no role for peacekeepers. As hinted elsewhere in the chapter, the most promising such role is likely to be in the consent-based provision of Pillar Two support. But this too requires resources – resources beyond those granted for these tasks in most of the missions established since 1999. Nor, it should be added, does recognising the limitations of peacekeeping suggest there is no place for the use of force in responding to mass atrocity crimes. That, clearly, is not the conclusion to draw from the UN's experience in Rwanda and former Yugoslavia. This does not, however, undermine the central contention of this chapter, to wit that clarity with respect to the limitations as well as the possibilities of UN-mounted field operations is, paradoxically, also the first step to identifying where the true contribution of UN peacekeeping to preventing mass atrocity crimes and building support for R2P lies.

13 Humanitarian law, refugee protection and the Responsibility to Protect

William Maley

The development since 2001 of the doctrine of the Responsibility to Protect (R2P) has been one of the most important normative developments in international relations in the last century. At a truly remarkable pace, it has moved from being an idea articulated by the International Commission on Intervention and State Sovereignty to a principle endorsed by leaders of United Nations member states at the World Summit in 2005, and given further substance by its employment to justify protective action for the population of Libya at the time of the overthrow of the Gaddafi regime, although the precise import of this particular case remains open for debate.¹

Nonetheless, it is but one of a range of norms that have appeared in the last century and a half with a view to offering some kind of protection to people in vulnerable situations. The establishment in 1863 of the International Committee of the Red Cross (ICRC) was one event of fundamental importance in highlighting the need for protection of the vulnerable: the stimulus for the ICRC's establishment was the carnage on the battlefield of Solferino that had been witnessed by Jean-Henry Dunant when by chance he found himself in the vicinity of combat, and which he documented in a famous memoir.² The corpus of international humanitarian law, also known as the law of armed conflict, that has developed since then provides critical protections for those in the firing line in armed combat. Another kind of protective regime is that which exists for the benefit of those forced to flight by a well-founded fear of being persecuted. The 1951 Convention Relating to the Status of Refugees is an important source of normative obligation in this respect, but it is only one part of a wider regime augmented by other instruments, and by institutions such as the Office of the United Nations High Commissioner for Refugees.

¹ See Marie-Eve Loisele, 'The Normative Status of the Responsibility to Protect after Libya', *Global Responsibility to Protect* 5:3 (2013), pp. 317–341.

² Henry Dunant, *A Memory of Solferino* (Geneva: International Committee of the Red Cross, 1992).

This chapter is concerned with a particular theoretical problem, namely how parallel but *distinct* norms can come into conflict with each other. It is easy to assume that norms with a broadly similar humanitarian impetus will prove complementary, but that need not be the case. The reason for this is that norms are implemented in a highly political environment in which considerations of domestic politics may dispose rulers to seek ways of avoiding responsibilities that their predecessors may have voluntarily accepted. The area of greatest risk is with respect to refugees: here, the emerging R2P norm may be exploited by states seeking to free themselves of responsibilities under existing refugee norms. This chapter is directed at identifying how this risk might arise, and how it can be minimised. It is divided into six sections. The first addresses the question of how norms arise. The second discusses the key dimensions of R2P as a nascent or embryonic norm. The third is concerned with the development and enforcement of norms embodied in international humanitarian law. The fourth examines refugee norms and their rather different enforcement mechanisms, while the fifth turns to the difficulties that may arise in giving effect to norms in an intrinsically political environment. The sixth offers some brief conclusions.

Norms: force, development, scope

The R2P doctrine represents one of the most important embryonic norms of the last hundred years. If it becomes widely accepted, it will have a transformative effect on relations between states. In order, however, to understand why this would be the case, it is important to elaborate on what we mean by 'norms', and to clarify how they can come into existence and shape the behaviour of political actors. At its most basic, according to James S. Coleman, 'a norm concerning a specific action exists when the socially defined right to control the action is held not by the actor but by others'.³ Social norms 'specify what actions are regarded by a set of persons as proper or correct, or improper or incorrect. They are purposively generated, in that those persons who initiate or help maintain a norm see themselves as benefiting from its being observed or harmed by being violated'.⁴ Norms are therefore grounded in *normative expectations of behaviour*, which provide secondary reasons for action going beyond the mere self-interest of actors. Norms differ in this respect from social conventions. Conventions, at least in the initial phase, may have no

³ James S. Coleman, *Foundations of Social Theory* (Cambridge: Harvard University Press, 1990), p. 243

⁴ *Ibid.*, p. 242.

