Responsibility to Protect: Concluding Observations

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In these concluding observations we identify the leading threads that run through the contributions to this book, with a view to assessing the current status and role of the responsibility to protect (RtoP) and its future potential. We have grouped the relevant themes as they emerge from this book under four headings: 1) autonomy of RtoP; 2) legalisation of RtoP; 3) balancing of responsibilities between territorial states and the international community; and 4) sharing of responsibilities within the international community. The latter two headings are of particular importance for the dominant challenge that emerges from this book, and indeed for the development of RtoP as such: that is, how states and the international community can and should cooperate to give meaning, substance and effect to the responsibility to protect. For each category, under the heading 'developments', we first identify and comment on the relevant developments that the contributors to this book have identified, and then, under the heading 'implications for research', we identify those questions that remain open and that deserve further thought and research.

1 Autonomy

1.1 Developments

A critical claim of the RtoP doctrine is that both the state where mass atrocities are committed and the international community (a term that we use here as shorthand for states and international organisations) have a responsibility to prevent such atrocities. This claim raises the preliminary question as to what extent RtoP in fact plays an independent role in defining such responsibilities.

Many of the contributions in this book have consequently raised the existential question of whether the principle of RtoP has any real autonomy or identity, in light of the many principles and procedures that are already in place for responding to mass atrocities. Luck notes in this context: '[t]he responsibility to protect is an important innovation, not a radical departure. It is based on the existing body of law, not on novel theories'. There is a well-established body of law, as well as a range of more political principles, strategies and institutions that have aspired largely to the same aims as RtoP, such as, for example, existing approaches to conflict prevention.
To put this in more concrete terms: when the military actions in Libya in the spring of 2011 contributed to the protection of civilians, can we determine that this was in any way attributable to the use of the principle of RtoP that according to Security Council (sc) Resolution 1973(2011) was at the foundation of the action, or would the outcome have been exactly the same had RtoP not existed? And, if we consider whether or not the un and/or the North Atlantic Treaty Organisation (NATO) should have intervened in Syria, or rather left the developments to local actors (and, if so, how states should apportion responsibilities between themselves), can any of that be said to have been guided by the concept of RtoP?

We need to distinguish several aspects here. First, it is clear that the emergence of RtoP was part of a wider shift in political values that has also led to an increasing concern about human rights and international justice. In other words, RtoP did not emerge on its own, but is part of the normative fabric and belief system of major actors in the international system. This was also true for the states that sponsored RtoP: in his analysis of the role of Canada in the emergence of the concept, Gionet makes it clear that RtoP was indeed part and parcel of a human security agenda. It was also true for the development of the concept at the UN.3

Second, RtoP largely relies on existing procedures and mechanisms rather than necessarily bringing about or requiring anything new. Thus, the normal procedures of the Security Council, regional organisations and the rules governing non-forcible measures by individual states are fully applicable. Even specific strategies that are often claimed to be central to RtoP, such as early warning, were in fact in place well before RtoP and continue to exist independently from it.

Third, while the wider normative context and the use of the same mechanisms for implementation in principle need not deny the concept a separate identity, in fact, RtoP may be hard to distinguish from its normative context. That is obviously true for the responsibilities of states to protect persons within their jurisdiction from international crimes. Indeed, it is even somewhat of an understatement to say that states have a responsibility to protect in such cases, whereas there are longstanding obligations to offer protection under international law. At the same time, there is considerable overlap between RtoP and the Security Council agenda items relating to ‘protection of civilians’, conflict prevention, the peacekeeping operations obligations of third states under international humanitarian law, the Genocide Convention and the law of international responsibility.

These overlaps are not a coincidence. They are a direct consequence of the pragmatic, but in retrospect not unproblematic, decision of the 2005 World Summit (the wso Document) to explicitly limit RtoP to four international crimes. These crimes have been embedded in a complex normative system, both in regard to the ‘territorial state’ and in regard to third states and the wider international community, notably through the un and the International Criminal Court (icc). In that normative system there is little space for yet more principles and approaches. Of course, while the system is already rather full, there has always been the possibility for a political choice to extend the existing available procedures for RtoP. However, it appears that this has not been done – most notably indicated by the explicit rejection of the option to extend RtoP in the direction of humanitarian intervention.27

The resulting paradox is that RtoP can now be said to have been successful even when it is not invoked, or, even more, that it can be called successful precisely because it is not invoked.28 As Morada points out, the military jinta of Myanmar accepted international humanitarian assistance only through the Association of Southeast Asian Nations’ (ASEAN’s) backdoor diplomacy and non-coercive intervention, while the fact that ASEAN did not openly invoke RtoP as justification for its “intervention” indicates that there are in fact alternative measures that could be adopted by regional organisations in dealing with crisis situations in their own backyard.29 The fact that the ambitions of RtoP can be achieved even without anyone relying on or even thinking of RtoP suggests that RtoP indeed does not have an autonomous identity.

