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Human rights obligations to the poor

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Poverty unquestionably detracts from the human rights mission. Modern human rights law recognizes a broad range of rights – for example, "to life, liberty, and security of person" and to adequate "food, clothing, and medical care."[1] Any number of those rights might go unrealized in conditions of extreme poverty. However, human rights law has always been partly aspirational. For those seeking to improve the lives of the poor, the key question is not what rights exist but how to make those rights operational. What does human rights law actually require of states? And how might its obligations benefit the poor?

28.1 Human rights obligations

Human rights instruments typically assign states obligations separately from recognizing rights. Many treaties – including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – define state obligations amorphously. Under the ICCPR, states must "respect and... ensure" rights.[2] The ICESCR generally requires states to "take steps" toward realizing rights.[3]

In his influential book, *Basic Rights*, Henry Shue argued for further specifying human rights obligations.[4] Shue contested the view, then

* This chapter is a condensed and slightly modified version of M. Hakimi, "State Bystander Responsibility," *Eur. J. Int'l L.*, 21 (2010), 341.

1 GA Res. 217A, UN GAOR, 3rd Sess., 1st plen. mtg., UN Doc. A/180, Arts. 3, 25 (December 12, 1948); see also ICCPR, GA Res. 2200A, UN GAOR, 21st Sess., UN Doc. A/RES/2200 (December 16, 1966) (entered into force March 23, 1976); ICESCR, GA Res. 2200A, UN GAOR, 21st Sess., UN Doc. A/6316 (December 16, 1966) (entered into force January 3, 1976).

2 ICCPR, Art. 2(1). 3 ICESCR, Art. 2(1).

4 H. Shue, *Basic Rights*, 2nd edn. (Princeton University Press, 1996), p. 52.

dominant in the human rights literature, that every right grounds a single, correlative obligation. He argued that the same ICCPR or ICESCR right might ground multiple obligations. And he identified three: obligations to respect, protect, and fulfill.[5] Obligations to respect are paradigmatic obligations not to violate rights. They are well established in human rights law. Obligations to protect require states to restrain *third parties* from violating rights. Obligations to fulfill assume no particular abuser; they require states to foster positive instead of negative liberties.

Shue's typology helped inform the human rights treaties. Consider the ICCPR right to life.[6] That right unquestionably grounds an obligation not to kill people arbitrarily (obligation to respect). Shue demonstrated that, based on the same right, states might have to restrain third parties from killing (obligation to protect). States might even have to give people access to emergency medical care (obligation to fulfill).[7] Similarly, the ICESCR right to food had been understood to require states to try to make food more widely available (obligation to fulfill).[8] Shue suggested that states might have to refrain from forcibly depriving people of food (obligation to respect) and prevent third parties from doing the same (obligation to protect). Of course, Shue's obligations could easily be rephrased as new rights. The obligation to respect the right to food might be rephrased as the right not to be forcibly deprived of food by the state. But the right to food had already been conceptualized and codified in more general terms. Shue was influential because he presented a vision for developing human rights law consistently with its own conceptual and textual foundations.

28.2 Obligations to protect

Obligations to protect have new energy in international law, because various actors now underscore that state sovereignty – historically a shield

5 Shue, *Basic Rights*. Shue refers to these obligations as obligations to avoid, protect, and aid. The respect, protect, and fulfill language is conceptually the same and dominates the human rights literature.

6 ICCPR, Art. 6.

7 Cf. *Samity* v. *State of W. B.* (1996) 4 SCC 36 (India) (finding that right to life grounds obligation to provide emergency medical care).

