Toward a Legal Theory on the Responsibility to Protect

Monica Hakimi

University of Michigan Law School, mhakimi@umich.edu

Follow this and additional works at: http://repository.law.umich.edu/articles

Part of the Human Rights Law Commons, International Humanitarian Law Commons, International Law Commons, and the Organizations Law Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Article

Toward a Legal Theory on the Responsibility to Protect

Monica Hakimi†

I. INTRODUCTION

Over the past several decades, the central focus of international law has shifted from protecting only sovereign states to protecting individuals.1 Still, the worst imaginable human rights violations—genocides, ethnic cleansings, crimes against humanity, and systemic war crimes—occur with alarming frequency.2 And the international response is often slow or ineffectual.

The most recent development for addressing this problem is the “responsibility to protect,” an idea that has received so much attention that it now goes

† Associate Dean for Academic Programming & Professor of Law, University of Michigan Law School. Earlier versions of this paper were presented at the May 2013 SHARES Conference at the University of Amsterdam Law School and the American Society of International Law Human Rights Workshop at the University of California at Berkeley Law School. I thank the participants in those events, in addition to Kristen Boon, Jacob Cogan, Karen Knop, Vijay Padmanabhan, Beth Van Schaack, and Ingrid Wuerth for helpful comments. I also thank Johanna Dennehy for exceptional research assistance.


2. For evidence that these violations are the worst of the worst, see the Rome Statute of the International Criminal Court, art. 4, opened for signature July 17, 1998, 2187 U.N.T.S. 3; and U.N. Secretary-General, Implementing the Responsibility to Protect: Rep. of the Secretary-General, ¶ 10(b), U.N. Doc. A/63/677 (Jan. 12, 2009).
simply by R2P. Almost all heads of state have endorsed R2P. The U.N. Secretary General has made R2P a top priority and issued multiple reports on the topic. The U.N. Security Council has recognized R2P in both thematic and case-specific resolutions. Civil society groups have invoked R2P to demand action in places like Libya and Syria. And the scholarly literature on R2P—in law, philosophy, and international relations—has mushroomed.

Yet for all this attention, R2P’s contribution to international law or to the ultimate goal of protecting people from atrocities is uncertain. R2P stands for two basic propositions. First, each state must protect its population from atrocities. This proposition is well established in international law, but experience demonstrates that states sometimes fail their own populations. R2P’s key innovation is its second proposition: that the broader international community should step in, when necessary, to help at-risk populations. Unlike the first proposition, the second is widely understood not to be legally operative. And

---

8. See, e.g., ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011); JAMES PATTISON, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO SHOULD INTERVENE? (2010); RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE (Julia Hoffmann & André Nollkaemper eds., 2012); GLOBAL RESPONSIBILITY TO PROTECT (peer-reviewed journal published on a quarterly basis); Alex J. Bellamy & Paul D. Williams, On the Limits of Moral Hazard: The ‘Responsibility to Protect,’ Armed Conflict, and Mass Atrocities, 18 EUR. J. INT’L REL. 539 (2011); John F. Murphy, Responsibility to Protect (R2P) Comes of Age? A Skeptic’s View, 18 ILSA J. INT’L & COMP. L. 413 (2012); Esther D. Reed, Responsibility to Protect and Militarized Humanitarian Intervention: When and Why the Churches Failed to Discern Moral Hazard, 40 J. RELIGIOUS ETHICS 308 (2012); Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?, 101 AM. J. INT’L L. 99 (2007).
10. See infra Section IV-A.
the extent to which it otherwise influences outside states is, at best, speculative and contested.\textsuperscript{12}

Part of R2P’s challenge is conceptual.\textsuperscript{13} The United Nations and almost all of the scholarly literature support a particular vision for R2P—of outside states banding together and doing everything possible to help at-risk populations. R2P is said to fall simultaneously on all outside states or to favor their collective action.\textsuperscript{14} As for what these states should do, the possibilities are almost endless. R2P emerged from the debate on humanitarian interventions and has always been associated with the use of force.\textsuperscript{15} A forcible intervention might be the only way to avert ongoing atrocities. But R2P has never been exclusively about forcible interventions. Recently, the conversation about R2P within the United Nations has shifted to the varied non-forcible and proactive measures for trying to prevent atrocities from breaking out.\textsuperscript{16} Such measures include programs to build domestic institutions or alleviate internal tensions. In the end, then, the vision for R2P that dominates current thinking is incredibly diffuse and open-ended.

This Article critiques that vision and offers an alternative. I argue that R2P should not posit an all-encompassing duty that falls, at once, on the entire international community. It should instead posit a bundle of more discrete duties, and responsibility for each of these duties should attach to specific outside states at a time.\textsuperscript{17} In particular, an outside state should be responsible as a re-

\textsuperscript{12} Compare, e.g., Alex J. Bellamy & Paul D. Williams, The New Politics of Protection? Côte d’Ivoire, Libya and the Responsibility to Protect, 87 INT’L AFF. 825, 826 (2011) (arguing that R2P duty to foreign populations is new and that existing justifications for it are insufficient); Stahn, supra note 8, at 109 (describing R2P as an expression of “a voluntary, rather than a mandatory, engagement”).