Several authors have nonetheless highlighted the potential of RtoP to break away from the established normative framework and to assert a distinctive identity. Perhaps most controversially, and despite evidence to the contrary in the wso Document, a strong claim persists that RtoP essentially justifies and indeed calls for humanitarian intervention when that is needed to save people from mass atrocities and the Security Council fails to act. Indeed, there is a close conceptual and historical connection between RtoP and humanitarian intervention. Clearly, the ultimate challenge remains whether the world will stand by in the face of another genocide, when for one reason or another the Security Council does not act. As Goldhagen poignantly notes:

In retrospect, would anyone really disagree that, if such measures could have prevented the Rwandan genocide and the deaths of 800,000, then we should have taken them – regardless of international law’s obstructionism and whatever unease we might feel? So how can we say that we should not adopt these same measures to prevent the next Rwanda, and the next one after that?32

More generally, emphasising and integrating different approaches to prevention – rather than reacting after human lives have been lost – may be a noteworthy attribute of RtoP. Such a shift might unite and create synergies among existing organisations and initiatives as well as sparking new ones. Importantly, the concept may also create a powerful discursive repertoire that can be used to advocate more forcefully the moral conduct of a more responsive, accountable international community.

Short of humanitarian intervention, RtoP has the potential to contribute to, or at least provide a conceptual basis for, smaller and less controversial measures that respond to (threats of) mass atrocities. Several contributions to this book have identified such measures, for instance in the form of intervention based on invitation from parties that rebel against a repressive regime and in response to incitement.
However, the strongest claim to innovation and identity is not to be found in any particular strategy, but rather in the totality and interaction of strategies. As noted by Luck: 'By combining established elements in fresh combinations, the whole has the potential to be much more than the sum of its parts.' RtoP seeks to connect the various pieces of the puzzle that arise when mass atrocities threaten to occur. Indeed, in terms of the three pillars approach of the 2009 UN Secretary-General Report (UNSG Report), there is no formal or temporal separation between the pillars of prevention by the territorial state, assistance and intervention. At any point in time, the relevant actors are to consider every option and how they interrelate.

1.2 Implications for Research
The absence of a distinct identity implies that methodologically, any attempt to say that RtoP has or has not worked in a specific context is next to impossible. Wouters, De Man and Vincent’s note that ‘it is likely that the intervention in Libya would have been authorised, even in the absence of the RtoP doctrine’. For those only concerned with the actual outcome, that may not be particularly disconcerting, but for an academic inquiry into the meaning, role and effect of RtoP, this is a troubling conclusion.

It will be challenging to find ways of investigating when a specific policy decision and outcome could validly be attributed to RtoP. Is a mention of the concept in relevant resolutions a sufficient indication of its impact? Or could the absence of its invocation in fact be interpreted as a success, given RtoP’s emphasis on (silent) diplomatic measures of prevention and support of states in order to live up to their protection tasks?

Though the odds may be against it from a conceptual perspective, the question of whether RtoP has a distinct and separate identity also is an empirical question. Undertaking empirical research into how the principle of RtoP has or has not been relied upon by relevant actors in particular conflict situations could make an important contribution to existing knowledge. Information on claims and counterclaims would shed more light on its independent meaning, as a political but potentially also as a legal principle.

Two related areas would benefit from further research. The first concerns the question of what specific measures have been implemented and tried for the protection of people from mass atrocities. What forms of operationalisation, if any, are unique for RtoP? Is it possible to relate any particular responses to the principle of RtoP? This question will require studies that compare the practice before and after the emergence of RtoP as a concept on the world stage, and within the latter category the practice that was expressly tied to RtoP to the practice were relevant actors did not make a connection to RtoP. Operationalisation is not something that can be theorised or decided upon during negotiations, but will have to be inferred first and foremost something from actual practice.

Second, specifically with regard to its potential as a comprehensive approach, the again largely empirical question is to what extent this potential has made the transition from the pages of the UNSC Report to actual political practice. Wouters, De Man and Vincent point out in this volume that this conceptual comprehensiveness has hardly been translated into the strategies of organisations such as the European Union (EU) that seek to interpret and implement the concept in practice. The question in empirical terms is whether it can be determined whether RtoP can be correlated to a more comprehensive policy-making, and, in conceptual terms, whether it provides a coherent and sound basis for such comprehensive policies.

2 Legalisation
2.1 Developments
The principle of RtoP is mainly seen as a political principle. But, as indicated above, it is an under-statement and indeed partly incorrect to say that RtoP is only a political principle. From the moment RtoP appeared on the international stage, and certainly after its inclusion in the UNSC Document and its restriction to the ‘four core crimes’, at its core, RtoP has obvious legal dimensions. Indeed, it can be argued that the change from the original International Commission on Intervention and State Sovereignty (ICISS) Report to the UNSC Document resulted in a distinct legalisation of the principle.