8 ICESCR, Art. 11.

from human rights criticism – is instead a justification for requiring states to protect people from third-party harm.[9] The idea is neither novel nor radical. Political theorists have long cited obligations to protect to justify the state's very existence.[10] States exist, at least in part, to protect their populations from harm and to enforce the law against those who might intrude on individual liberties. In human rights law, decision-makers now claim, prescribe, and apply such obligations in a broad range of contexts. For example, several human rights treaties obligate states to protect people from abuses committed by private actors.[11] States acknowledge that they have such obligations,[12] and courts and treaty bodies enforce and apply them.[13] In the *Genocide Case*, the International Court of Justice (ICJ) determined that states must protect against acts of genocide committed by or in another state.[14] And many actors now endorse a concept that they term the "Responsibility to Protect."[15] The concept posits that: (i) each state must protect its own population from war crimes and mass

9 See, e.g. International Commission on Intervention and State Sovereignty, "The Responsibility to Protect" (2001), p. 13, www.iciss.ca/report-en.asp; High-Level Panel on Threats, Challenges & Changes, "A More Secure World: Our Shared Responsibility," UN Doc. A/59/565 (2004), paras. 29–30; see also M. Ignatieff, "Intervention and State Failure," *Dissent*, 49 (2002), 114, 119: "State sovereignty, instead of being the enemy of human rights, has to be seen as their basic precondition."

10 For an overview, see S. J. Heyman, "The First Duty of Government: Protection, Liberty and the Fourteenth Amendment," *Duke L. J.*, 41 (1991), 507.

11 See, e.g. Convention on the Elimination of all Forms of Discrimination against Women, Art. 2(e), GA Res. 34/180, UN GAOR Supp., 46th Sess., UN Doc. A/34/180 (December 18, 1979) (entered into force September 3, 1981) (hereinafter, CEDAW); and Convention on the Rights of the Child, Art. 19(1), GA Res. 44/25, Annex, UN GAOR, 49th Sess., UN Doc. A/44/49 (November 20, 1989) (entered into force September 2, 1990).

12 See, e.g. *Albán-Cornejo* v. *Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 171 (November 22, 2007), para. 11; and Human Rights Committee (HRC), "Initial Report: Honduras," UN Doc. CCPR/C/HND/2005/1 (April 26, 2005), paras. 45–53.

13 See, e.g. Report of the HRC, "Concluding Observations: Mali," UN Doc. A/58/40 (Vol. I) (2003), at 47, para. 81(16); Report of the CESCR, 25th Sess., April 23–May 11, 2001, "Concluding Observations: Togo," UN Doc. E/2002/22, at 57, paras. 316, 322–3; and *Edwards* v. *United Kingdom*, App. No. 46477/99, para. 56, Eur. Ct. H. R. (2002).

14 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz.* v. *Serb. & Montenegro*), Judgment, 2007 ICJ 1, paras. 429–30 (February 26) (hereinafter, *Genocide Case*).

15 See, e.g. SC Res. 1674, para. 4, UN Doc. S/RES/1674 (April 28, 2006); 2005 World Summit Outcome, GA Res. 60/1, para. 138, UN Doc. A/RES/60/1 (September 16, 2005); and UN Secretary-General, "Implementing the Responsibility to Protect," paras. 8–9, UN Doc. A/63/677 (January 12, 2009).

atrocities; and (ii) if one state fails, that obligation shifts to the international community as a whole.

Although that practice is extensive, it also is disjointed. Decision-makers prescribe and apply the obligation ad hoc and for discrete contexts at a time.[16] Not surprisingly, then, their decisions are at times misguided, inconsistent, and even conceptually confused.[17] In other work, I presented a generalized framework on "state bystander responsibility" – when states are and should be responsible for failing to satisfy obligations to protect.[18] The framework is partly interpretive and partly normative. It is interpretive in that it explains most of the existing practice. Surveying the practice across different contexts and legal sources, it extracts the common principles that animate obligations to protect. Because the practice is splintered, however, the framework also constructs a vision of where the practice should go. In short, it seeks to nudge the practice in a particular direction, as indicated by the dominant trends. I outline my framework below.