particular normative dimension, although with the passage of time a convention may be 'internalised' by the actors following it so that it does come to have normative force. A pure convention of behaviour provides an equilibrium solution to a coordination problem, but is sustained by the self-interest of actors.⁵ That said, the mechanisms that can support norms are many and varied. In a path-breaking study, Robert Axelrod pointed particularly to *metanorms* – norms that one must punish those who do not punish departures from first-order norms. However, he identified a number of other mechanisms as well. These included, most notably: (1) the *dominance* of one group over another; (2) *internalisation*, a situation in which 'violating an established norm is psychologically painful even if the direct material benefits are positive'; (3) *deterrence*, where 'even if punishing a defection is costly now it might have long-term gains by discouraging other defections later'; (4) *social proof*, when the actions of an individual are in response to the actions of others whose behaviour he or she can observe; (5) *membership*, where an individual is a voluntary member of a 'group working together for a common end'; (6) *law*, which may support, maintain and extend pre-existing norms; and (7) *reputation*, which is relevant because violating a norm 'would provide a signal about the type of person you are'.⁶

Norms have a complex history in writings about international relations, but in recent decades they have attracted attention in the context of both regime theory and constructivist ideas about world affairs. In his discussion of regimes, Krasner depicted regimes as 'implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'. Norms he saw as 'standards of behaviour defined in terms of rights and obligations'.⁷ While the processes by which norms take shape are complex and varied,⁸ Constructivist scholars have illuminated the importance of norm entrepreneurship. Norm entrepreneurs, Finnemore and Sikkink have argued, 'are critical for norm emergence because they call attention to issues or even "create" issues by using language that names, interprets,

⁵ David Lewis, *Convention: A Philosophical Study* (Cambridge: Harvard University Press, 1969), p. 78.

⁶ Robert Axelrod, 'An Evolutionary Approach to Norms', *American Political Science Review* 80:4 (1986), pp. 1095–1111 at pp. 1104–1107.

⁷ Stephen D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in Stephen D. Krasner, ed, *International Regimes* (Ithaca: Cornell University Press, 1983), pp. 1–21 at p. 2.

⁸ See Ramesh Thakur, *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics* (London: Routledge, 2011), pp. 1–13; Amitav Acharya, 'The R2P and Norm Diffusion: Towards a Framework of Norm Circulation', *Global Responsibility to Protect* 5:4 (2013), pp. 466–479.

and dramatizes them'.⁹ In a strict sense, norm entrepreneurs may be dispensable. One can imagine a situation in which norms emerge through the internalisation of conventions without an entrepreneur playing a significant role. Nonetheless, in many cases, norm entrepreneurs have indeed proved significant, whether one speaks of individuals such as Raphael Lemkin, who devoted his later life to promoting the norm against genocide, or bodies such as the International Commission on Intervention and State Sovereignty which gave rise to the notion of a responsibility to protect.

Where the idea of norm entrepreneurship is particularly useful is in helping to explain the emergence of what one might call 'instant norms'. Some approaches to the emergence of norms see the creation of norms as a learning process in which actors engaging with each other in an iterated rather than one-off fashion adjust their behaviours so that they match the expectations of other actors in ways that prove mutually beneficial.¹⁰ Norms that emerge in this way may take quite some time to crystallise, and there may be room for considerable debate over whether norms have emerged, and if so, what their precise content might be. Where, however, norm entrepreneurs are active, the whole process of norm generation may be speeded up. This is particularly the case if the objective of the norm entrepreneur is to produce a new rule of international law, since the process of crafting a new treaty can move as quickly as the potential parties to the treaty are prepared to permit. Almost the classic example was the campaign promoted by Canadian Foreign Minister Lloyd Axworthy to procure a ban on anti-personnel landmines. Embodied in the 1997 Ottawa Treaty which came into effect in 1999, it produced in short order a very effective norm that rapidly choked off a problem that through much of the 1990s had looked likely to leave a hideous legacy well into the twenty-first century.¹¹ As an exercise in norm creation, the promotion of the notion of a global responsibility to protect had some striking similarities to Axworthy's earlier exercise, with the support of the Canadian government being a critical element. Where it differed was in the engagement of the mass public. Axworthy's landmines campaign sought to generate a groundswell of public opinion in favour of a new norm, and was very successful in doing so. The norm entrepreneurship

⁹ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', *International Organization* 52:4 (1998), pp. 887–917 at p. 897.

¹⁰ See Edna Ullmann-Margalit, *The Emergence of Norms* (Oxford: Oxford University Press, 1977).

