004).

There are three key claims advanced by those who deny the applicability of the moral argumentation framework to debates in the international realm. The first is that the international society of sovereign states is ill-disposed to the idea of shared norms from which social actors generate common understandings. Yet it is important not to be too formalistic about the degree of shared norms required. This is in part because the procedures of moral argumentation themselves make it possible to 'reach agreement on norms without presupposing common values and interests' (Eriksen and Fossum 2000: 19). To require too high a degree of pre-existing commonality, would be to misunderstand the

conditions required for moral argumentation to occur and would prejudge the outcome of the discourse. It can plausibly be argued that, over time, Habermas himself has moved to a recognition that his previous formality did not 'capture the idea that practical discourse is primarily intended to be an undertaking in the real (less than ideal) world by real (less than ideal) social actors' (Risse 2000: 17 citing Habermas 1995: 553).[2]

In the case we are analyzing, the question of whether common norms can be, or have been, established is also not as difficult as the critique suggests. This is because we are limiting our discussion to debate around the implementation of decisive military action in response to systematic human rights violations in Libya. We are making a claim for the presence of moral argumentation in concert with bargaining in a particular, structured realm; namely, between and among actors who are well versed in the principles underlying R2P, the debates that surrounded its normative evolution and practical implementation, and the common texts and vocabulary that actors use to express their concerns. The existence of a 'common narrative' – encapsulated by the phrase 'sovereignty as responsibility' – has been made possible by a collective identity that presupposes shared values and norms (Risse 2000: 15) and is arguably a sufficient normative understanding for moral argumentation to take place.[3]

The second claim is that the international arena is so imbued with power inequalities as to render moral argumentation unviable. Mulligan, for example, argues that international negotiations are particularly poor candidates for a discourse-theoretical analysis since 'there are few places one is likely to find a sincere, non-coercive quest for agreement and understanding' (Mulligan 2004: 476). He argues that despite the increasing influence of NGOs in international negotiations, such negotiations are 'notoriously lacking in transparency, plagued by secret deals' and constituted by participants who do not wish to engage in real argumentation. He concludes that an application of the discourse-theoretical approach to such environments is 'formidably optimistic' (2004: 477). We argue that while Mulligan's concerns may be applicable to *some* international negotiations, they ought not to be presumed as applicable to all, and that the circumstances of the debate matter. Further, as Risse argues, in moments when arguing matters, the voices of actors with less material resources are heard, despite their relative power disadvantages (2004: 295, 302–3); power inequalities are not obliterated, but recede into the background. Below, we will demonstrate that this occurred.

A third, and related, claim is that in the international arena, bargaining often dominates, leaving no space for genuine argumentation. Krebs and Jackson, for example, argue that '[a]lthough persuasion undoubtedly does occur in the political arena, it is also rare' (2007: 36). It is of course true from a cursory overview of international relations that speakers (who often represent states, nongovernmental organizations, intergovernmental organizations or regional organizations) frequently rely on bargaining strategies. Yet this need not always be the case. Risse, for example, suggests that focusing on the arguing that occurs in international relations 'furthers our understanding of how actors develop a common knowledge concerning both a definition of the situation and an agreement about the underlying "rules of the game" that enable them to engage in strategic bargaining' (Risse 2000: 2). In other words, even where actors are not engaged solely in arguing, their engagement in discursive interchange is vital to creating shared understandings that can become a precondition for later moral argumentation.

The most relevant institution for this analysis is the UN Security Council.[4] A number of factors point to the possibility of moral argumentation taking place in the UNSC: its mission is clear and receives widespread assent from the General Assembly; the range of possible arguments any actor deploys is limited to the activation of Charter provisions and the customary law of nations (*jus cogens*) in relation to the use of force; and the deliberations of the Council are scrutinized by the Assembly and increasingly by the global media and international nongovernment organizations. Of course, granting that a potential for moral argumentation exists must not obscure the challenges associated with Council as a deliberative actor.