Precisely for the four crimes to which RtoP applies, both treaties and customary international law place affirmative obligations to protect on the territorial state. In any case, the Genocide Convention, and arguably human rights law and a purposive interpretation of Common Article 1 of the Geneva Conventions, would furthermore create obligations for third states to ensure that no other state commits genocide, war crimes or crimes against humanity. In effect, the equation of the scope of RtoP with these crimes has indisputably brought it within a legal regime.

The fact that RtoP is largely embedded in existing international law does not render the newly emerged principle superfluous. In fact, one of the reasons for its emergence may be the fact that existing legal obligations in this area have been very unevenly and imperfectly implemented. Had the regime of international law induced the effective protection of the peoples of Rwanda, Yugoslavia or Sudan, it is unlikely that the debate on RtoP would ever have taken place. The political support that RtoP has been able to generate from some states, at least, holds the promise of strengthening political support for and increasing pressure to ensure better implementation. As noted by Jørgensen, RtoP and the responsibility regime under the law of international responsibility ‘are potentially mutually reinforcing, because RtoP gives greater moral and political force to State obligations, and the mandatory legal nature of those obligations in turn gives greater force and legitimacy to the reaction under RtoP’.

From a legal point of view, this may be the greatest contribution of RtoP. What it may have brought, then, is not so much a reaffirmation of the law, but rather an added political impetus to have the law applied, and to provide a set of policy
instruments, such as early warning and preventive deployment, that helps to implement these obligations. A margin of appreciation and down-to-earth pragmatism may always remain a necessary ingredient when it comes to the conduct of politics in regard to mass atrocities. Yet, RtoP may help to enforce the normative acknowledgement that outright arbitrariness and the cynicism of selective compassion with victims of state-sponsored or tolerated mass atrocity is no longer a policy option. As Jørgensen emphasises in her contribution in this volume:

Responsibility is essentially about promises, as the roots of the word mean to promise something back. This meaning underlies the notions of responsibility to protect, State responsibility, responsibility of international organisations and responsibility of the territorial State. The responsibility regime in respect of serious breaches offers some legal tools based on States promising something back as members of the international community which could in turn help to ensure the fulfilment of the promise embodied in RtoP. 31

Beyond the political support for existing state obligations to protect, RtoP can in addition lead to further legalisation. This holds in particular for the Security Council, which is bound to exercise a key role in the normative system of RtoP, but which has thus far been assumed to have full discretion in determining whether and how to act. A strong argument can be made that the obligations of both the UN and its member states to act in case of mass atrocities imply that the Security Council no longer has full discretion to decide whether or not to respond to such situations. Of particular relevance in this regard are the procedural obligations falling on the members of the Security Council to justify their vote.32 So, just as RtoP has led to a strengthened political impetus to make legal obligations work, it may lead to a strengthened effort to ground the political powers in law to incrementally remove the arbitrariness of their use.

At the same time, the very example of the Security Council also shows that there are limits to the possible legalisation of RtoP. Peters observes that the potential consequences of RtoP, if endorsed as a legal principle, are rather serious. Spelling out the consequences to their very end is apt to deter states from accepting RtoP as a hard legal obligation. The prospects of endless chains of legal obligations might, in the final analysis, turn out to be counter-productive for alleviating the plight of endangered populations.33

The larger point here is that while the limitation of RtoP to the four crimes connects the principle to a well-established body of international law, states have always aimed at keeping control over the implementation and enforcement of that body of law, and it remains to be seen whether RtoP will make much of a difference in this respect.

2.2 Implications for Research

While the general contours are thus relatively clear (RtoP builds on and confirms law, while leaving ample room for political decision-making at the level of implementation), several questions can benefit from further research.

Even though there is a number of possible sources to guide interpretation of the legal content and scope of RtoP, as for example the jurisprudence of the International Court of Justice (ICJ) that has been analysed by Zysber in this volume, there is a long list of legal uncertainties surrounding the concept of RtoP.34 While recognising the utility of flexibility, and the need for patience when developing international norms that can stand the test of time with sufficiently robust support of a diverse community of states, there is a number of legal issues concerning the content and scope of RtoP that remain controversial and that have not yet been sufficiently explored. One pertinent question is who are the beneficiaries of the obligations associated with RtoP, and who, under current legal norms and practices, are being left out of the regime of protection.35

Another area of research is whether the obligations to protect that rest on territorial states, traditionally seen as obligations of result, can be developed in the direction of obligations of conduct. This would be in line with the ICJ's interpretation of the obligation to prevent genocide. Another question to be investigated is whether there are certain best practices that have proven to be essential elements of any strategy of protection and that should be considered as minimum elements of the obligation to protect. One example would be the control of media outlets that may result in incitement.36