¹¹ See Ramesh Thakur and William Maley, 'The Ottawa Convention on Landmines: A Landmark Humanitarian Treaty in Arms Control?', *Global Governance* 5:3 (1999), pp. 273–302.

surrounding the Responsibility to Protect was a much more cerebral exercise, although the International Commission held consultations with civil society groups and experts in Ottawa, Geneva, London, Maputo, Washington DC, Santiago, Cairo, Paris, New Delhi, Beijing and St Petersburg.¹²

One other important difference needs to be noted. Many norms are formulated in such a way as to prohibit forms of destructive behaviour, and embody sanctions that can be directed against those who behave destructively. The Ottawa Treaty held out the prospect that those who continued to manufacture, transfer, stockpile or use anti-personnel mines would be anathematised. A Responsibility to Protect norm does not fit this particular pattern. The mass atrocity crimes with which R2P is concerned are already anathematised in a range of different instruments. An R2P norm is rather concerned with finding more effective ways of promoting responses to such atrocities. Given commitments to the sovereignty of states in the international system, it is exceedingly difficult actually to *sanction* any single state for not becoming involved in efforts to deal with mass atrocity crimes. Therefore, if the R2P norm is to become effective, it is unlikely to be because any sanction is in place to bolster it; rather, its effectiveness will be measured by the extent to which it is internalised – that is, so accepted by key states as *the* way in which to approach the problem of mass atrocity crime that it is unthinkable that it not be applied when circumstances demand.

R2P as a norm

Barely a decade has passed since the International Commission on Intervention and State Sovereignty introduced the vocabulary of a 'responsibility to protect'. This is a very short time span indeed when compared to the centuries it took for the idea of state sovereignty to be refined following the Peace of Westphalia.¹³ In addition, the terrorist attacks of 11 September 2001, coming only three months before the release of the International Commission's report, focused a great deal of attention on counterterrorism rather than the kinds of mass atrocity crime

¹² See International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), p. 83. The present author was a participant in the New Delhi consultation.

¹³ On the evolution of ideas of sovereignty, see Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999); Daniel Philpott, *Revolutions in Sovereignty* (Princeton: Princeton University Press, 2001); Luke Glanville, *Sovereignty and the Responsibility to Protect: A New History* (Chicago: University of Chicago Press, 2013).

with which the report was concerned. This makes it all the more remarkable that the report did not fall dead from the press, something that can be attributed in part to the energy devoted by some of the commissioners to ensuring that its message would not be lost in the wider clamour of those times. That said, it is only to be expected that many issues relating to R2P remain contested, as they will surely do for quite some time to come.

The International Commission report's impact was undoubtedly a product in part of its clarity and rigour. In perhaps its most quoted passage, it stated that 'where population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect'. It went on to argue that the Responsibility to Protect embraced three specific responsibilities – the responsibility to prevent, the responsibility to react, and the responsibility to rebuild. Affirming the central role of the United Nations Security Council as a source of right authority, it argued that 'the Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby'.¹⁴

The idea of a responsibility to protect has since undergone considerable refinement.¹⁵ Most importantly, the 2005 World Summit, recognising the potential for disputes over the meaning of 'serious harm', sharpened the focus of R2P to four specific crimes to act as its trigger: genocide, war crimes, ethnic cleansing, and crimes against humanity.¹⁶ It also voiced a commitment on behalf of participating leaders to react to these affronts, stating 'we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.¹⁷ But that said, until it is buttressed by considerable state

¹⁴ ICISS, *The Responsibility to Protect*, pp. xi, xiii.

¹⁵ See Alex J. Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (London: Routledge, 2011), pp. 26–50; Elizabeth G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action* (Washington DC: Brookings Institution Press, 2011), pp. 162–173.

¹⁶ See Gareth Evans and Ramesh Thakur, 'Humanitarian Intervention and the Responsibility to Protect', *International Security* 37:4 (2013), pp. 199–207 at p. 201.

¹⁷ *World Summit Outcome*, Document A/RES/60/1, 24 (New York: United Nations, 2005), paragraph 139.

practice, it will remain a subject of debate exactly how R2P should shape the wider normative space that it inhabits. This is in no small measure because the United Nations system is not geared up to respond consistently to threats to international peace and security. The veto power of the permanent members of the Security Council ensures that this is the case: no matter what atrocities might be committed by a permanent member or one of its close allies, authorisation from the Security Council for action is most unlikely to be forthcoming. Nevertheless, while these limitations might be cause for some disgust, they should not be cause for despair. The mere fact that one cannot stop all atrocities is no basis for abandoning the effort to prevent at least some.