The most significant challenge is the unequal power relations that are embodied in the special privileges granted to the 'P5' (five permanent members of the Security Council) – the United States, the United Kingdom, France, the People's Republic of China and the Russian Federation. Does the veto power wielded by the P5 imply that the conditions within which speech occurs are too strongly linked to the strategic interests of the powerful? We argue that it does not. First, the P5 justify their decision-making by way of detailed statements made before and after key resolutions are passed or over-turned. Second, the onus is upon non-permanent members to make a 'greater argumentative effort' (Risse 2000: 16) than the more powerful countries in order to gain support for their views. Finally, over the last two decades, there have been considerable reforms of the Council to increase transparency, and widen its interaction with states that are not part of the UNSC and with

NGOs (Malone 2007: 128–131; Johnstone, 2008: 88). Indeed, it has been argued that 'while the council is far from being an ideal venue for deliberation, it is less exclusive and closed than meets the eye' (Johnstone 2008: 80, 87).

We take the position, therefore, that the presence of bargaining in the UNSC does not necessarily imply the absence of argumentation. By examining the case of Libya, we show how the conditions have occurred in which moral argumentation mattered in achieving the agreement to intervene, and the lessons that can be learned from those experiences for the future of human protection.

R2P and Libya

In examining the claims made in deliberations surrounding the forceful measures adopted in relation to Libya, we start with the discourse that took place between 20 February 2011 and end in the early phase of the NATO-led action in support of the resolution when regime change became part of the justification for the military action.

We will ask first, what were the claimed facts deployed by relevant actors relating to the situation on the ground in Libya? Second, what norms were appealed to by which actors, and how did they justify their positions in relation to the key norms to which appeals were made? The kinds of norms that could have legitimately been appealed to include sovereignty/independence, R2P and humanitarian protection, and the 'balance of consequences' in the sense of whether military intervention might do more harm than good. The relevant actors whose language we will be examining include international human rights organizations, the Gaddafi regime, UNSC members, the League of Arab States and the African Union. A key element of this analysis is demonstrating how a variety of actors were able to engage meaningfully in the debate over intervention in Libya, thus establishing conditions for the presence of moral argumentation.

Facts on the ground as the violence began

The diplomatic consensus around R2P states that the international community has a responsibility to protect peoples from actual or threatened violation of one or more crimes: genocide, ethnic cleansing, war crimes, and crimes against humanity.[5] It is not a characteristic of UNSC deliberations that these crimes are debated with the degree of specificity captured in the Rome Statute of the International Criminal Court (ICC). However, as we show below, it is reasonable to conclude that the claims

made by pro-intervention actors in relation to Libya cohered with the meaning attached to crimes against humanity.[6]

There was, in fact, relatively little opposition to this 'charge' except from the Gaddafi regime itself. Consensus built extremely quickly – within days – which formed the basis for normative debate about intervention. The respected NGO, UN Watch, on 20 February 2011, was the first to describe what was occurring in Libya as 'mass atrocities,' including the deliberate killings of 'hundreds of peaceful protesters and innocent bystanders,' and arguing the government was 'committing gross and systematic violations of the right to life' and 'crimes against humanity' including 'mass killings' in a 'widespread and systematic policy' (UN Watch 2011).[7] The following day, Secretary General Ban Ki-moon (Ban 2011) spoke with Gaddafi and urged him to end the violence against demonstrators and uphold and respect 'fundamental freedoms and human rights, including the right to free assembly and the right to information.' Similar assessments of the situation on the ground were made on 22 February by the International Crisis Group (ICG 2011), and the INGO Civicus (Civicus 2011). Unusually for a humanitarian crisis, the Security Council was also making the running. On 22 February the Security Council made a statement accepting this account of the facts on the ground (UNSC 2011a). The Organisation of Islamic Conference (OIC 2011a) made a statement the same day condemning the excessive use of force and describing it as a 'humanitarian catastrophe.' Their statement was widely picked up in the media, including in *Turkish Weekly*, the *Jerusalem Post*, *Malaysian Digest*, *PanArmenian.Net*, *Arab News*, *Asharq Alawsat*, *Qatar News Agency*, and *Deutsche Press-Agentur*.[8] Also the same day the European Union and US Secretary of State Hilary Clinton both expressed the view that violence was excessive, and Human Rights Watch was monitoring the situation (BBC World News 2011a). The next day similar statements regarding the 'indiscriminate and excessive use of force' were made by the African Union (African Union 2011a).