Another area where the law remains relatively unsettled is the legal basis and scope of obligations of third states and regional organisations in responding to (threats of) mass atrocities. The obligations of third states under the Geneva Conventions,37 the Genocide Convention38 and the law of state responsibility39 are rather unclear. While little will be gained from further scrutiny of the text, much may be gained from an assessment of whether and how such obligations have been invoked and relied upon in recent instances that are relevant from an RtoP perspective. This also holds for regional organisations, in particular the African Union (AU) and the EU, both of which have, to some extent, recognised the policy implications of RtoP. But the question whether this is - and is understood to be - a political choice or a legal obligation, and the scope and limits of such obligations remain wide open. One of the areas where this holds true concerns the use of non-forcible measures. Bilkova, referring to the issue of unilateral non-forcible measures, concedes that such measures are 'fully compatible with [the RtoP] framework' and could play a significant role in its implementation. Yet, she stresses, there first needs to be clarification of the legal basis of such measures and reflection on issues such as 'whether they may derogate from international law and whether the resort to them constitutes a right or a duty.'40

Another highly relevant question is the role of invitations for support by local movements that rebel against regimes oppressing the population. When is recogni-
tion of such movements lawful and, in particular, are the actions of such movements in a position to legitimise intervention by military means that otherwise would be unlawful? Lieblich refers in this context to the 'chaotic' law of intervention upon invitation or consent of a party to such a conflict.41

Yet another set of questions relates to the ultimate objective of protection. If it is accepted that under the above-mentioned provisions, as well as under relevant Security Council resolutions (notably 1973(2011)) there is a legal obligation or mandate to protect populations, the question is what exactly the relevant actors must (and may) do to achieve that aim and, more in particular, when it can be said that the aim has been realised. Does a semi-permanent ceasefire qualify as protection, or is protection only achieved if the root causes of the problem (in the case of Libya the Gaddafi regime) are removed? The question is relevant particularly as it relates to the perceived threat of abuse of RtoP for ulterior motives (see below, section 3).

This issue is directly related to the aftermath of an intervention. If (third-pillar) intervention leads to the overthrow of a regime that had been seen to cause mass atrocities, can the intervening actors at that time simply end their involvement? Or is it a (political, but also legal) consequence that these actors should take responsibility for the aftermath and be involved in a new cycle, from intervention to prevention? In other words: does the duty of protection ever end when conflict is considered to be cyclical?

3 Balancing responsibilities

3.1 Developments

The third main theme that emerges from the contributions to this book is the balance between the responsibilities of the territorial state on the one hand, and those of third states, international organisations and 'the international community' on the other. RtoP is a responsibility that is shared between various actors. However, the precise modalities of this sharing remain somewhat ambiguous. As noted by the representative of the Netherlands in the General Assembly:

The World Summit of heads of State and Government that took place in 2005 ... consolidated a consensus that, in the true spirit of the Organisation's founding fathers, laid down our shared moral responsibility to prevent the occurrence of conscience shocking mass atrocities: genocide, war crimes, ethnic cleansing and crimes against humanity.42

There is no question that the territorial state should take action first, and the UN should only take the lead if things go wrong. But how, exactly, responsibilities should be divided between the UN and regional organisations and between third states (who should save Darfur?) remains complex, and may prove to be the Achilles heel of the concept.

The first part of this balance may strike some as counterintuitive. The principle of RtoP has often been heralded for the role that it assigns to the international community. But it needs emphasis that the role of the international community is only a secondary one. The principle of RtoP puts primary responsibility for prevention firmly on the shoulders of the territorial state. Only if and when a state fails its population should other actors come into play. Even then, the main role of the international community is to support a state in living up to the responsibilities that comes with its claim to sovereignty. Some states indeed appear to read RtoP primarily in this supportive way.43 While this reading would be incomplete if it were to neglect the other side of the balance, it is important, because it may help bolster support for the principle among states that see it as a threat to their sovereignty. Indeed, the principle of RtoP does provide normative support for states that seek to resist the interventionist policies of the international community.

The other side of the balance concerns the residual and complementary responsibility of the international community, in part through the second (assistance) pillar of the 2009 SC Report, but in particular through the taking of decisive measures by the UN Security Council by employing 'the whole raft of tools available under Chapters vii, viii, and vi of the Charter'.44 Many of the chapters in this volume have explored the ways and means through which the Security Council,45 regional organisations46 and individual states47 can and should assume responsibility if the territorial state fails to act.

As long as such attempts fall short of coercion and the use of force, they are legally unproblematic.48 Yet in the past, more often than not, 'target states' have challenged such attempts as undue interference in their internal affairs. The principle of RtoP has made such challenges more problematic and less persuasive. As a result, often the discussion is no longer about the question of whether interference is allowed or not (RtoP has put that beyond controversy), but about the question of whether in any particular context there are sufficient indications to justify interference, thereby no longer leaving the matter to the territorial state.