\textsuperscript{13} See, e.g., Alex J. Bellamy, The Responsibility to Protect—Five Years On, 24 ETHICS & INT’L AFF. 143, 144 (2010) (“[P]rofound disagreements persist about the function, meaning, and proper use of R2P . . . .”); Hanne Cuyckens & Philip De Man, The Responsibility to Prevent: On the Assumed Legal Nature of Responsibility to Protect and its Relationship with Conflict Prevention, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, supra note 8, at 111 (“[A] conceptual entanglement . . . significantly compounds the practical operationalisation of the RtoP concept.”).

\textsuperscript{14} See infra Part III.

\textsuperscript{15} See, e.g., ICISS REPORT, supra note 9, ¶¶ 2.24–27; Interview by UN News Centre with Edward Luck, Special Advisor to the U.N. Secretary-General (Aug. 1, 2011), http://www.un.org/apps/news/newsletter.asp?NewsID=38 (“Many people think that responsibility to protect is all about the use of military force after the bodies start piling up.”).

\textsuperscript{16} See Implementing the Responsibility to Protect: Rep. of the Secretary-General, supra note 2, ¶ 44; Responsibility to Protect: State Responsibility and Prevention: Rep. of the Secretary-General, supra note 4, ¶¶ 30–64; see also Alex J. Bellamy, Making RtoP a Living Reality: Reflections on the 2012 General Assembly Dialogue on Timely and Decisive Response, 5 GLOBAL RESP. TO PROTECT 109, 122 (2013) (“[M]any Member States expressed their support for the Secretary-General’s view that the international community should focus on preventing [atrocities] thereby reducing the need for timely and decisive response.”).

\textsuperscript{17} Some philosophers have argued that a moral duty to intervene militarily can fall on specific outside states. Compare, e.g., PATTISON, supra note 8, at 36–38, 182 (arguing for assigning the duty
sult of its own conduct or relationships. This vision for R2P is preferable to the one that now dominates R2P thinking because this vision builds on existing international law. International law has already begun to assign states duties for the benefit of foreign populations, and the trajectory is to continue expanding these duties. The duties are legally operative, however, only when responsibility can be pinned on particular states at a time.

My goal in this Article is to offer a framework for refining the R2P idea—that is, for identifying when atrocities do or should trigger an outside state’s responsibility. Rooting this framework in international law, as opposed to in mere policy proposals, might be beneficial for two reasons. First, because international law has already begun to account for the interests that animate R2P, existing legal arrangements have descriptive and predictive value for R2P. They shed light both on the extent to which global actors already support R2P and on the prospects for success going forward. Second, tethering R2P to international law might make it more effective. International law might help broaden R2P’s base of support, influence the behavior of outside states, or legitimize efforts to hold particular outside states responsible.

Because I focus on legal duties, I do not address the right to use armed force for humanitarian purposes. Though outside states sometimes have that right, any duty to use armed force would be completely out of touch with

primarily on the basis of each actor’s capacity to achieve good consequences), and Luke Glanville, On the Meaning of ‘Responsibility’ in the ‘Responsibility to Protect’, 20 GRIFFITH L. REV. 482, 494-96 (2011) (arguing that emergent norms assign the duty on the basis of a state’s capacity or historical ties to the population), with Kok-Chor Tan, The Duty to Protect, in NOMOS XLVII: HUMANITARIAN INTERVENTION 84, 102 (Terry Nardin & Melissa S. Williams eds., 2006) (arguing that assigning the duty on the basis of capacity might impose “unreasonably heavy burdens on a country just because it is capable of action”). My vision builds on that philosophical argument but differs from it in two respects. First, I focus on legal, not moral, duties. Second, I focus on duties that do not involve the use of armed force.

18. See infra Section IV.A.


21. Although international lawyers debate whether outside states may use force for humanitarian ends in the absence of any authorization from the U.N. Security Council, states clearly have this
current expectations. First, the duty would be extraordinarily onerous if it were assigned to only one or a small handful of states. Second, international law never requires—and is skittish even about permitting—cross-border violence. Still, states might have to use other levers of power, like economic or diplomatic measures, to help a foreign population. These other measures might be less effective than force at averting a particular crisis, but they also are less burdensome for the acting state and less intrusive on the territorial state. As such, an outside state might realistically be expected to take these measures even if it would rather not.

The Article proceeds as follows. Part I briefly describes the emergence and development of R2P. Part II argues that framing R2P as a collective duty saps the idea of its legal potential. Part III presents my alternative vision for R2P. I argue that international law already establishes a solid foundation for R2P. Human rights law and the law on state responsibility together provide the seeds both for defining discrete R2P duties and for distributing among outside states the associated responsibilities. After demonstrating that this foundation exists in international law, Part IV examines how global actors might build upon it to help satisfy R2P’s objectives.