The emphasis on the authority of the Security Council provides some protection against abuse of the doctrine. (Hitler, after all, claimed to be acting on behalf of suffering co-ethnics when he pursued his plans for expansion in Europe in the 1930s.) Perhaps the greatest challenge for R2P is to secure action when it is needed. As one scholar has recently pointed out, 'the Council's role in *authorizing* actions designed to fulfil international responsibilities (particularly those involving the use of military force) cannot and should not be confused with the role of actually *fulfilling* such responsibilities'.¹⁸ When a genocide breaks out in a country such as Rwanda, very few countries will be motivated by direct and immediate *interests* to do anything about it. Indeed, a crime that is widely known to be occurring may go unaddressed because each observer expects some other observer to take the lead in responding.¹⁹ If action is to be taken, it will need to be because the R2P norm has been internalised to the point that it provides an additional reason for action.

Norms rarely emerge in virginal form. They arise in the context of concerns that have often long preoccupied those who seek to promote norms as solutions to political problems, and often take shape alongside other norms and rules that may have something to offer. It may be quite important that new protective norms not undermine existing normative structures, since in their embryonic phase at least, their protective force may be limited. Some normative structures are more fragile than others. To demonstrate this, it is useful to discuss two important sets of norms, namely international humanitarian law and refugee protection norms.

¹⁸ Jennifer M. Welsh, 'Who Should Act? Collective responsibility and the Responsibility to Protect', in W. Andy Knight and Frazer Egerton, eds, *The Routledge Handbook of the Responsibility to Protect* (London: Routledge, 2012), pp. 103–114 at p. 109.

¹⁹ See Geoffrey Brennan and Loren Lomasky, *Democracy and Decision: The Pure Theory of Electoral Preference* (Cambridge: Cambridge University Press, 1993), pp. 125–126.

International humanitarian law

Humanitarian protection largely dates from the nineteenth century, and paralleled an increasing focus on the rights and concerns of those beyond the realm of political elites. For members of political elites, norms of course have a venerable history. Customary diplomatic law encoded a range of norms of behaviour with respect to representatives of states, underpinned by an understanding of reciprocity: that if a state mistreated the representatives of another state, it could hardly complain if its own ambassadors were mistreated as well. It is not at all surprising that one of the most ferocious conflicts in Europe, the Thirty Years War, was triggered by the 1618 'Defenestration of Prague', in which three representatives of the King of Bohemia were ejected from a third storey window in the Bohemian chancellery. It was only much later, however, that humanitarian norms began to take shape to protect those outside the level of political elites. Yet once this process began, it was remarkable how relatively quickly it moved. In part this reflected the growth of individualism and humanitarian ideas in the aftermath of the Enlightenment; in part it reflected a growing significance of thinking about individual rights, which have a longer pedigree than is often conceded.²⁰ However, of great significance in bringing about these changes was the entrepreneurship of Jean-Henry Dunant, and the activism of both those who fell under his influence and of the Red Cross movement that he played a critical role in founding.

A mere quirk of circumstance, noted earlier, accounted for this: Dunant happened to witness the mayhem at the Battle of Solferino, and was motivated by the spectacle to do something about the horrors of war that he had witnessed. The ICRC was the organisational manifestation of the concerns that Dunant felt. More broadly, however, the Red Cross was able to tap into growing concerns about the costs of war for both combatants and civilians. By the second half of the nineteenth century, the development of photography had brought images of war in a more realistic fashion into the vision of large numbers of people for whom it would otherwise have been a remote phenomenon. There was thus a certain amount of fertile soil in which new ideas could be planted. The ultimate consequence was the development of two very important streams of international law, sometimes called the Law of The Hague and the Law of Geneva, that sought to give effect to new norms of conduct in the context of military operations.²¹

²⁰ See Christian Reus-Smit, *Individual Rights and the Making of the International System* (Cambridge: Cambridge University Press, 2013).

²¹ For an overview, see Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Cambridge: Cambridge University Press, 2011).