On 25 February these facts were supported by the United Nations High Commissioner for Human Rights Navi Pillay[9] (Pillay 2011; see also UNHRC 2011a), who brought to the United Nations Human Rights Council's attention the use of hard military power against the demonstrators: 'tanks, helicopters and military aircraft have reportedly been used indiscriminately to attack the protesters [...] thousands may have been killed or injured' (UNHRC 2011a). On the same day that the UNHRC was meeting, the UNSC held a debate on 'peace and security in Africa' that had been called for by the recently defected Libyan delegate to the UN (though he was still treated by the UN as the representative of

the Libyan state). The meeting was opened by the UN Secretary-General who spoke about the estimated 1000 deaths, and the threats by Gaddafi and his family to engage in more mass killings. Accounts of crimes being committed were cause, he added, of grave concern – while not constituting 'conclusive proof' they nevertheless 'appear to be credible and consistent' (UNSC 2011b). It therefore only took a matter of days for an international consensus to be formed on the scale of violence against civilians and the failure of the Libyan government to respond to international pressure to stop this violence. On this basis, actors were able to consider a range of possible responses consistent with the responsible sovereignty principle.

Appeals to norms and values: The lead up to Security Council Res. 1970

As noted, the first appeal to the facts on the ground by UN Watch on 20 February argued that they constituted crimes against humanity; this happened just five days after the political rebellion in Benghazi had begun, and was followed by a brutal crackdown. The statement concluded with a strongly worded invocation of the international responsibility to protect and prevent: 'Member states and high officials of the United Nations have a responsibility to protect the people of Libya from what are preventable crimes' (UN Watch 2011). The INGO statements that emerged within days also did not confine themselves to describing the atrocities; they put forward normative positions. The International Crisis Group's (ICG 2011) carefully worded statement called for targeted sanctions (in accordance with Chapter VII of the UN Charter) against Gaddafi and his family, and for member states to offer a safe haven to security personnel who refused orders to attack civilians, and to impose an arms embargo against the Libyan state.[10] Civicus' statement also used the term 'crimes against humanity' and explicitly invoked R2P (Civicus 2011); they did so again in a joint statement with the Arab NGO Network for Development to the UN Human Rights Council on 25 February (UNHRC 2011b).

The UNSC's statement of 22 February also explicitly invoked R2P (UNSC 2011a). What explains the fact that the UNSC was able to issue this strong condemnatory statement within seven days of the initial demonstrations in eastern Libya? Two factors in particular should be highlighted, both relating to the involvement of actors who ordinarily are not considered strong players in UNSC debates. First, an important regional actor had raised normative claims relevant to R2P: the League of Arab States (LAS 2011) earlier the same day had suspended

Libya from the League and issued a statement strongly condemning the violence by the Libyan regime. Second, a day previously the Deputy Ambassador of the Libyan mission to the UN called for a meeting of the Security Council, while also dissociating himself from the actions of Gaddafi and his ruling elite.