II. R2P’S PROMISE AND CHALLENGE

R2P emerged from the international community’s broad sense of regret for the humanitarian crises in Rwanda, Bosnia, and Kosovo. These crises triggered an extensive debate among officials, practitioners, and scholars about how to improve the international response to atrocities. The debate initially focused on forcible humanitarian interventions. Such interventions are controversial—many would say unlawful—without authorization from the U.N. Security Council or consent from the territorial state. Yet the Kosovo crisis demonstrated that the Council might be paralyzed by a permanent member’s veto, even when the weight of opinion overwhelmingly favors a military inter-
vention.27 Further, Rwanda demonstrated that states might lack the political will to intervene or, therefore, to seek the Council’s authorization.28 The early debate about improving the international response to atrocities thus struggled to overcome the practical impediments to a Council-authorized intervention.

The logjam in that debate began to break in 2001, when an independent commission established by Canada (the International Commission on Intervention and State Sovereignty or ICISS) published a report entitled The Responsibility to Protect.29 The ICISS report made two key moves. First, instead of addressing the right of outside states to intervene militarily, the report declared a responsibility—something akin to a duty—to get involved.30 The report affirmatively encouraged states to try to protect foreign populations. Second, instead of focusing only on military actions, the ICISS report endorsed a broad range of measures for protecting at-risk populations, including measures to target the root causes of atrocity.31 Forcible interventions were just a small piece of the R2P idea.

A few years after the ICISS published its report, the U.N. Secretary General endorsed the R2P idea and then initiated a broader conversation about R2P within the United Nations.32 This conversation was, from the beginning, haunted by R2P’s association with humanitarian interventions. States refused to support a new right—and especially a new duty—to intervene militarily in humanitarian crises.33 Thus, when almost all heads of state addressed R2P in their 2005 World Summit Outcome Document, they hedged on humanitarian interventions: “We are prepared to take collective action, in a timely and decisive manner, through the Security Council . . . on a case-by-case basis and in cooperation with relevant regional organizations, as appropriate, should peace-

27. See, e.g., INDEPENDENT INT’L COMM’N ON KOS., KOSOVO REPORT 140-42, 163-98 (2000) (examining the Kosovo incident).

28. U.N. Secretary-General, Letter dated Dec. 15, 1999 from the Secretary-General addressed to the President of the Security Council, 43-44, U.N. Doc. S/1999/1257 (Dec. 16, 1999) (explaining that one reason for the failure to stop the Rwandan genocide was a lack of political will to contribute troops to any Council-authorized operation); ALISON DES FORGES, “LEAVE NONE TO TELL THE STORY”: GENOCIDE IN RWANDA 644-46 (1999) (explaining that states were slow to contribute to the U.N. peacekeeping operation in Rwanda, despite the evidence of genocide).

29. ICISS REPORT, supra note 9.

30. Id. ¶ 2.24-33, at 15-18; see also ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 430 (2004) (explaining that, although the report “stops short of declaring explicitly that there is an obligation to protect, it . . . clearly goes beyond the traditional assumption that at most intervention is permissible”); Louise Arbour, The Responsibility to Protect as a Duty of Care in International Law and Practice, 34 REV. INT’L STUD. 445, 450 (2008) (“[States] have lost their ‘right’ to intervene, a discretionary prerogative, and willingly acquired, instead, a responsibility for a failure to act, a failure for which, I suggest, they could be held accountable.”).


ful means be inadequate and national authorities are manifestly failing to protect their populations . . . .34 That formulation retreats from the ICISS report, which supports unauthorized humanitarian interventions when all other options for averting a crisis have been exhausted.35 Many have therefore criticized the World Summit Outcome Document for watering down the R2P idea.36

But the document still endorses the normative impulse behind R2P: that outside states should try to protect at-risk populations, even if not with armed force. The document declares that the “international community . . . . has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . . to help to protect populations from [atrocities].”37 Moreover, once the outcome document put to the side the question of humanitarian interventions, R2P’s popularity grew. Dozens of states have established so-called “focal points” on R2P—national offices that are designed to promote R2P internally and coordinate with other actors internationally.38 Within the United Nations, the Secretary General, Security Council, and General Assembly have all repeatedly engaged on R2P and, with varying degrees of enthusiasm, supported the basic idea.39 The Secretary General has also appointed two special advisers on R2P—one to focus on genocide, and the other to work on R2P more generally.40 With all this support, the Secretary General proudly proclaimed in 2011 that, notwithstanding the persistent question of how to implement R2P, “[n]o government questions the principle” itself.41

And yet, the implementation question is real. R2P offers little concrete guidance on what outside states should do for at-risk populations.42 This, then, is R2P’s principal challenge: translating its basic principle into an operational doctrine. To be clear, this doctrine need not be exclusively legal in form. Mere policy proposals might induce certain outside states to act; states might themselves support the proposals or be responsive to constituents who do. But assigning outside states operative legal duties would mean establishing the expectation that helping at-risk populations is not always discretionary—and that not helping can legitimately trigger an outside state’s responsibility.