These two streams of law are central to modern understandings of what constitutes a war crime. The Law of The Hague (embodied mainly in The Hague Conventions of 1899 and 1907) is broadly concerned with protections for combatants, while the Law of Geneva (comprising the four 1949 Geneva Conventions and the two 1977 Additional Protocols to those Conventions) is much more directly concerned with civilians and non-combatant personnel who might be at risk in the context of armed conflict.²²

A distinctive feature of the laws of armed conflict is how widely they have come to be accepted. One reason, beyond any doubt, is reciprocity. A military that does not meticulously observe its obligations under international humanitarian law is poorly placed to demand that its soldiers be properly treated if they become prisoners of some other force, or that the status of its civilian population be respected. Two other factors, however, also come into play. One is that certain standards of behaviour seem, at least at the doctrinal level, to be shared across a range of different societies and cultures. Even the Taliban in Afghanistan sought to convey the impression that they respected some restraints on the waging of war.²³ The other has been the development of enforcement mechanisms through which criminal prosecutions can occur. The most striking examples of these were to be found in the International Military Tribunals in Nuremberg and Tokyo that tried and convicted German and Japanese war criminals at the end of the Second World War, along with a range of national judicial processes which dealt with war crimes committed by figures less prominent than those who were arraigned in the major trials. In a number of these trials, the perpetrators of war crimes were handed capital sentences that were then carried out.²⁴ Of course, in other conflicts, a much gentler approach was taken: US Lieutenant William Calley, for example, served a far lighter sentence than the March 1968 My Lai massacre in South Vietnam might have justified, not least because of popular agitation in his favour.²⁵ It remains to be seen what difference

²² For relevant texts, see Adam Roberts and Richard Guelff, eds, *Documents on the Laws of War* (Oxford: Oxford University Press, 2000).

²³ See Muhammad Munir, 'The Layha for the Mujahideen: An Analysis of the Code of Conduct for Taliban Fighters under Islamic Law', *International Review of the Red Cross* 93:881 (2011), pp. 81–102.

²⁴ For background, see Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf, 1993); Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001); Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008).

²⁵ Claude Cookman, 'An American Atrocity: The My Lai Massacre Concretized in a Victim's Face', *Journal of American History* 94:1 (2007), pp. 154–162 at p. 161.

the 2002 establishment of the International Criminal Court, pursuant to the Rome Statute of 1998, will make in this respect.²⁶

There is very significant overlap between the war crimes with which international humanitarian law is concerned, and the mass atrocity crimes that are the focus of the Responsibility to Protect doctrine. They are not, however, identical. At the Nuremberg Trial, it proved necessary, as well as entirely appropriate, to include in the indictment of the accused not just war crimes in the strict sense of the term, but also crimes against humanity. The reason for this was that not all mass atrocity crimes were covered by the laws of armed conflict. A mass atrocity crime might occur entirely within the boundaries of a single state, without any interstate or even intrastate conflict occurring. Systematic persecution of a particular minority, for example, could be carried out by the government of the state against its own people, and historically this has been all too common a phenomenon.²⁷ Furthermore, criminal law exists to punish people for proven crimes, and – hopefully – to deter the commission of crimes in the first place. Once, however, a genocide or exercise of mass ethnic cleansing is underway, to warn the perpetrators that they may be criminally liable is not necessarily an effective way of dealing with the problem. They will have already crossed their Rubicon. One of the key factors leading to the genesis of R2P was that existing norms had proved *unequal* to the task that the international community confronted when faced with appalling events such as the Rwandan genocide of 1994.²⁸ That may not always be the case, but one Rwanda is one horror too many.

Refugee norms

All too often when people find themselves in desperate need, representatives of states are nowhere to be found. The renowned economist Albert O. Hirschman wrote an insightful book entitled *Exit, Voice and Loyalty* which rightly put *exit* at the top of the list of options that one might choose in such circumstances.²⁹ Hirschman himself had experienced the situation. Of Jewish background, he found himself in Marseilles following the

²⁶ See William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2011).

²⁷ See R.J. Rummel, *Death by Government* (New Brunswick: Transaction Publishers, 1994).

²⁸ On these events, see, for example, Samantha Power, *'A Problem from Hell': America and the Age of Genocide* (New York: Basic Books, 2002), pp. 329–389; Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca: Cornell University Press, 2002); Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Random House, 2003).

²⁹ Albert O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970).

fall of France in June 1940, and, in alliance with the dynamic young American journalist Varian Fry, he helped organise the escape through Spain to America of a range of eminent Europeans who were under threat from the Nazis and their Vichy collaborators,³⁰ including figures such as Hannah Arendt, Marc Chagall, Heinrich Mann, Franz Werfel and Lion Feuchtwanger. What is remarkable about this case, however, is that Fry and Hirschman received no support of any significance from US authorities. The United States had recognised the Vichy regime and located its embassy to France in Vichy. Maintaining cordial relations with the puppet regime headed by Marshal Pétain was given unambiguously higher priority than assisting in the rescue of those who were vulnerable to the racist ideologies of the Nazis. Here one finds an ominous warning – that the needs of individuals can easily be subordinated by political processes to what are seen as higher political objectives.