In this light, RtoP can be seen as one further contribution to the erosion of Article 2(7) of the UN Charter, which lays down the principle of non-intervention in the internal affairs of states.49 RtoP provides further legitimacy to interference in states' internal affairs or, rather, changes our definition of what qualifies as interference and what is internal (and what is not). But this change is more political than legal: from a legal perspective, an attempt to induce a state to stop killing its population has never been qualified as intervention, as long as it was not pursued by coercion.

One might think that the first accomplishment (strengthening powers of territorial states) and the second one (justifying interference) would cancel each other out, thus rendering them meaningless. But that would be a misunderstanding. The fact that the principle provides support on both sides of the normative spectrum forces and shapes a normative debate that is concerned with the substance of the roles of both the territorial state and third states, and with what actually is achieved.
The debate has been recast: it is no longer about sovereignty versus intervention, but about the protection that is to be offered by all relevant parties.

There is one other consequence of the parallel justification of the roles of the territorial state and third states. RtoP necessarily leads to a factual inquiry into the events in a particular situation, and into what was and could be done by the territorial state. In this situation, a critical question is when and how the responsibility of the international community is actually triggered. A key mechanism is the role of early warning mechanisms. RtoP has led to the bolstering of early warning functions in regard to the four crimes. Both Special Advisors will play a key role in the assessment of when 'national authorities are manifestly failing to protect their populations', as stated in paragraph 139 of the wso Document.

The sharing of responsibilities by the territorial state and the international community inevitably raises questions of trust and fear of abuse on the side of (potential) target states of intervention and their allies. Sensitivities regarding the neo-imperialist ambitions of 'the West', 'the North' or, yet more generally, powerful states, still taint the debate on RtoP; trigger deeply felt anxieties, and are sometimes manipulated as an excuse to justify exceptionalism and abusive uses of sovereignty by national elites. Indeed, as Swatek-Evenstein notes, there is a direct parallel with old theories of intervention on behalf of civilised nations: 'The "agents" and methods of the theory of the intervention d'humanité and RtoP are remarkably similar, only the "international community" has replaced the "civilised" states and "humanity" is now cast as "responsibility". Yet, as Welsh reminds us, a significant number of developing countries from Latin America and Africa joined the pro-RtoP coalition during negotiations over the wso Document (including Argentina, Chile, Mexico, Peru, South Africa, Rwanda, Tanzania and Senegal), 'making it impossible to portray the debate within the un as solely "North vs. South"'. It also is relevant that the request from the Arab League to establish a no-fly zone to protect civilians in Libya was critical to the passing of the first 'RtoP resolution': Security Council Resolution 1973. Moreover, while some states continue to oppose the concept, it is relevant to note, following Wouters, De Man and Vincent, that there is often a discernible chasm between what they term the 'recalcitrance of many Southern and Asian state leaders' when it comes to RtoP and the contrasting support that has built up among their populations. Here we may again see a parallel with the discourse surrounding the validity of a universal human rights regime: while the charge of cultural relativism is often put forth by governments with poor human rights records, the victims of abuses are usually much less likely to claim cultural exceptions when it comes to the realisation of human dignity.

As to the danger of abuse and 'ulterior motives', there is the real danger of invoking RtoP, as may have been the case in Libya, as a guise for other ambitions. In particular with regard to the third pillar, many states are concerned about coercive action. As pointed out by Luck, '[h]istorical narratives matter in that regard: who invented and championed RtoP? Why? Whose interests and contributions does it serve? Is RtoP about Rwanda or Iraq, power or principle? Who owns it and can it be universalised?'

3.2 Implications for research
A core area for research will be to examine more closely the tipping point at which the international community assumes – or ought to assume – its part in protection. While each case will be individual and contexts will be decisive, such clarity may go some way towards preventing the fear of selectivity.

Another set of questions relating to the balance of responsibilities is whether the possibility that the international community will intervene may in fact reduce the ambition of territorial states to carry out their share of the responsibility. A notable example is the transfer of cases by Uganda to the ICC in a situation where, so it appears, Uganda could have done much more. Complementarity was originally designed to boost states' willingness to address issues, but we have actually witnessed a desire of certain states to 'pass' those issues to the ICC rather than engage in taking up their sovereign responsibility themselves.

And finally, the question arises as to the end goal of the responsibility of the international community. Should it be satisfied when, at any given moment, mass atrocities have stopped? Or should it consider the root causes that may lead to renewed atrocities in the future? In this context, Goldhagen points us to the realisation that despite its enormity and seeming universality in human history, we still do not really understand the scope, magnitude and nature of genocide. Thus, we simplify and dismissively blame 'ancient' ethnic hatreds that 'other' people seem to have cultivated among themselves. Yet, he reminds us, large-scale mass murder is a systemic feature of modern states and the international system, and that is how we should begin to address it.

4 Sharing within the international community

4.1 Developments
In addition to the question of the allocation of responsibilities between territorial and third states (or the international community), a critical question is how responsibilities are to be shared within the international community.