34. 2005 World Summit Outcome, supra note 3, ¶ 139.
35. See Mohamed, supra note 11, at 326-28.
37. 2005 World Summit Outcome, supra note 3, ¶ 139.
39. See supra notes 3-6 and accompanying text; U.N. GAOR, 63d Sess., 97th plen. mtg. at 3, U.N. Doc. A/63/PV.97 (July 23, 2009) (statement of Miguel d’Escoto Brockmann, President of the General Assembly) (recognizing during General Assembly discussions that “there is . . . broad agreement that the international community can no longer remain silent in the face of genocide, ethnic cleansing, war crimes and crimes against humanity,” despite the “prevailing lack of trust in developing countries when it comes to the use of force for humanitarian reasons”).
42. See supra notes 13-16 and accompanying text.
III. THE UNFULFILLED PROMISE OF COLLECTIVE DUTIES

Almost all of the R2P literature envisions outside states implementing R2P collectively—by banding together to help at-risk populations. This vision drives even the language that is used to articulate R2P. R2P’s burdens are said to fall first on the territorial state and then on the international community as a whole. Two kinds of legal claims support this vision. One is that an R2P duty falls simultaneously on all outside states, such that they all must satisfy the same basic standard in any R2P scenario. This claim tries to pin responsibility on every state that does not do enough for the at-risk population. The second claim is that the R2P duty falls not on states themselves but on states’ collective organizations, like the United Nations or analogous regional organizations. Here, not satisfying the duty would trigger the organization’s responsibility.

These legal claims have some intuitive appeal. Measures to help an at-risk population might well be more effective or legitimate if they are taken collectively than if they are taken by only one or a small handful of states.43 Moreover, if an R2P duty were widely distributed, then all outside states would have to pitch in. None would carry too heavy a burden. Nevertheless, neither of these claims is likely to gain legal traction in the near term.

A. Assigning R2P to All Outside States Simultaneously

The claim that R2P demands action by all outside states simultaneously has some authoritative support but remains almost entirely aspirational.44 This claim treats all outside states as if they are in the same boat; none is uniquely obligated to help the at-risk population or responsible when that population suffers.45 As David Miller has explained, “an undistributed duty . . . to which everybody is subject is likely to be discharged by nobody unless it can be allocated in some way.”46 To appreciate the problem, consider three discrete contexts in which the claim appears, plus evidence that it is inoperative.

First, the 1949 Geneva Conventions require states to “ensure respect” for the Conventions “in all circumstances.”47 This language is widely interpreted

44. See infra notes 47-60 and accompanying text; cf. Christian J. Tams, Individual States as Guardians of Community Interests, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 379, 400-01 (Ulrich Fastenrath et al. eds., 2011) (“[T]he few existing enforcement duties tend to be approached in a rather cavalier way.”).
45. Philosophers sometimes call this kind of duty “imperfect” because it is not owed by or to any particular agent. See, e.g., Terry Nardin, Introduction to HUMANITARIAN INTERVENTION: NOMOS XLVII 1, 14-16 (Terry Nardin & Melissa S. Williams eds., 2006).
46. David Miller, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 98 (2007); see also Alex J. Bellamy, Conflict Prevention and the Responsibility to Protect, 14 GLOBAL GOVERNANCE 135, 147 (2008)(“[T]he whole concept of responsibility is rendered meaningless without a related concept of where that responsibility resides.”).
to mean that every party must try to avert ongoing war crimes, no matter where or by whom the crimes are committed. State officials verbally endorse that interpretation but regularly ignore it in practice. What’s more, states that stand by in the face of ongoing war crimes are rarely, if ever, held responsible.

Second, the Draft Articles on State Responsibility, which the International Law Commission (ILC) adopted in 2001, aim to identify when states are responsible for violating international law and what follows from these violations. The ILC spent decades developing the draft articles and, from early on, sought to attach special consequences to especially egregious violations. In the end, the draft articles declare that all “[s]tates shall cooperate to bring to an end . . . serious breach[es]” of peremptory norms. The category of peremptory norms is notoriously indeterminate but, by all accounts, includes mass atrocities. Thus, any duty to cooperate on peremptory norms should come into play in scenarios that implicate R2P.

Yet the ILC’s draft articles do not even try to identify the conduct that would satisfy a duty to cooperate—or, therefore, when a state might be responsible for not cooperating. Though the ILC posits that cooperation can be “non-institutionalized,” it assumes that most cooperation will occur through international organizations. The ILC does not identify what states must do in these


50. See, e.g., INT’L COMM. OF THE RED CROSS, IMPROVING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW: ICRC EXPERT SEMINARS, at 3-8 (Oct. 2003) (acknowledging that the supposed duty is not yet operational because states lack the political will to implement it); Carlo Focarelli, Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?, 21 EUR. J. INT’L. L. 125 (2010) (arguing that the supposed duty is not meaningfully enforceable); Toni Pfanner, Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims, 91 INT’L REV. RED CROSS 279, 305-06 (2009) (recognizing that “states have rarely ventured beyond discreet representations behind the scenes” to try to avert others’ war crimes).

51. Draft Articles on State Responsibility, supra note 19, ch. III, pmbl., cmt. 5 (“From the first it was recognized that these developments [on peremptory norms] had implications for the secondary rules of State responsibility which would need to be reflected in some way in the Articles.”). Initially, the ILC sought to establish a category of violations that were so serious that they qualified as “crimes of State.” See generally INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC’S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (Joseph H.H. Weiler et al. eds., 1989) (analyzing the ILC’s earlier efforts).