The Westphalian political order is premised on the centrality of states, and more broadly on the supposition that protection for individuals is to be obtained from the state of which they are citizens. Equally, however, there has developed a recognition that not all states are alike, that some states will prove unequal to the task of protecting their citizens, while in the worst of cases, predatory forces in control of the state may turn directly against their own. The phenomenon of the 'refugee' can thus be seen as reflecting a failure of the states system properly to perform its tasks, and under those circumstances one can argue that those states which are happy to harvest the benefits of the system owe duties towards those whom the system has failed.³¹ Given the vast scale that refugee flows can take,³² one can certainly argue that more lives have been saved through such people acting on their own initiative than have ever been saved through rescue operations consciously mounted by the international community.

Specific norms for the protection of refugees are now embodied in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as well as texts such as the 1969 Organization of African Unity's (OAU) Convention on the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees. The 1951 Convention classes as a refugee a person who 'owing to well-founded fear of being persecuted for

³⁰ See Carla Killough McClafferty, *In Defiance of Hitler: The Secret Mission of Varian Fry* (New York: Farrar, Straus and Giroux, 2008).

³¹ See Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008); Anne McNevin, *Contesting Citizenship: Irregular Migrants and New Frontiers of the Political* (New York: Columbia University Press, 2011).

³² See Peter Gatrell, *The Making of the Modern Refugee* (Oxford: Oxford University Press, 2013).

reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. The 1951 Convention outlines a range of refugee rights,³³ of which arguably the most important is that of non-refoulement in Article 33.1 – 'No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

Does this mean that refugees are adequately protected in contemporary international society? Hardly. For a considerable period of time, it has been clear that many states are more interested in paying lip-service to refugee protection than in carrying a significant burden. The enforcement mechanisms for refugee rights are inherently weak, as are the incentives for burden sharing. Many refugees, when they flee persecution, find themselves in territories that are nearly as stressed and unstable as those which they have fled, and which lack the wherewithal to provide assistance even to their own populations, let alone a substantial influx of forced migrants. Yet asymmetries of power in the international system mean that these states of first asylum may have limited leverage in procuring cooperation from richer, more remote states, which often prefer the option of 'cherry-picking' refugee populations by resettling the more highly educated and skilled and leaving developing countries with responsibility for the poor, the non-literate and the disabled.³⁴ One consequence, ironically, has been the growth of protracted refugee situations in which refugees are 'warehoused' with little prospect of encountering a durable solution to their problem in the form of safe repatriation, or integration in their country of first asylum, or resettlement to a more nurturing environment.³⁵ The danger of such situations is that they can

³³ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005).

³⁴ For discussion of these asymmetries, see Astri Suhrke, 'Burden-Sharing During Refugee Emergencies: The Logic of Collective versus National Action', *Journal of Refugee Studies* 11:4 (1998), pp. 396–415; Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Ithaca: Cornell University Press, 2009); William Maley, 'Refugee Diplomacy', in Andrew F. Cooper, Jorge Heine and Ramesh Thakur, eds, *The Oxford Handbook of Modern Diplomacy* (Oxford: Oxford University Press, 2013), pp. 675–690; Martin Gottwald, 'Burden Sharing and Refugee Protection', in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona, eds, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014) pp. 525–537.

³⁵ See Gil Loescher, James Milner, Edward Newman and Gary G. Troeller, eds, *Protracted Refugee Situations: Political, Human Rights and Security Implications* (Tokyo: United Nations University Press, 2008); Howard Adelman, ed, *Protracted Displacement in Asia: No Place to Call Home* (Aldershot: Ashgate, 2008).

become breeding grounds for extremism as people detached from normal life and without hope succumb to simple messages to the effect that violence offers a legitimate means for escaping from the plight in which people find themselves. They can also provide fodder for host-country agendas.³⁶

Ultimately, the protections available for refugee rights are very fragile. While the office of the United Nations High Commissioner for Refugees has protective responsibilities under its Statute, in practice the UNHCR is so heavily burdened with responsibilities for relief delivery that its capacity to provide individualised assistance to people in danger is often compromised.³⁷ In contrast to the case of norms embodied in the law of armed conflict, reciprocity does little to promote good-faith implementation of refugee protection norms. Furthermore, there is no international tribunal to which refugees can have recourse in order to enforce the rights that the 1951 Convention grants to them. Refugees depend on the benevolence or goodwill of states for the protection of their rights, and this protection is often not forthcoming. One reason why this is the case is that refugee protection often becomes entangled in the toxic domestic politics of democratic states. Refugees are strangers, and not everyone wants to help them. They can readily be blamed by populists for all the ills that voters resent, ranging from unemployment and urban sprawl to traffic congestion and amorphous unease that the character of a community is beginning to change. In July 1938, a conference at Evian was held at the instigation of US President Franklin D. Roosevelt to address the terrible plight of Jews fleeing Nazi Germany. In his address to the conference, the Australian delegate remarked that 'as we have no racial problem, we are not desirous of importing one'.³⁸ This kind of mindset has by no means disappeared.