28.2.1 Relationship with the abuser

The interest in protecting people from harm motivates human rights law but does not (by itself) define the obligation to protect. First, that interest does not identify which state must act in any particular case. Unless all states must protect against all third-party harms, something more is needed – some additional nexus – to justify assigning the obligation to a particular state. Second, the interest in restraining abusive third parties is inevitably in tension with desired *limits* on the state's restraints. Some such limits appear in human rights law itself. If a state suspects that someone is planning a killing spree, the interest in protecting potential victims favors requiring the state to restrain the suspect. But the interest in protecting the suspect (from undue state intrusion) justifies limiting the state's restraints.[19] Analogous considerations appear elsewhere in international law. For example, international legal norms discourage states from unilaterally influencing intergovernmental organizations (IOs) outside the

16 Hakimi, "State Bystander Responsibility," pp. 349–50.

17 Hakimi, "State Bystander Responsibility," pp. 350–4 and nn. 113–17, 127–30, 257–61.

18 Hakimi, "State Bystander Responsibility," pp. 354–76.

19 Cf. *Osman* v. *United Kingdom*, App. No. 23452/94, para. 116, Eur. Ct. H. R. (1998) (hereinafter, *Osman*) (asserting that the obligation must be defined "in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of [police] action").

IOs' ordinary decision-making processes.[20] Those norms circumscribe when and how states should restrain abusive IOs. Obligations to protect must manage those tensions. They require a normative judgment that, given the state's particular relationship with the abuser, its restraints are desirable and not overly intrusive.

That determination will sometimes be difficult or indeterminate. But for many common relationships in the international legal order, the practice offers substantial guidance. Paradigmatically, obligations to protect require a state to restrain private abusers in its territory.[21] The dominant explanation for why is textual.[22] Many human rights treaties bind a state only in its own territory or jurisdiction.[23] If those treaties establish obligations to protect, then (the reasoning goes) those obligations are essentially territorial. That account is insufficient. First, it does not explain why human rights treaties codify territorial or jurisdictional limitations in the first place. Second, it does not identify when states have jurisdiction – and therefore obligations to protect – outside their national territories. Third, it does not explain why obligations to protect are primarily territorial, even when the treaties establishing them lack explicit territorial or jurisdictional limits.[24] Obligations to protect are primarily territorial because statehood defines the relevant relationships in an area and justifies requiring states to satisfy certain minimum standards. A state must keep its house in order – in Max Huber's words, "display therein the activities of a state."[25]

States host in their territories not only private actors, but also other states and IOs. The practice on whether states must restrain those actors is relatively sparse. In one notable opinion, the Venice Commission of the Council of Europe addressed the question of whether European states had to protect against abuses committed during the CIA's detention and

20 See A. S. Muller, *International Organizations and Their Host States* (The Hague/London/Boston: Kluwer Law International, 1995), p. 149 (asserting that a "very important goal" of the rules on IOs is "to ensure the independence of the organization from any interference by any individual state").

21 Hakimi, "State Bystander Responsibility," pp. 360–1 (discussing practice).

22 See M. Milanović, "From Compromise to Principle: Clarifying the Concept of State 'Jurisdiction' in Human Rights Treaties," *Hum. Rts. L. Rev.*, 8 (2008), 411, 412: "[T]he scope of extraterritorial application of [human rights] treaties ultimately hinges" on "the notion of 'jurisdiction'" in the treaty texts.

23 See, e.g. ICCPR, Art. 2(1).

24 See, e.g. ICESCR (no explicit jurisdictional limitation); and CEDAW (same).

25 *Island of Palmas (Neth. v. US)*, 2 RIAA 829, 854–5 (Perm. Ct. Arb. 1928) (Huber, sole arb.).

rendition program.[26] The Venice Commission concluded that each European state had to protect against abuses in its airspace or territory. The commission supported that conclusion by citing the well-established rule that states must protect against *private* abuses in their territories. The commission then reasoned, "[t]his is even more true in respect of agents of foreign states."[27]

That reasoning is only partially correct. The commission rightly determined that a state must restrain third parties, including other states, in its territory. However, a state's obligations should be *weaker* against other states than against private actors. Varied legal norms limit when and how host states influence other states.[28] Such norms are intended to foster cooperation and friendly relations among states and to preserve their legal equality. The Venice Commission implicitly accommodated those norms. It did not direct European states to invoke their expansive domestic authorities against the United States, as it almost certainly would have done if the United States were a private actor. Instead, the commission directed European states to try to restrain the CIA while managing other treaty commitments and the rules on immunity.[29]

By contrast, states generally need not restrain third parties in other states. If anything, international law discourages states from unilaterally exercising governmental authority – and thereby restraining third parties – outside their territories.[30] That norm against extraterritoriality carries less weight when a population suffers serious harm. In such cases, a state might have the right to restrain external abusers.[31] But any right

26 Venice Commission, Opinion No. 363/2005 on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-state Transport of Prisoners, Doc. CDL-AD(2006)009 (2006) (hereinafter, Venice Commission Opinion).