52. Draft Articles on State Responsibility, supra note 19, art. 41, § 1. The draft articles also articulate a duty not to recognize situations created by these breaches. See id. art. 41, § 2. The ILC commentary suggests that a duty not to recognize kicks in after the violation has ceased and is mostly relevant in cases involving aggressive force or the right to self-determination. It is not clear how, if at all, such a duty would help avert atrocities, so I do not address the idea here.

53. See id. art. 40, cmts. 2-6; ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 50-66 (2006).

54. Draft Articles on State Responsibility, supra note 19, art. 41, cmt. 2; see also Nina H.B. Jørgensen, The Responsibility to Protect and the Obligations of States and Organizations under the Law of International Responsibility, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, supra
organizations, other than simply participate. More significantly, the ILC acknowledges that any duty to cooperate to end violations of peremptory norms might still be aspirational and not (yet) effective law.

Finally, in its 2007 judgment in the Bosnia-Serbia Genocide Case, the International Court of Justice (ICJ) determined that the Genocide Convention obligates states to try to avert genocidal conduct in and by third states. This interpretation is progressive and potentially far-reaching. It arguably requires every party to the Convention to act in the face of genocide. After all, every party has the same obligation under the Convention’s text. However, the ICJ limited that expansive implication. The court explained that the duty to prevent genocide requires different measures of each state, depending on that state’s particular tools for averting a crisis. As a practical matter, an outside state that lacks any nexus to or mechanisms for averting a crisis might not have to do anything at all. The claim that every state must try to avert genocide seems more expansive than the ICJ’s own interpretation and is, in any event, unsupported by state practice. Here again, the claim that a legal duty attaches simultaneously to all outside states is inoperative.

B. Assigning R2P to International Organizations

An alternative claim seeks to attach the R2P duty not to individual states but to their collective organizations. The claim that international organizations (IOs) must implement R2P is principally directed at the U.N. Security Council and reflects, at least in part, R2P’s historic association with the use of force. Some have argued for requiring the Council to act in humanitarian crises, or

note 8, at 125, 129 (explaining that the ILC “appears to envisage a form of collective response through the organised international community, that is, the UN”).

55. Draft Articles on State Responsibility, supra note 19, art. 41, cmt. 2 (“Because of the diversity of circumstances which could possibly be involved, the [draft article] does not prescribe in detail what form this cooperation should take.”).

56. Id. art. 41, cmt. 3 (“It may be open to question whether general international law at present prescribes a positive duty of cooperation, and [any such duty] may reflect the progressive development of the law.”).


60. But cf. HR 6 september 2013, ..., m. nt. (Nederland/Nuhanovic) (Neth.), Case 12/03324 (Sept. 6, 2013) (finding that Dutch peacekeepers unlawfully evicted from their base Bosnian men who were later killed).

61. For an argument that regional organizations have a residual duty that kicks in when the U.N. Security Council stalls, see ICISS REPORT, supra note 9, ¶¶ 6.28, 6.31-35; Cristina Gabriela Badescu, Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights 84 (2011); and Kristin M. Haugevik, Regionalising the Responsibility to Protect: Possibilities, Capabilities and Actualities, 1 Global Resp. to Protect 346, 350-51 (2009).

Toward a Legal Theory on the Responsibility to Protect

for restricting the use of the veto in such cases. Yet the claim against IOs is not directed exclusively at the Security Council. For example, the U.N. Secretary General has identified varied proactive measures that different kinds of IOs might coordinate or implement.

The claim that an R2P duty attaches to IOs is likely to confront serious hurdles in the near term. First, the U.N. Security Council and its regional analogs are run by states. If R2P duties are not functional when they demand that all outside states act simultaneously, why would the duties become functional simply by demanding that states act through collective organizations? The demand on any particular state would still be diluted, both because of the number of states involved and because holding particular states responsible would mean piercing the IO’s veil.

Second, the relevant IOs are, at bottom, political bodies. They have broad discretion to decide whether and how to help an at-risk population, and they ultimately may decide to do nothing. This does not mean that IOs may do whatever they please. For example, the U.N. Security Council is generally

---


64. Implementing the Responsibility to Protect: Rep. of the Secretary-General, supra note 2, ¶¶ 28-48; see also Arbour, supra note 30, at 456-57 (discussing potential roles for different U.N. organs); Alex J. Bellamy, Making R2P a Living Reality: Reflections on the 2012 General Assembly Dialogue on Timely and Decisive Response, 5 GLOBAL RESP. TO PROTECT 109, 122-24 (2013) (suggesting that IOs coordinate on R2P).


67. See, e.g., ANTONIOS TZANAKOPOULOS, DISOBEDIING THE SECURITY COUNCIL 202 (2011)
expected to account for human rights interests when it makes decisions. But the Council has considerable discretion to weigh those interests against the countervailing considerations that favor or disfavor a particular decision. Proposals to further constrain the Council’s discretion, including proposals on R2P, have had little success. The idea that the Council is obligated to respond to humanitarian crises is, in José Alvarez’s words, “absurdly premature and not likely to be affirmed by state practice.”