Reconciling norms

It is useful at this point to draw together some of the elements of the previous discussion. At least where the norms embodied in international humanitarian law are concerned, the story is a relatively happy one. In key

³⁶ See, for example, Farnaz Fassihi, 'Iran Recruiting Afghan Refugees to Fight for Regime in Syria', *The Wall Street Journal*, 15 May 2014.

³⁷ See William Maley, 'A New Tower of Babel? Reappraising the Architecture of Refugee Protection', in Edward Newman and Joanne Van Selms, eds, *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo: United Nations University Press, 2003), pp. 306–329.

³⁸ Quoted in Martin Gilbert, *The Holocaust: The Jewish Tragedy* (London: William Collins, 1986), p. 64.

respects, international humanitarian law provides the micro foundations for the macro response that R2P involves. There is no real risk that dissemination and wider acceptance of an R2P norm will be at the expense of protections under international humanitarian law; on the contrary, to the extent that those making the case for action under R2P point to war crimes as support for their argument, they reduce the risk that war crimes may be swept under the carpet, as on occasion has happened. Furthermore, in democratic polities, it is relatively rare to encounter strong domestic pressure groups opposed to the prosecution of war crimes per se. What one more frequently encounters are attempts to exculpate specific individuals such as Lieutenant Calley, who may be seen by some of their fellow citizens as scapegoats for guiltier people higher up the chain of command.

Where refugee protection is concerned, however, the story is rather different. R2P can potentially underpin preventive action that may avert the need for exit.³⁹ Yet at the same time, it is important to note that protective norms are fundamentally concerned with those who are seeking *asylum*. While UNHCR welcomes the contributions of states that are prepared to resettle refugees in need from countries of first asylum, this is essentially an act of benevolence rather than something that is required of states by virtue of some evolved norm. Japan, for example, certainly has the economic capacity to resettle a significant number of refugees, but it has not become a significant country of resettlement, because in exercise of its sovereign rights it has opted not to do so. It is the appearance at a country's border of a person claiming the protections of the 1951 Convention (or some like instrument) that activates the obligations that arise from the normative framework of refugee protection. Yet there is no doubt whatsoever that in many wealthy developed countries, the disposition to welcome such approaches has been shrinking, and in some cases shrinking dramatically. Some states have sought to frame those seeking asylum in this way as somehow illegitimate or even criminal.⁴⁰ Others have sought to use various control mechanisms to prevent those in need of protection from reaching the point where they can actually lodge a protection claim.⁴¹ Still others have attempted to deter such approaches by

³⁹ See Angus Francis, 'The Responsibility to Protect and the International Refugee Regime', in Angus Francis, Vesselin Popovski and Charles Sampford, eds, *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction* (Tokyo: United Nations University Press, 2012), pp. 215–233.

⁴⁰ See Sharon Pickering, *Refugees and State Crime* (Sydney: The Federation Press, 2005); Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008), pp. 50–68.

⁴¹ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011).

providing for detention without trial of asylum seekers often beyond the reach of judicial oversight.⁴² In dangerous ways, refugees have found themselves 'securitised', with claims of 'security risk' and the need to protect 'sovereignty' being cited as a basis for attempts by states to wash their hands of responsibilities that they had freely accepted in exercise of their sovereign capacities.⁴³ Part of the problem arises from a tension between international norms and democratic or populist politics. Perhaps in most societies, one should expect to find voters who are not enthusiastic about the prospect of having to interact with people who are different from themselves, and who therefore respond to promises to maintain the homogeneity of populations. At the same time, a number of countries have witnessed the rise of parties of the far right for which agitation against refugees has proved an electorally rewarding strategy: party leaders such as Jean-Marie Le Pen of the Front National in France, Jörg Haider of the Freiheitliche Partei Österreichs in Austria and Pauline Hanson of the One Nation Party in Australia come to mind. The risk that these figures pose is not that they will gain power themselves, but rather that elements of their platforms will be adopted by more mainstream parties seeking to win back some of the extremists' supporters.