At this early stage, however, there was disagreement as to the appropriate norms to be invoked, with several commentators making condemnatory statements regarding the violence but not reaching so far as to invoke R2P-based intervention. The OIC's statement of 22 February used the term 'humanitarian catastrophe' (OIC 2011a). The African Union Peace and Security Council's statement of 23 February argued that the events were a 'violation of human rights and international humanitarian law' (AU 2011a). A statement to the UN Human Rights Council on 25 February made by Mr. José-Luis Gomez said the events 'could amount to crimes against humanity' (UNHRC 2011a), and a joint statement by Amnesty International, the International Federation for Human Rights and Oxfam on 25 February called on the EU to protect civilians and establish an inquiry into 'crimes under international law' (Amnesty International, FIDH, and Oxfam 2011).

On 25 February 2011, Navi Pillay, the UN High Commissioner for Human Rights issued a statement coinciding with a special session of the Human Rights Council (UNHRC). Paragraph 2 of the statement reminded the council that, at the 2005 Summit, world leaders 'unanimously agreed that each individual state has a responsibility to protect its populations from crimes against humanity and other international crimes [...] When a state manifestly fails to protect its population from serious international crimes, the international community has the responsibility to step in taking protective action in a collective, timely and decisive manner' (Pillay 2011). This means that within only a few days of the crisis beginning, key UN actors were explicitly framing the humanitarian crisis in transparently R2P terms, thereby interpreting the 'facts' as being a 'trigger' for decisive action by the international community.

The UNHRC adopted a resolution on 25 February that argued that 'recent and systematic human rights violations ... may also amount to crimes against humanity' and explicitly called upon the Libyan government to 'meet its responsibility to protect its population' (UNGA 2011a). The resolution agreed to establish an international commission of inquiry into the violations, and recommended that the UN General Assembly consider the suspension of Libya's membership of the Council. At a meeting of the Security Council on 25 February, the UN

Secretary-General reiterated Libya's responsibility to protect in accordance with the 2005 World Summit: 'the challenge for us all now,' Ban Ki-Moon said, 'is how to provide real protection and do all we can to halt the ongoing violence' (UNSC 2011b). The significance of this statement is that it is a crystal clear reminder that the responsibility to protect passes to the international community to provide for humanitarian protection when a state is clearly failing in its guardianship of its citizens.

On 26 February the Security Council *unanimously* adopted Res. 1970, which invoked R2P and the principles of the UN Charter including a 'strong commitment to the sovereignty, independence, territorial integrity and national unity' of Libya. The resolution urged Libyan authorities to act with restraint, referred the situation to the ICC for investigation, imposed an arms embargo, enforced a travel ban on senior members of the regime, and froze Libyan assets.

Statements made by member states after the vote was taken are instructive. First up was the UK representative, Sir Mark Lyall Grant – he made it clear that Res. 1970 showed that the Council was exercising its international responsibility to protect the Libyan people, who were at risk from their own government. India's representative, Mr. Hardeep Singh Puri, noted that India was not a member of the ICC, and that 5 of the 15 members of the Council were not parties to the Rome Statute. In spite of this, India had decided to go along with the consensus in the Council, due both to the positions of African and Middle East delegations who believed the resolution would end the violence, and support for the resolution from the permanent representative of Libya. Other non-permanent members, including South Africa, Nigeria, and Lebanon, also referred to the Libyan delegation's call for a 'swift, decisive and courageous resolution' to end the killing of civilians, and the positions taken by the African Union, the Organisation of Islamic Conference and the League of Arab States (UNSC 2011c). This is one instance among many in which the normative power of regional organizations was invoked by permanent and nongovernment members of the Security Council in both resolutions 1970 and 1973.

The US government, represented by Susan Rice, advocated adopting 'biting sanctions' and referral of the 'egregious human rights situation' to the ICC, in spite of the fact that the US is has not acceded to the Rome Statute. Rice argued that the Libyan leadership had lost its legitimacy to rule, thus connecting its normative justification for Res. 1970 to a strongly liberal conception of the appropriate normative role of the state. The Russian representative also agreed with the consensus on

the need for 'targeted, clearly expressed, restrictive measures' against those guilty of violence against civilians. However, Russia also noted that the resolution did not authorize 'forceful interference in Libya's affairs, which could make the situation worse.'