This question arises in several ways. One concerns the relationship between the UN and regional organisations. Under the UN Charter, regional organisations can act, indeed at the same time as the Council itself, but the scope of action is narrowly circumscribed and limited by the Charter. The question is whether these limits will be reflected in practice. Abass rightly notes that:

Africa has deliberately or inadvertently become the victim of the Security Council's most profound inaction. Asking Africans to once again trust a body that has proved several times to be totally useless when their lives are at stake is thus like...
squeezing a stone to yield water. Yet, the dictates of civilisation, the spirit of com-
unity and the garrison privileges of camaraderie impel Africans to once again entrust the Security Council with the sacred responsibility to protect them from
harm. In entertaining this request, however, Africans clearly reserve for themselves the right to go it alone, if and whenever they deem fit. This is, to be fair, a small price for the Security Council to pay for squandering its legitimacy. At the same time, the likelihood that the AU would be able to carry out the action necessary to implement RtoP, in, say, Libya in the circumstances of early 2011 seems very slim, and it would be dependent on supportive action by the UN or other
regional organisations such as NATO.

The question of the allocation of responsibility also arises within the category of third states and regional organisations. It is one thing to argue, as Brollowski does, that 'a purposive interpretation in accordance with the principle of effectiveness and
the Vienna Convention on the Law of Treaties, undoubtedly leads to the conclusion
that today, common Article 1 creates obligations for third States'. Nonetheless, this does not answer the question of which state or organisation is to act. In
the ICJSS Report, the appeal to the international community is a very general one,
leaving us with an essentially unallocated responsibility to protect.

It is a known phenomenon in social psychology that the more bystanders wit-
ness an incident that would require intervention to help a victim, the less likely bystanders feel an individual responsibility to act, and thus the less likely interven-
tion becomes. A similar risk of inaction is engrained in the set-up of RtoP, which
spreads responsibility to each state, individually as well as jointly. When everyone is
responsible, no one is. In its jurisprudence, the ICJ has given certain indications for relevant criteria, in particular those of political influence and geographical proximity. These criteria can be particularly relevant not only for states, but also for the Security Council: if we accept that a third country that has influence over the state of the genocide is responsible to prevent, surely does the Security Council, which must be presumed to have such influence over any state anywhere. In consequence, it could also be held responsible and, of course, accountable in case of failure.

Yet, as Welsh notes, this and similar criteria have drawbacks, 'making it impos-
sible to establish a priori a general theory as to which should be applied in each
case'. In particular, one could argue that 'the intervening power is likely to have a particular agenda of its own (including partiality towards particular factions within
the target state's society) that would complicate its exercise of remedial responsibil-
ity'. Pattison eventually argues that the dominant criterion should be effectiveness
— meaning that the bearers of remedial responsibility should be the agent that has
the capacity to mount the most effective response. The fundamental idea is that
an intervenor's effectiveness is the primary determinant of its legitimacy.

Still, Welsh observes that 'it is not clear in all cases whether local knowledge or
Western capacity will translate into greater effectiveness'. Moreover, it could be
argued that those who cannot intervene today (for reasons of insufficient capac-
ity) should exercise their moral duty in other ways (for example, by isolating the
perpetrating state diplomatically, offering diplomatic support for action, or financ-
ing non-military assistance). Welsh, in congruence with Pattison's argument, also argues that 'the responsibility to protect is to be an international responsibility — also demands concrete steps to develop greater capacity for intervention and a commitment to contribute to the costs of military action'.

4.2 Implications for Research

Our knowledge and understanding about the way responsibilities to protect are,
and should be, shared within the international community, remains fairly limited. A
proper starting point for further research is the set of international obligations that
permit and/or oblige third states and international organisations to respond to the
crimes covered by RtoP. While to some extent these are fairly well established, for
another part (notably the obligations under the law of international responsibility,
that are part of the 'progressive development of international law') remain indeter-
minate. Particular relevant questions pertain to international organisations — which
organisations are in fact under such obligations, taking into account the differences
in objectives and competences?

More insight into their scope under positive international law, but in particular in
the direction of their development can gained from an examination of the practi-
ces of states, international organisations and other relevant actors — both in terms
of their actual conduct, and in terms of the degree and way in which they are held
to account if they do not live up to such obligations.

However, the main research challenges in this area are normative, rather than
empirical. If we are to differentiate between states that can be expected to or should
respond to mass atrocities, the question is on what basis this is to be done. If all
states are obliged to realise a certain objective, such as the protection of civilians
against mass atrocities, does this impose on all states an obligation to take certain
actions? And if not all states have such obligations, how is to be determined which
states should act and which not?