Plainly many different factors have contributed to these developments. Nonetheless, there is a risk that some actors with no desire to discharge their responsibilities towards refugees may see intervention in refugee-producing areas as a device for limiting refugee flows. Gibney, for example, has noted that 'the Clinton Administration in the US, faced with criticism over its policy of summarily interdicting asylum seekers on boats heading for Florida, launched a military intervention into the island nation of Haiti, largely to restore a regime less likely to produce refugees'.⁴⁴ But beyond this, there is a risk that states may also seek to cite the activation of the Responsibility to Protect as a basis for deferring the processing of refugee claims or even rejecting them altogether. The claim that there is no need to offer protection to people 'here' because they are in the process of being protected 'there' could prove extremely insidious, especially given that it may take years before one can plausibly conclude that international action has made it safe for

⁴² Daniel Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge: Cambridge University Press, 2012).

⁴³ See Danièle Joly, *Haven or Hell? Asylum Policies and Refugees in Europe* (London: Macmillan, 1996); Vicki Squire, *The Exclusionary Politics of Asylum* (London: Palgrave Macmillan, 2009); Jeremy Harding, *Border Vigils: Keeping Migrants Out of the Rich World* (London: Verso, 2012).

⁴⁴ Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004), p. 1.

vulnerable people to return to a particular country.⁴⁵ It is hard as yet to point to a specific example of this kind of misuse of the R2P norm, but since the norm is still in its adolescence, if not exactly its infancy, it pays to be wary even at this stage about ways in which it could be misappropriated by political actors whose ultimate objectives may be anything but humanitarian.

Conclusion

In a contribution to the deliberations of the International Commission on Intervention and State Sovereignty in 2001, this author adopted the language of Montesquieu in cautioning that intervention, if it were to be attempted, should be attempted with a trembling hand.⁴⁶ So much can easily go wrong in the aftermath of an intervention – a point strikingly illustrated by US experience in Iraq after 2003⁴⁷ – that the International Commission was extremely wise in setting a high threshold before the R2P doctrine would be engaged. What this chapter has done is identify another kind of problem that could flow as an unintended consequence of the acceptance of R2P. There is a concrete risk that political leaders seeking to ingratiate themselves with domestic audiences may seize on the notion of a Responsibility to Protect as a means of washing their hands of other normative obligations that they have voluntarily assumed. This would doubtless be a cynical exercise on their part, but such things have been known to happen. In no sense does this provide a basis for walking away from mass atrocity crimes. On occasion the only effective way to deal with them will be robust action, of the kind that was tragically absent in Rwanda, and for that matter during the Cambodian genocide of 1975–1978. But it does mean that there is a problem that needs to be addressed: that the consolidation of the R2P norm may end up undermining other protective norms that it was never designed to weaken.

How might this problem be addressed? It is hardly likely that political leaders will pay it much attention, but fortunately they are by no means the only relevant contributors to this discussion. Scholarly commentators

⁴⁵ See William Maley, 'Political Transitions and the Cessation of Refugee Status: Some Lessons from Afghanistan and Iraq', *Law in Context* 22:2 (2005), pp. 156–186.

⁴⁶ See William Maley, 'Twelve Theses on the Impact of Humanitarian Intervention', *Security Dialogue* 33:3 (2002), pp. 265–278.

⁴⁷ See David L. Phillips, *Losing Iraq: Inside the Postwar Reconstruction Fiasco* (Boulder: Westview Press, 2005); George Packer, *The Assassins' Gate: America in Iraq* (New York: Farrar, Straus and Giroux, 2005); Ahmed S. Hashim, *Insurgency and Counter-Insurgency in Iraq* (Ithaca: Cornell University Press, 2006). The US invasion of Iraq was not in any sense an exercise in the responsibility to protect, but it remains a potent example of the limitations of force as a tool for overcoming complex problems.

and norm entrepreneurs are well placed to address the issue more directly. To the extent that the promotion of R2P is underpinned by humanitarian impulses, those impulses equally support attention being paid to the needs of refugees to flee from the scene of mass atrocity episodes. In particular, there is no harm in reiterating that the honouring of R2P principles should never be at the expense of other protective norms that have developed in response to critical needs. Rather than being seen as in conflict with each other, the norms embodied in international humanitarian law and in refugee law and practice should be seen as *complements* to the Responsibility to Protect, members of a family of principles directed at preventing, ameliorating and confronting lethal practices that degrade our common humanity. Yet they are not to be taken for granted. Against the example of great humanitarian figures such as Dunant, one can all too easily point to a Hitler, a Stalin or a Pol Pot. Sustaining protective norms requires constant vigilance.