Appeals to norms and values: From Res. 1970 to Res. 1973

The passage of Res. 1970 did not resolve the humanitarian crisis in Libya, where violence and bloodshed continued. On 1 March the UN General Assembly suspended Libya's membership in the Human Rights Council (UNGA 2011b), and demanded an immediate end to violence against civilians. Increasingly, the debate became polarized over the scale and kind of intervention required to protect Libyans in mortal danger. The R2P norm, which validates intervention when the host state has turned the weapons of war against its own people, competed with other norms (such as traditional conceptions of sovereignty and non-intervention) and practical issues about whether force would achieve the right outcomes.

A number of actors were opposed to direct intervention. In the immediate aftermath of the adoption of Res. 1970, Russia made a statement reaffirming that while they condemned the use of violence to quell protestors, 'these problems should be addressed by the peoples of the relevant countries' (UNSC 2011d). The Peace and Security Council of the African Union reaffirmed its respect for the territorial integrity of Libya (AU 2011b). The Secretary-General of the OIC (2011b) on 8 March simultaneously opposed the option of foreign military intervention and reiterated Libya's own responsibility to protect its people (OIC 2011c).

However, the idea of intervention in the form of a no-fly zone began to gather momentum. Crucially, on 12 March the League of Arab States urged the creation of a no-fly zone while affirming Libya's territorial integrity (LAS 2011). The language used by the League of Arab States is worthy of note, saying that the Libyan government 'had lost its sovereignty' in view of its conduct. Their support for a no-fly zone appears to have swung the momentum in favor of a further Security Council resolution, with the French making it known that they were drafting a resolution to that effect.

Others advocated stronger measures. A statement by the European Council to the UN Security Council on 14 March 2011 argued that 'all necessary means' ought to be used to ensure the safety of the people; a phrase that, once used, validates armed intervention under the UN Charter. A majority of the G8 countries took the same stand as the

European Council (UNSC 2011f: 2). However, as late as 16 March it was being reported that China was 'preventing' UN action (AFP 2011).

This momentum, to be sustained, required the support of the United States. However, Defense Secretary Robert Gates had been initially cautious, keeping in mind the shambolic attempts at establishing 'no-flys' during the Balkan conflicts, and questioning whether it was in the United States' national security interests to pursue the issue further (the traditional realist objection to humanitarian intervention). What seems to have been critical in tipping the Obama administration in favor of intervention was Secretary of State Clinton's taking up the cause at a time when Gaddafi's forces appeared to be crushing the uprising. Clinton was in Paris on the weekend of 12/13 March for a G8 summit. The *New York Times* reported how, on Sunday 'Mrs Clinton – along with her boss President Obama – was a sceptic about whether the United States should take military action in Libya' (Cooper and Myers 2011). By Monday night, her position was more open to taking decisive action, a message that Clinton took with her when visiting a number of Arab States in the days immediately prior to the Security Council vote on 17 March. At the same time, Ambassador Rice was seeking to persuade many cautious states on the Security Council to support a draft resolution that had been prepared the previous week by her staff 'just in case, officials said' (Cooper and Myers 2011; Corn 2012: 202–225).

A critical meeting of Obama's cabinet took place with 18 advisors in the Situation Room on the afternoon of 15 March 2011.[11] The president conducted an open meeting exploring different scenarios: what became apparent to him was that a resolution advocating a no-fly zone was not going to save civilians in Benghazi and elsewhere. What other options were there before the president? It appears that the Pentagon had not mapped out other strategies – due to the fact that there were no core national-security interests at stake (Lewis 2012: 6), a position that Vice-President Biden is said to have shared. Other more junior staffers were said to be uneasy with the view that the United States should not take the risks and bear the costs of an intervention. After bringing the discussion to a temporary halt to attend to other engagements, Obama reconvened the meeting that evening, still without a sense of what was the right course of action. The agenda for part two of the discussion was focused on three options: first, do nothing; second, settle for a 'no-fly zone'; third, seek a resolution from the UN to take 'all necessary measures,' which would enable the use of 'American airpower to destroy Gaddafi's army' (Lewis 2012: 7). Despite little support from his most senior office holders, other than Samantha Power, Obama took

the decision to push hard for a robust Security Council resolution. The justification provided, in the most detailed first-hand account to date, was a strong invocation of an ethic of responsibility: leaving the people of Benghazi to their fate was just 'not who we are' (Obama in Lewis 2012: 7).