27 Venice Commission Opinion, para. 126.

28 See, e.g. S. Murphy, *Principles of International Law* (St. Paul, MN: Thomson West, 2006), pp. 259–67 (discussing rules on immunity); and G. Simpson, *Great Powers and Outlaw States* (New York: Cambridge University Press, 2004), pp. 26–9 (discussing legal equality of states).

29 Venice Commission Opinion, paras. 157–9.

30 See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625, Annex, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028, at 122 (October 24, 1970) (endorsing principle of non-interference); and R. Jennings and A. Watts, *Oppenheim's International Law*, 9th edn. (London and Harlow: Longman, 1992), pp. 382–90 (discussing state independence and territorial authority).

31 See *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Sp.)*, Judgment, 1970 ICJ 3, paras. 33–4 (February 5) (identifying *erga omnes* obligations as those owed to all states); see

has not developed into an operative legal obligation. Decision-makers sometimes *claim* that it has. For example, the claim of the Responsibility to Protect is that all states must protect against especially severe abuses no matter where they occur.[32] Although the claim is directed at all states, it is essentially unenforceable and in practice unenforced against particular bystander states.[33] It does not reflect an operative obligation to protect.

Nevertheless, the general rule against extraterritorial obligations to protect has certain exceptions. For example, a state typically has such obligations if it exercises complete control over foreign territory.[34] The logic is similar to that which applies in a state's own territory.[35] The state should maintain order in the area and avoid a vacuum of governance authority. Thus, in the *Armed Activities Case*, Uganda had to protect people in occupied Congo because Uganda alone exercised governmental authority there.[36] The logic differs when a state has some territorial

generally C. J. Tams, *Enforcing Obligations Erga Omnes* in International Law (Cambridge University Press, 2005) (concluding that states may take countermeasures for severe *erga omnes* violations in other states).

32 See, e.g. n. 15 above and accompanying text; SC Res. 681, para. 5, UN Doc. S/RES/681 (December 20, 1990) (war crimes); and *Genocide Case*, paras. 429–30 (genocide).

33 See, e.g. International Committee of the Red Cross, "Improving Compliance with International Humanitarian Law: ICRC Expert Seminars" (October 2003), p. 5, www.icrc.org/eng/assets/files/other/improving_compliance_with_ihl-oct_2003.pdf (asking how to translate the claim on war crimes into "state practices and policies"); Institut de Droit International, 10th Commission, "Present Problems of the Use of Force in International Law" (September 21, 2007) (prepared by W. M. Reisman), p. 176, www.idi-iil.org/idiF/annuaireF/10th_com_leger_b.pdf (concluding that "responsibility" in responsibility to protect is "not a 'duty' to act"); see also D. Miller, *National Responsibility and Global Justice* (Oxford University Press, 2007), p. 98: "[A]n undistributed duty . . . to which everybody is subject is likely to be discharged by nobody unless it can be allocated in some way."

34 See, e.g. Armed Activities on the Territory of the Congo (*Dem. Rep. Congo* v. *Uganda*), Judgment, 2005 ICJ 168, paras. 172–80 (December 19) (hereinafter, *Armed Activities*); *Cyprus* v. *Turkey*, App. No. 25781/34, paras. 76–7, Eur. Ct. H. R. (2001) (hereinafter, *Cyprus*); and Report of the CESCR, 19th Sess., November 16–December 4, 1998, "Concluding Observations: Israel," UN Doc. E/1999/22, paras. 232, 234 (1999).

35 See, e.g. *Cyprus*, para. 78 (justifying Turkish obligations in Cyprus partly on the ground that "any other finding would result in a regrettable vacuum in the system of human rights protection"); and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ 16, para. 118 (June 21): "Physical control of a territory . . . is the basis of State liability for acts affecting other States."