Third, even if IOs had an R2P duty, the extent to which it could meaningfully be enforced is unclear. IOs are rarely held responsible for international legal violations. Part of the reason for the dearth of relevant practice is that

(“The threat of massive disobedience . . . is a potent tool for inducing compliance of a powerful organ [such as the Security Council] with international law.”); cf. Ian Hurd, The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003, 59 INT’L ORG. 495, 523 (2005) (“Once the dominant powers have come to rely in part on a legitimated institution to provide order in the international system, . . . their influence thereafter relies on a perpetual effort to police and maintain the legitimacy of the institution.”).


69. See Nico Krisch, Introduction to Chapter VII: The General Framework, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, supra note 66, at 1258 (“It is then up to the [Security Council] to strike the concrete balance between humanitarian and human rights concerns and the goal of maintaining peace.”)


73. See, e.g., Anastasia Telestsky, Binding the United Nations: Compulsory Review of Disputes Involving UN International Responsibility Before the International Court of Justice, 21 MINN. J. INT’L L. 75, 80 (2012) (noting that the ILC’s recent draft articles on IO responsibility fail to answer how the U.N. might be held responsible).

74. Draft Articles on IO Responsibility, supra note 65, at 2, cmt. 5 (“One of the main difficulties in elaborating rules concerning the responsibility of international organizations is due to the limited availability of pertinent practice.”); Responsibility of International Organizations: Comments and Observations Received From International Organizations, Int’l Law Comm’n, 63d Sess. Apr. 26-June 3, July 4-Aug. 12, 2011, at 8, U.N. Doc. A/CN.4/637 (Feb. 14, 2011) (EU statement that “some commentaries show that there is very little or no relevant practice to support the [ILC’s] suggested provisions on the responsibility of IOs); William E. Holder, Can International Organizations Be Controlled? Accountability and Responsibility, 97 AM. SOC’Y INT’L L. PROC. 231, 234 (2003) (“[I]nternational practice is in fact quite scant and precedents for claims against international organizations are few.”). Note that
international and national courts commonly lack jurisdiction over claims against IOs. However, even the more informal enforcement tools that are used against scofflaw states—like tit-for-tat noncompliance or verbal denunciations—might be maladapted for IOs. IOs are likely to be less responsive to such enforcement than are individual states because IOs are more diverse and less unified. A claimant who tries to enforce an R2P duty against the IO presumably would have to convince many states, not just one, to take that duty seriously.

IV. THE POTENTIAL OF INDIVIDUAL DUTIES

The claim that outside states should collectively implement R2P translates poorly to international law. No matter whether the claim is directed at all outside states simultaneously or at states’ collective organizations, it is unlikely to garner support from international law. Instead, R2P should offer a framework for obligating and then holding responsible particular outside states. Each state should have multiple, discrete duties relating to R2P. And in any given case, responsibility for one or another duty should attach to the state or small handful of states that, because of their own conduct or relationships, have unique ties to the situation. This alternative vision for R2P is appealing because it is already rooted in international law and thus has the potential to gain legal traction going forward.


76. See Draft Articles on IO Responsibility, supra note 65, art. 51, cmts. 4, 6 (recognizing that the “[p]rocedure concerning countermeasures taken against international organizations is undoubtedly scarce,” and that countermeasures might be ill-suited for IOs because they might “hamper the functioning of the responsible international organization and therefore endanger the attainment of the objectives for which that organization was established”).
Some readers might instinctively worry about encouraging outside states to act individualistically. Working through an IO or with other states can curb a state’s opportunistic impulses or legitimize efforts to help the at-risk population. In contrast, acting alone gives the outside state more leeway to exploit its power for its own gains, to the potential detriment of the territorial state or population. This worry is understandable but should not be overstated. Outside states that want to act opportunistically may already do so. They may take non-forceful measures, without going through an IO, to help at-risk populations. The question is when to convert that right into a duty—when to require outside states to take measures that they might otherwise forgo. Any such duty could be crafted to lessen, rather than increase, the risk of individual states acting invidiously. For instance, certain R2P duties might kick in only after an outside state has inserted itself into a situation. Such duties might dissuade states from getting involved in the first place or might influence states that are involved to act benevolently.

Other readers might object that my vision is instead too cautious. The duties that exist or realistically might emerge in international law will sometimes be too weak to protect people from atrocities. The chances of success might be higher if states banded together, or if responsibility fell on states that were not already implicated in the situation by virtue of their own conduct or relationships. Yet the vision that I advance would establish only a floor—not necessarily a ceiling—of what outside states might do. States that want to do more always could. Further, even if R2P’s legal articulation is limited in the ways that I suggest, its normative impulse and rhetoric might be available to advocate for more robust, discretionary, and collective action.