The moral criteria identified above are highly relevant in this context. These
include effectiveness, or capacity. However, the scope of that criterion remains con-
tested. If we accept effectiveness as decisive criterion is there any moral basis for
expecting involvement of states to ensure that they can play an effective role? What
is the time span within which this should be assessed? Moreover, the criterion
needs to be considered in juxtaposition with other criteria, such as the legitimacy of
the intervening actors.

Fundamental research is also relevant on the transition of such moral criteria
into the legal realm. What is the relationship between moral criteria of the type
advanced by Pattison and legal criteria such as those formulated by the ICJ in the
Genocide case? And through what processes can such moral criteria influence and
shape the development of the law?
5 Looking Forward

At this moment, RtoP is situated at the intersection between theory and practice. The international community has journeyed from the theoretical and conceptual stages of RtoP development to a new stage that sees RtoP appearing in policy documents and practice. As noted by Luck, the principle, after all, is designed to change human behaviour. Therefore, it can only ultimately be judged by what does (not) occur in practice. The theories that support RtoP, be they legal, political or philosophical (many of which have been discussed in this volume), are means to an end only, and not an end in themselves.69 The Security Council’s invocation of RtoP in the spring of 2011 in support of its decision to act on the situation of Libya70 signifies a key moment in this new stage.

The case of Libya demonstrates that several aspects of RtoP are now firmly recognised, such as the fact that Libya was under a clear obligation to protect the civilians within its borders, and that its failure to protect civilians triggered the responsibility of other states – notably the Arab League and the UN, but also individual states such as France and the United States. The case of Libya may even be used to argue that RtoP has been instrumental in guiding the Security Council into action, as may be inferred from the Council’s reference to the principle in its resolutions on Libya.

Yet, the case of Libya has also demonstrated that many difficult questions remain. For one thing, the case showed little of the comprehensive approach that has perhaps been the most heralded aspect of the principle of RtoP. The case of Libya was all about urgent reaction by intervention, while very little effort seems to have been made in terms of prevention. Until very recently, many states had been so involved with bringing Libya on board concerning their anti-terrorism policies that few could be bothered to look for – or merely register – signs that the state might turn against its own people. Little was put in place in terms of functioning early warning mechanisms, another important feature of RtoP. The case furthermore shows that while RtoP depends on a strong role for regional organisations, their ability to respond effectively without the Security Council is fairly limited and that, moreover, once the Council has acted, the room for the AU and the Arab League to act (for instance by broker ing a ceasefire) is evidently curtailed if the Council prefers to continue with military attacks. There is also continuing ambiguity and controversy about the nature of protection, who is to be protected, how this is to be done and when the task of protection could be considered as completed – are we to be satisfied with the cessation of attacks or will regime change be a sine qua non? If so, are there and can there be requirements for the nature of an incoming new government? And what role should third parties play in the process of reconstruction and reconciliation?

RtoP remains vulnerable to the critique that it can be used to cloak motives of regime change in the language of civilian protection. As Wouters, De Man and Vincent note, the EU’s motives in this regard remain murky and ‘seem to confirm the impression that RtoP is once again being instrumentalised for political goals extraneous to the protection of civilians in order to bring about regime change. While the political motives as such may be justifiable, they continue to contribute to the commonly-held suspicion that the RtoP references in the UNSC resolutions were used mainly as a pretext to overthrow a dictator that had long been a thorn in the side of the West, rather than as a real indication of a strong political willingness of the international community to come to the rescue of a suffering civilian population’.71

In the end, it is likely that a ‘successful’ intervention in Libya that would protect civilians would also help to remove the current regime from power. Indeed, it may be a necessary ingredient of any application of RtoP – after all, it seems hard to imagine intervening in a situation where a regime that is committing mass atrocity crimes is stopped and subsequently left in control of the very people it had targeted. Yet, the mutation of a civilian protection mission into an apparent regime change endeavour is likely to reinforce fears about RtoP as a threat to sovereignty. Importantly – and even despite the support of the Arab world for the military intervention in Libya – a perceived instrumentalisation of RtoP as a fig leaf for enforcing regime change within a larger Western policy framework will do little to bolster support among initially sceptical states.

Many of these fears may be mitigated by seeing RtoP not (primarily) as an instrument for intervention by the West in other continents, but as a principle of mechanism for prevention and response at the regional level. As noted by Morada in the context of South-East Asia, a bottom-up strategy that focuses on domestic constituency-building around RtoP is therefore an important step in promoting the internalisation of the norm.72 The events in Libya in the spring of 2011 show that RtoP still has a long way to go to achieve this and thereby to achieve its potential.