36 *Armed Activities*, paras. 172–80; see also D. Fleck, *The Handbook of International Humanitarian Law*, 2nd edn. (Oxford University Press, 2008), p. 280: "The occupying power must also take all measures to protect the inhabitants of occupied territories from violence by third parties."

control but lacks complete authority to govern. In such cases, the state might be discouraged from exercising the kind of authority necessary to restrain abusers. In *Cyprus* v. *Turkey*, Turkey exercised some territorial control in Northern Cyprus, but the Turkish Cypriots exercised most administrative authority.[37] Restraining private abusers in Northern Cyprus would have required Turkey to expand its authority – a move that would have undermined the broader interest in an independent and unified Cyprus. In the end, Turkey did *not* have to restrain private actors in the area; that job properly fell to the Turkish Cypriots.[38]

In addition, several important decisions extend the obligation extraterritorially when a state substantially enables an external actor to violate rights but does not establish appropriate restraints. In the *Genocide Case*, the ICJ determined that Serbia had not participated in the genocidal conduct of the Bosnian Serbs, but Serbia *had* failed to satisfy an obligation to protect.[39] Serbia supported the Bosnian Serbs politically and militarily, and it helped to oversee and direct them.[40] Having placed the Bosnian Serbs in a position to violate rights, Serbia could not lawfully stand by in the face of their violations.[41] Analogous considerations inform both *Cyprus* and *Ilaşcu* v. *Moldova and Russia*.[42] In each case, the defendant state propped up and provided immense support to an abusive external actor. Turkey supported the Turkish Cypriot administration,[43] and Russia did the same for separatists in Moldova.[44] The claimants could not demonstrate that, since ratifying the European Convention on Human Rights, those states participated in the abuse. Nevertheless, the European Court of Human Rights held them responsible. The court's reasoning on why they were responsible is unclear,[45] but the best answer is that they failed to satisfy their obligations to protect.

Those cases make good sense. A state that substantially supports an external actor has already involved itself in another state's affairs. The normative considerations that usually discourage states from unilaterally

37 *Cyprus*.

38 *Cyprus*, paras. 80–1, 272, 347–8, 376. The *Cyprus* court is unclear on why Turkey's obligations flowed from the abuses committed by the Turkish Cypriot administration but not from the abuses committed by private actors. See Hakimi, "State Bystander Responsibility," pp. 353–4, 377–8.

39 *Genocide Case*, paras. 386, 438. 40 *Genocide Case*, paras. 422, 434–8.

41 For more analysis, see Hakimi, "State Bystander Responsibility," pp. 364–5.

42 *Ilaşcu* v. *Moldova and Russia*, App. No. 48787/99, Eur. Ct. H. R. (2004) (hereinafter, *Ilaşcu*).

43 *Cyprus*, paras. 76–7. 44 *Ilaşcu*, para. 392.

45 Hakimi, "State Bystander Responsibility," pp. 353, 365–6.

restraining external actors – the interests of non-interference and fostering friendly relations among states – either are less pronounced or have already been compromised. They are outweighed by the interest in protecting human life. Moreover, the enabling state's contribution warrants assigning the obligation to *that* state, even though not to all others.

28.2.2 Severity of harm

Whether a state has the obligation also depends on the kind of harm at issue. States must protect only against conduct that: (i) causes serious physical or psychological harm; or (ii) affects people because they belong to a vulnerable group. Conduct in the first category usually intrudes on physical security. Torture, rape, slavery, extrajudicial killings, forced disappearances, and other cruel or inhuman treatment all trigger obligations to protect. Conduct in the second category typically discriminates on the basis of a protected status – for example, because the person is a woman, child, racial minority, or person with a disability. Such conduct is harmful because it reinforces existing inequalities or undermines the victim's capacity to participate fully in public life.[46]

Limiting the obligation to those two categories of conduct resolves apparent inconsistencies in the practice. Decision-makers sometimes assert that states must protect against *all* harms, no matter how severe.[47] That claim does not reflect the practice as applied. Treaties that expressly establish the obligation do so almost exclusively for conduct falling in the above two categories.[48] The post-ratification practice follows the same general pattern.[49]

Readers may worry that this limitation exposes a lacuna in the human rights regime. Certain conduct may intrude on rights without triggering any obligation to protect. As a practical matter, the worry is most pronounced for economic and social rights. Although some conduct that interferes with those rights triggers an obligation to protect,[50] most such conduct does not. Human rights law partly addresses the lacuna with

46 Hakimi, "State Bystander Responsibility," pp. 367–9 (reviewing practice).

47 See, e.g. CESCR, General Comment 18, UN Doc. E/C.12/GC/18, para. 24 (February 6, 2006); and HRC, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8 (May 26, 2004).