A. Theoretical Foundations

I turn, then, to demonstrating that this vision for R2P is rooted in existing international law. International law has two natural starting points for thinking about R2P: human rights law and the law on state responsibility. These two bodies of law provide a foundation for assigning outside states duties that bene-


78. International law differentiates between non-forceful measures that comply with the acting state’s legal obligations and non-forceful measures that do not comply. Compliant measures are lawful. See Draft Articles on State Responsibility, supra note 19, at ch. II, cmt. 3; CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGO OMNES IN INTERNATIONAL LAW 8-9 (2005). Noncompliant measures are usually unlawful but can be excused as countermeasures, when they are taken against a scofflaw state. In most circumstances, countermeasures are available only to states that have been specifically injured by the scofflaw’s breach. But the weight of state practice suggests that, in cases involving especially egregious human rights violations, countermeasures are available to all states. See ELENA KATSELLI PROUKAKI, THE PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW 204-07 (2010); TAMS, supra, at 298–51; Martin Dawidowicz, Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council, 77 BRIT. Y.B. INT’L L. 333 (2006).
fit foreign populations and then for allocating the associated responsibilities.

1. The Seeds for Prescribing R2P-Relevant Conduct

Human rights law and the law on state responsibility both seek to prescribe R2P-relevant conduct. Like R2P, human rights law is fundamentally concerned with protecting people from harm. This body of law recognizes a broad range of rights—for instance, rights to life, liberty, health, and food. It then assigns states three kinds of duties to help realize those rights. Duties to respect are paradigmatic duties not to intrude on rights. For instance, a duty to respect the right to life prohibits states from arbitrarily killing people. A duty to respect the right to food prohibits states from actively depriving people of food. Duties to protect require states to try to restrain third parties from violating rights. Protecting the right to life means taking reasonable steps—or as sometimes stated, exercising due diligence—to prevent murder. Depending on the circumstances, a duty-holding state might have to clamp down on gang-related violence or try to incapacitate someone who is about to detonate a bomb. Finally, duties to fulfill require states to help realize positive liberties. These duties are unlike the other two in that they do not assume a single, identifiable abuser. Fulfilling the right to life might mean guaranteeing emergency medical care or responding competently to a natural disaster.

That taxonomy of human rights duties is conceptually useful for R2P. It reminds us that one objective—like avoiding unnecessary losses of life—can justify multiple duties. States might have to achieve that objective in different ways. Moreover, disaggregating the objective might make it more manageable. Rather than establish one daunting duty to avoid unnecessary losses of life, human rights law establishes three more concrete duties: a duty not to kill unnecessarily, a duty to try to protect people from third-party killings, and a duty to create conditions in which life is not unduly at risk. R2P would benefit from a similar approach. R2P is currently fashioned as an all-encompassing duty to protect—a duty to try to shield people from third-party atrocities. R2P might instead articulate a bundle of more discrete duties.

The question, then, is how to define those duties. Human rights law provides a potentially useful model for R2P. It but would have to be further developed to support R2P. As a matter of positive law, human rights law applies principally in a state’s own territory, for the benefit of its own population.

---


81. See, e.g., Olivier De Schutter et al., Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 34 Hum. Rts. Q. 1084, 1090 (2012) (“The obligation to comply with internationally recognized human rights imposes three levels of duties on states: to respect, protect, and fulfill human rights.”). For a review of various efforts to expand these duties, or to develop slightly different or more precise duties, see MAGDALENA SEPÚLVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 157-248 (2003).

82. Cf Paschim Banga Khet Mazdoosamity v. West Bengal, (1996) 4 S.C.C. 37 (India) (finding that the right to life grounds a duty to provide emergency medical care).

83. See, e.g., ICCPR, supra note 80, art. 2, § 1 (obligating each party to respect and ensure
The current trend is to expand the extraterritorial scope of application of human rights law. Yet this trend is contested and deeply under-theorized. Most decisions that apply human rights law extraterritorially do so by reference to state control. The more control a state exercises in an extraterritorial setting, the greater the likelihood that the state will be held to its human rights duties. But the relevant decisions lack a coherent account of when and why control matters. These decisions vary on the kinds of extraterritorial control that trigger a state’s human rights duties; on whether factors other than control can trigger these duties; and on whether the duties are always triggered simultane-
ously or can be triggered piecemeal, depending on the circumstances of a case. Further, whatever the extraterritorial scope of a state’s ordinary human rights duties, its R2P duties might be more expansive. Outside states might reasonably have more demanding duties in cases of atrocity. Indeed, the treaties that specifically regulate states on atrocities—the Geneva and Genocide Conventions—are widely understood not to be territorially limited. Thus, R2P might build on human rights law but needs its own conceptual work. R2P must justify assigning duties to outside states in cases of atrocity.

Likewise, R2P might build on the law on state responsibility. Recall that the Draft Articles on State Responsibility claim a unique enforcement duty—a duty to cooperate on enforcement—in cases of atrocity. Like R2P, this claim is motivated by the idea that some human rights violations are so egregious that they justify a serious response. But alas, any duty to cooperate is not yet functional. The ILC could not identify the level or kind of cooperation that is required of outside states. Again, R2P must do more conceptual work.

2. The Seeds for Grounding R2P Responsibilities

The human rights duties and the supposed duty to cooperate raise a follow-up question for my vision for R2P: if the duties go unsatisfied, when and why would particular outside states be responsible? The answer, I argue, must be extracted from the intersection between human rights law and the law on state responsibility. Under these two bodies of law, responsibility relating to human suffering stems from either the state’s own misconduct, the state’s unique relationship with the malfеasant, or a messy combination of both.