Two historical memories appeared to be weighing heavily on the deliberations inside the Administration. The first was Iraq in 1991 when no-fly zones stopped Saddam Hussein from undertaking further massacres in Kurdish- and Shia-dominated parts of Iraq. The second was the failure of the Clinton presidency to respond to the Rwandan genocide (for which he later sought atonement). Both prior cases of action and inaction were enabling of the 2011 intervention *provided that* such action did not resemble the war of regime change in Iraq 2003. In order to put clear blue water between any armed intervention in Libya and the neoconservative war on Iraq, the Obama Administration had to ensure that an intervention would be multilateral and properly authorized by the Security Council.

On 17 March 2011, the UNSC adopted Res. 1973, which authorized the protection of civilians using 'all necessary measures' and established a no-fly zone and ongoing arms embargo to be enforced by a NATO-led coalition. Unlike Res. 1970, the vote on Res. 1973 was not unanimous. The resolution was put forward by France, Lebanon, the United Kingdom and the United States – though, as we have seen, the United States was very much leading from the front. Speaking in favor of the resolution, France reiterated that the violence against civilians provided a mandate to use 'all means necessary.' In addition to those who put the resolution forward, those voting in favor included Bosnia and Herzegovina, Colombia, Gabon, Nigeria, and Portugal. South Africa had been wavering – a personal call from President Obama to President Zuma might have been critical in delivering the vote in favor.[12] Brazil, China, India, Germany, and Russia abstained. Brazil and Germany opposed military confrontation on the ground that it would contribute to casualties and undermine the objective of achieving an end to the violence (UNSC 2011f: 4–6). The United States again utilized its normative liberal frame by affirming the Libyan people's 'universal rights' (UNSC 2011f: 5).

Our argument is that up to the vote for, and initial implementation of, Res. 1973 the agreement reached between relevant actors in relation to the responsibility to prevent harm to civilians in Gaddafi's Libya was openly couched in the language of the responsibility to protect civilians. It is clear that even though alternative norms were put forward in favor of intervention and non-intervention, the influence of

the norm of protecting civilians was extant. Throughout the debates, the voices of non-permanent members and regional organizations who were not members of the Security Council contributed to the justifications used by Council members to explain and support their positions. Facts on the ground supplied by INGOs (actors with no formal power) were interpolated into the debate and widely regarded as credible. Finally, China and Russia did not exercise their veto power. That these world powers acquiesced, rather than voted in favor of the resolution, means that – whatever their behind-the-scenes motives may have been – they expressed views that invoked alternative norms (such as territorial integrity and sovereignty) but in such a way that could concur with coercive action in the name of responsible protection. They agreed to intervene by not blocking the necessary action required to achieve the norm of protection, knowing that the Resolution would trigger military intervention. We conclude from this range of evidence that it is likely that argumentation around the humanitarian norm of intervention to protect civilians mattered in achieving the consensus required to pass Res. 1973.

R2P, post–Res. 1973

Within days of the military action commencing, critics both inside and outside the Council questioned the legitimacy of the use of force to protect civilians. The United States, the United Kingdom, and France claimed that members of the Council had been thoroughly briefed about the military strategy that would be implemented following the passage of Res. 1973. Much earlier, Robert Gates had said in a widely reported interview that 'the reality is . . . a no-fly zone begins with an attack on Libya to destroy the air defences. That's the way you do a no-fly zone' (Gates 2011; see also Eyal 2012: 57). An NGO account of discussions inside the Security Council on 17 March confirms that it was clear that the resolution authorized broad military intervention (Security Council Report 2011).