48 See, e.g. sources cited at n. 11 above. 49 See, e.g. sources cited at nn. 12–13 above.

50 See, e.g. CESCR, "Concluding Observations: Morocco," UN Doc. E/C.12/1/Add.55, paras. 30, 54 (December 1, 2000) (urging state to protect people from contaminated foodstuffs causing death or serious illness).

obligations to fulfill. Obligations to fulfill require states to enable rights holders, rather than to restrain abusers.

To understand how the two obligations intersect, consider the right to work. Dismissing an employee interferes with her right to work, but absent some discrimination or serious harm, it does not trigger an obligation to protect: the state need not restrain the employer from dismissing the employee.[51] Nevertheless, the state might have to fulfill the right – for example, by offering educational programs or trying to target the causes of unemployment. Because the obligations to protect and fulfill are complementary, obligations to fulfill may render obligations to protect less compelling. Protecting people from workplace dismissal is less critical if they may easily transfer to new jobs. Moreover, some measures may satisfy both obligations simultaneously. Regulations mandating parental leave arguably protect women from workplace discrimination – conduct that triggers an obligation to protect. The same regulations might fulfill the right to work by enabling people to continue working after becoming parents. The distinction between obligations to protect and fulfill remains important, however, because the applicable obligation determines what the state must do.

28.2.3 Reasonable measures

A state that has the obligation to protect – because of its relationship with the abuser and the severity of the harm – must take reasonable measures of restraint.[52] Such measures differ in kind (for example, criminal or diplomatic sanction); in their intended immediate effect (for example, to avert an imminent harm or establish a general deterrent); and in their

51 The CESCR asserts that the right to work grounds an obligation to protect, but the committee uses hopelessly vague language to define that obligation. CESCR, General Comment 18, paras. 25, 35. Its most concrete suggestions are that states must protect against forced labor and must protect people who are especially vulnerable (paras. 25, 31). Those suggestions are consistent with my approach. ILO Convention (No. 158), Concerning Termination of Employment, adopted June 22, 1982, www.ilo.org/ilolex/cgi-lex/convde.pl?C158, establishes slightly broader protections against workplace dismissal. However, that convention has been ratified by only thirty-four states, and its obligations are rarely invoked by, or before, the ILO. See www.ilo.org/ilolex/english/iloquery.htm.

52 My reasonableness standard is similar to the due diligence standard that appears in some of the practice. On due diligence standards, see generally R. Pisillo Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States," *German Y. B. Int'l L.*, 35 (1992), 9.

target (for example, a particular abuser or a diffuse group of potential abusers). However, in any particular scenario, only some measures will be both available to the state and sufficient to satisfy its obligation to protect.

The reasonableness standard is context-specific, but several factors inform the inquiry. First, reasonableness turns on both the state's relationship with the abuser and the severity of the harm. Those factors affect not only whether a state has the obligation, but also what the obligation requires. Measures that are reasonable for one kind of relationship or harm may be unreasonable for another.[53] Second, reasonableness depends on the degree of discretion afforded to states in any particular context. In some contexts, obligations to protect are well developed and specific. For example, states might have to investigate criminally and, if possible, prosecute the abuser.[54] In other contexts, states have more discretion to define their own measures.[55] Third, reasonableness depends on the scope of the problem. Case-specific measures may be necessary to avert even a single harm,[56] but a widespread problem suggests the need for systemic measures targeting the legal or behavioral patterns that contribute to abuse.[57]

Finally, reasonableness may depend on the state's capacity to restrain the abuser. A state is not absolved of an obligation simply because it lacks effective measures of restraint. The whole point of the obligation is to require states to develop those measures. Most of the practice assumes that states *can* develop such measures. And though states are disparately capable, the practice is circumspect about differentiating the obligation on that basis.[58] It should be less so. Defining reasonableness in part based on capacity would enjoin all states to make concerted efforts to restrain abusers, without requiring them to do that which they genuinely cannot. Further, it would permit each state to focus on its primary areas of concern – on abuses that are especially deep-seated or prevalent – instead of stretching its (inevitably limited) resources too thin.