Partly as a result of these continuing ambiguities and controversies, furthering the path of RtoP will have to mean engaging with the legitimate concerns of states that fear selectivity and abuse and that will undoubtedly interpret and critically evaluate the Libyan example in this light. At the moment of writing, in Syria and Bahrain, scenarios are unfolding that might just as well be characterised as crimes against humanity that would trigger RtoP, while no action comparable to that in the Libyan case is being taken or even publicly considered. While it is clear that the UN (and NATO) is currently simply incapable of protecting all victims of all abuses, even those that reach the scale that would trigger RtoP, some form of transparency and predictability as to when action is and is not taken is necessary. This is not merely a matter of the academic preference for conceptual clarity, but a dire necessity to ensure the long-term credibility and legitimacy of responses in a spirit of what is now increasingly coming to be seen as a global responsibility towards human beings – wherever they happen to live.
Notes

1 Luck's contribution in the present volume, at 39.
2 The added value of RoP when it comes to this existing arsenal of measures has been questioned in this volume inter alia by Cuyckens and De Man's contribution in the present volume, at 111-123.
3 Gionet's contribution in the present volume, at 61-70.
4 Luck's contribution in the present volume, at 39-46; Deng's contribution in the present volume, at 337-346.
5 Peters's contribution in the present volume, at 199-211.
6 Abass's contribution in the present volume, at 213-236.
7 Bilkova's contribution in the present volume, at 291-304.
8 Deng's contribution in the present volume, at 337-346.
9 Luck's contribution in the present volume, at 39-46.
10 Poli's contribution in the present volume, at 71-81.
11 Cuyckens and De Man's contribution in the present volume, at 111-123.
12 Brollowski's contribution in the present volume, at 93-110. It should be added that, as admitted by the author herself, it is contested whether this indeed is the legal implication of article 1 of the Geneva Conventions, see ibid at 95.
13 Zyberi's contribution in the present volume, at 305-317.
14 Jørgensen's contribution in the present volume, at 125-138.
15 Kleffner's contribution in the present volume, at 85-91.
16 Though in many respects, the addition of the fourth crime (ethnic cleansing) is odd, as this may not be subject to the same regime as war crimes, crimes against humanity and genocide, unless in a particular context, it itself is part of these categories; see Kleffner's contribution in the present volume, at 87.
17 Amneus's contribution in the present volume, at 137-171.
18 Luck's contribution in the present volume, at 39-46.
19 Morada's contribution in the present volume, at 241.
20 Amneus's contribution in the present volume, at 137-171.
21 Swatek-Evenstein's contribution in the present volume, at 47-59.
22 Goldhagen's contribution in the present volume, at 337-351.
23 Deng's contribution in the present volume, at 337-346.
24 Lieblich's contribution in the present volume, at 139-154.
25 Hoffmann and Okany's contribution in the present volume, at 319-336.
27 Wouters, De Man and Vincent's contribution in the present volume, at 254.
28 Ibid, at 247-270.
29 Brollowski's contribution in the present volume, at 93-110.
30 Jørgensen's contribution in the present volume, at 136.
31 Ibid, at 137.
32 Peters's contribution in the present volume, at 199-211.
33 Ibid.
34 Zyberi's contribution in the present volume, at 305-317.
35 Halbert's contribution in the present volume, at 273-289.
36 Hoffmann and Okany's contribution in the present volume, at 319-336.

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37 Brollowski's contribution in the present volume, at 93-110.
38 Zyberi's contribution in this volume, at 310.
39 Jørgensen's contribution in the present volume, at 125-138.
40 Bilkova's contribution in the present volume, at 300.
41 Lieblich's contribution in the present volume, at 140.
43 Morada's contribution in the present volume, at 237-246.
44 Luck's contribution in the present volume, at 42.
45 Peters's contribution in the present volume, at 190-211.
46 Abass's contribution in the present volume, at 213-236; Morada's contribution in the present volume, at 237-246; Wouters et al's contribution in the present volume, at 247-270.
47 Bilkova's contribution in the present volume, at 291-304; Jørgensen's contribution in the present volume, at 125-138.
48 Bilkova's contribution in the present volume, at 291-304.
49 Advisory Council on International Affairs, 'The Netherlands and the Responsibility to Protect'.
50 Luck's contribution in the present volume, at 41-44; Deng's contribution in the present volume, at 337-346.
51 Swatek-Evenstein's contribution in the present volume, at 54.
52 Welsh's contribution in the present volume, at 189.
53 Ibid.
54 Wouters, De Man and Vincent's contribution in the present volume, at 258.
56 Luck's contribution in the present volume, at 40.
58 Goldhagen's contribution in the present volume, at 347.
59 Abass's contribution in the present volume, at 232.
60 Brollowski's contribution in the present volume, at 103.
61 Welsh's contribution in the present volume, at 190.
62 Ibid.
63 Zyberi's contribution in the present volume, at 312.
64 Welsh's contribution in the present volume, at 190.
65 Pattison's contribution in the present volume, at 310.
66 Welsh's contribution in the present volume, at 190.
67 Ibid.
68 Ibid.
69 Luck's contribution in the present volume, at 39.
71 Wouters, De Man and Vincent's contribution in the present volume, at 263.
72 Morada's contribution in the present volume, at 245.