Yet Russian Prime Minister Putin condemned the air strikes, saying they showed that the resolution was deeply flawed because it 'allows everything'[13] (cited in Bryanski 2011). South African President Jacob Zuma and Brazil called for an immediate end to the airstrikes (Naidoo 2011; Reuters 2011), and India began to describe the events in Libya as clearly an 'internal matter' (IANS 2011). On 14 April, Brazil, Russia, India, China, and South Africa released the 'Sanya Declaration' calling for the Libyan situation to be resolved peacefully (see AU 2011c). Others

continued to try to connect the airstrikes with the R2P norm that had played such an important role in enabling the passage of Res. 1973. The Secretary-General of the League of Arab States expressed concern at the consequences of the airstrikes, saying 'what we want is the protection of civilians and not the shelling of more civilians' (Cody 2011).

In this fractured environment, the discursive link between the aims of the intervention and the protection of civilians required normative reaffirmation. Unfortunately, the state leaders, who were the architects and advocates of Res. 1973, closed down the discursive space that had been opened up by the R2P norm. This left that space wide open for other competing – and potentially incompatible – norms to fill. Further, it enabled a post hoc reconstruction of what had earlier taken place; namely, the reconstruction of the earlier debate as having always been simply a cloak for other intentions. An example of this undermining of the conditions within which the R2P norm was likely to matter is that UK Defence Secretary Liam Fox implied that Res. 1973 enabled the assassination of the Libyan leader (BBC World News 2011b) – which is clearly a mistaken view of Res. 1973 as well as the Law of Armed Conflict. He was corrected by the Chief of Defence Forces Sir David Richards, who said that an attack on Gaddafi was 'not allowed' under the resolution (BBC World News 2011b).

The impact of Fox's comment was exacerbated by the failure of others to maintain consistent argumentation around the R2P norm as well. On 29 March, a joint statement was issued by the United States, the United Kingdom, and France that openly discussed both the protection of civilians and the need for regime change (Clinton 2011; Cameron, Obama and Sarkozy 2011). The view of the Libyan intervention as having always been intended to achieve regime change, rather than a robustly enforced protection of civilians mission, is one that is now widely accepted in many capitals.[14] According to a report by the respected Royal United Services Institute, all of the BRICS took the view in April 2011 that 'NATO's actions [had] morphed from enforcing a no-fly zone to actively seeking regime change' and that this had exceeded the mandate of UNSCR 1973 (RUSI 2011).

Conclusion

The consequences of inconsistent normative argumentation were in full view when it came to the early framing of the Syria crisis. During April 2011, just weeks after Res. 1973 had been passed, the same P3 sought to pass a resolution condemning Assad's violence against

civilians, protestors, and supporters of the Syrian National Council. Russia argued that the draft resolution represented interference in the internal affairs of a sovereign state – thus prioritizing the sovereignty as independence norm, when of course the starting point for the R2P norm is that sovereignty does not provide a legal or moral defense for committing atrocity crimes. While the norm of sovereignty had also been raised in earlier debate regarding Libya, at that time it had been at least matched by the argumentative force of the civilian protection norm. By early April, the effect of inconsistent moral argumentation was to strengthen a more traditionalist view of sovereignty as an unqualified entitlement to non-intervention.

It is beyond the scope of this chapter to examine the communicative strategies deployed in the Security Council in relation to Syria. Yet there are good reasons to think that the widely reported breakdown, especially among the P5, is intelligible in relation to moral argumentation and its limits. Once the United States, United Kingdom, and France had established a pro-R2P consensus, they needed to constantly reaffirm its legitimacy by showing how means and ends were aligned: had they regarded moral argumentation as a process rather than a moment of decision, the other 12 members of the Security Council would likely have not reached the damaging conclusion that the P3 retained too much room for maneuver during the campaign (Evans 2012).