53 Hakimi, "State Bystander Responsibility," p. 373.

54 See, e.g. International Convention for the Suppression of Terrorist Bombings, December 17, 1997, 37 ILM 249 (1998).

55 See, e.g. CEDAW, Art. 2(e) (requiring "appropriate" measures).

56 See, e.g. *Osman*, para. 116; and Committee on the Elimination of Discrimination against Women, "Communication No. 5/2005: *Goekce* v. *Austria*," UN Doc. CEDAW/C/39/D/5/2005, para. 12.1.2 (August 6, 2007).

57 See, e.g. *da Penha* v. *Brazil*, Case 12.051, Inter-Am. Comm'n H. R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. para. 61(4) (2000); and CRC, "Report of the Eighth Session," UN Doc. CRC/C/38, para. 288 (February 20, 1995).

58 Hakimi, "State Bystander Responsibility," pp. 374–6 (reviewing practice).

28.3 Concluding implications on the rights of the poor

That framework explains when states must protect the poor from third-party harm. First, a state usually must protect only its own poor. It need not protect the poor in other states unless it has a special relationship with the abuser. Second, a state must protect the poor from only some kinds of harm. This limitation is not as narrow as it may appear. Some conduct that triggers the obligation, like human trafficking, disproportionately affects the poor.[59] Other conduct, like race-based discrimination, may correlate highly with poverty. States must try to protect people – including poor people – from that conduct. Precisely what the state must do depends on the circumstances. But in all cases, states must make an affirmative effort to restrain actual or prospective abusers.

Advocates for the poor may feel disheartened. The economic and social rights that are most relevant to the alleviation of poverty paradigmatically trigger obligations to fulfill, not to protect. Obligations to fulfill remain frustratingly soft, notwithstanding considerable effort to make them operational.[60] The solution is to continue developing those obligations. I conclude, then, with an example that both illustrates the protect-fulfill distinction and shows promise for the obligation to fulfill. In *Port Elizabeth Municipality* v. *Various Occupiers*, the South African Constitutional Court forbade the state from removing squatters from private land.[61] The decision's practical effect was to restrain private landowners from evicting squatters. Yet *Port Elizabeth* does not stand for the proposition that the right to housing triggers an obligation to protect. Rather, the case is about the obligation to fulfill.[62] The government might have fulfilled the squatters' right to housing in all sorts of ways other than by restraining private landowners. For example, the government might have – and perhaps ideally would have – provided accommodation to people in need. Absent those alternatives, however, preventing

59 See B. Carr, "When Federal and State Systems Converge: Foreign National Human Trafficking Victims within Juvenile and Family Courts," *Juvenile and Family Court Journal*, 63 (2012), 77, 79: "Children who are vulnerable to trafficking often share common characteristics and circumstances including . . . impoverished childhoods . . . [and] homelessness."

60 For a recent discussion, see S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (New York: Oxford University Press, 2008), pp. 77–90.

61 *Port Elizabeth Municipality* v. *Various Occupiers*, 2005 (1) SA 217 (CC) (S. Afr.).

62 See *Port Elizabeth*, para. 56 (examining "the fulfilment of the rights of all to have access to adequate housing").

the eviction was the best option for fulfilling the right.[63] *Port Elizabeth* gave the obligation to fulfill real bite.

63 *Port Elizabeth*, para. 58 ("The real question in this case is whether the Municipality has considered seriously or at all the request of these occupiers that they be provided with suitable alternative land . . . "); and para. 61 ("[T]his decision in no way precludes further efforts to find a solution to a situation that is manifestly unsatisfactory to all concerned.").