This examination of the debate over Libya demonstrates that in the lead up to Res. 1973, argumentation around the R2P norm mattered. Our analysis attests to the presence of key conditions facilitating this, including the conduct of less salient actors who successfully mobilized normative power in support of R2P. We have also shown the power of argumentation in terms of persuading President Obama that the use of American armed forces was both necessary and just. China and Russia might not have been persuaded by an appeal to the international community's R2P but they were sufficiently oriented toward the discourse that they chose not to use their power of veto. Choosing not to play the veto card, in spite of expressing countervailing norms that affirmed Libya's territorial integrity and sovereignty, was a deliberate choice that was critical to the agreement being reached.

While acquiescence to the norm of protection was an upside to the case, the temporal brevity was the main failing. Supporters of the original justification for the action failed to grasp the importance of persistent and consistent advocacy. Far from enhancing the justification, the supporters of Res. 1973 engaged in public diplomacy that undermined the protection of civilians mandate by fatally entwining

it with regime change. Others, who had previously been convinced, such as the BRICS, quickly retreated from their positions of support. The P3 abjectly failed to maintain consistency in promoting the norm of protecting civilians that had been vital to the creation of agreement that facilitated the intervention. We do not make claims here as to the success or otherwise of the Libyan intervention in relation to the civilians who were protected or harmed by it. What we do argue is that the legitimacy needs of a norm as fragile as using force to protect civilians, while clearly attainable, are high. The norm requires careful and continual discursive nurturing to be successful in the international arena.

Notes

1. These questions are derived from Habermas' validity claims (1984: 305).
2. For critiques of the utopianism of Habermas' earlier work on this, see Risse (2000: 16).
3. This view is supported by, and follows, Bjola's argument that the institutional settings within which decisions are made about the legitimate use of force themselves constitute an 'institutional lifeworld' (2005: 279).
4. In evaluating argumentation inside the UNSC, we are making no claims about how this operates in the wider UN system.
5. The precise meaning of these crimes is not spelt out in paragraphs 138 and 139 of the World Summit Outcome Document; however, the Rome Statute of the International Criminal Court (ICC) provides definitions of genocide (Article 6), crimes against humanity (Article 7), and war crimes (Article 8).
6. Rome Statute, Article 7, (i)a-k, (ii)a-h.
7. UN Watch has official consultative status in various organs of the UN system.
8. See http://www.oic-oci.org/in_news.asp?Page=18.
9. Pillay's estimate of 'thousands' was widely reported in the press: *London Independent*, http://www.independent.co.uk/news/world/africa/gaddafi-defiant-as-protesters-killed-2225667.html.
10. Interestingly, while the ICG did not fully support UNSCR 1973, they were one of the first INGOs to call for the Security Council to establish 'a no-fly zone under Chapter VII if aircraft attacks against civilians continue' (ICG, 2011).
11. Those attending the meeting included Joe Biden, Robert Gates, Admiral Mike Mullen, William Daley, Tom Donilon, with Susan Rice on a link-up from New York and Hilary Clinton on the phone in Cairo. The meeting, in Obama's diary, is called 'The President and the Vice-President Meet with Secretary of Defense Gates.' A freedom of information request has been lodged with the US State Department, with a view to obtaining a transcript of this meeting.
12. The *New York Times* reports that the South African Ambassador failed to show up in time for the vote, causing Ambassador Rice to go out of the chamber in search of him (he eventually showed up) (Cooper and Myers 2011).

13. Russia had proposed an alternative resolution in the Security Council, that called for a ceasefire, but it was not supported (Security Council Report 2011).
14. The Brazilian government's concept note called 'responsibility while protecting' has received significant support in the UN General Assembly, and is predicated on the argument that the will of the Security Council had been abused in the Libya action (UNSC 2011g).

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