To start, consider a state’s well-established duty not to commit atrocities in its territory. A territorial state that commits atrocities violates this duty and is responsible. But of course, the state cannot itself commit atrocities; the state is just a concept. A more accurate formulation is that the state is responsible if its agents commit atrocities. That formulation highlights three important points relating to state responsibility. First, state responsibility results from the con-

90. Compare, e.g., Bankovic v. Belgium, App. No. 52207/99, 2001-XII Eur. Ct. H.R. ¶ 65 (asking about “the scope and reach of the entire Convention system of human rights protection”), with, e.g., Al-Skeini, App. No. 55721/07, 53 Eur. H.R. Rep. ¶ 137 (explaining that the duties can, at least in some sense, “be divided and tailored”), and Cerone, supra note 84, at 397 (2007) (“[I]t may be that negative obligations apply whenever a state acts extraterritoriall... but that the degree of positive obligations will be dependent upon the type and degree of control (or power or authority) exercised by the state”).


92. See Draft Articles on State Responsibility, supra note 19, art. 12, cmt. 7 (asserting that “states have a special role [in creating peremptory norms] as par excellence the holders of normative authority on behalf of the international community” and that the violation of such norms might trigger “a stricter regime of responsibility than that applied to other internationally wrongful acts”).

93. This duty is both well established in human rights law, see supra Section IV.A, and part of the classic formulation on R2P, see INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND 147 (2001); Sheri P. Rosenberg, Responsibility to Protect: A Framework for Prevention, 1 GLOBAL RESP. TO PROTECT 442, 450–53 (2009).
current application of so-called primary rules and secondary rules. The primary rules in human rights law prescribe certain conduct. Secondary rules in the law on state responsibility identify whether that conduct is attributable to a state and, if so, what follows from a breach.

Second, although these two bodies of law are understood to be distinct, one sometimes turns on the other. For example, any duty to cooperate on enforcement under the secondary rules on state responsibility would kick in for only some primary rules—namely, the primary rules on peremptory norms. Likewise, primary rules in human rights law require a state to prevent its agents from committing atrocities precisely because they are its agents—as defined by the secondary rules on state responsibility. Under the law on state responsibility, state agents have particular kinds of relationships with the state. State officials of course qualify as agents. So do people who are not formally officials but nevertheless act on the state’s behalf. For example, the Draft Articles on State Responsibility posit that if a state empowers a private entity to perform a classically governmental function, then the entity becomes an agent while performing that function. If the state effectively controls someone’s conduct, the person becomes an agent while committing the conduct.

Third, a state is strictly responsible for its agents’ misconduct because it is expected to oversee its agents and ensure that they behave. To be clear, the state is responsible even if it did not actually oversee or control a particular agent. Control over someone can create an agency relationship if that relationship does not otherwise exist, but a lack of control over someone who already qualifies as an agent does not dissolve the agency relationship or relieve the state of responsibility. The whole point of this strict responsibility regime is to encourage the state to establish control over its agents.

I have argued in another work that human rights duties to protect reflect a similar logic. A state is not expected to oversee third parties—that is, people who are not its agents—to the same extent that it oversees its own agents. Consequently, a state is not strictly responsible every time a third party violates rights. Duties to protect are due diligence duties, meaning that the state is responsible only if it (or more precisely, its agents) should have done more to restrain the third party. Moreover, whether a state should have made that effort

95. Draft Articles on State Responsibility, supra note 19, art. 4.
96. Id. art. 5.
97. Id. art. 8.
98. Id.
99. Id. art. 4, cmt. 9 (“[I]t is . . . irrelevant whether the internal law of the State in question gives the [State] power to compel the [agent] to abide by the State’s international obligations.”); id. art. 5, cmt. 7 (“[T]here is no need to show that the conduct was in fact carried out under the control of the State.”); id. art. 7, cmt. 2 (asserting that the state is responsible even when an agent “has manifestly exceeded its competence”).
100. Monica Hakimi, State Bystander Responsibility, 21 Eur. J. Int’l L. 341 (2010). Note that, because both kinds of duties are relationally grounded, they sometimes are conflated or bleed into each other at the margins. See id. at 353-54; infra notes 139-151 and accompanying text (discussing examples).
depends largely on the nature of its relationship with the third party. A state must try to restrain third parties in its territory because of its governance relationship with those actors. States exist, at least in part, to maintain order and enforce the law against inhabitants who might intrude on individual liberties. 101

I demonstrate in Section IV.B that, where international law already holds an outside state responsible for human suffering, it likewise does so on the basis of the state’s own conduct or relationships. These grounds for pinning responsibility on a state are in tension with two other grounds that appear in the R2P literature. First, most of the R2P literature assumes that all outside states are in the same boat—that none has a legally relevant nexus to the at-risk population that justifies holding it, but not all other outside states, responsible. In fact, outside states can be differently situated relative to the at-risk population. Some outside states might participate in or contribute to a humanitarian crisis, or might have a unique relationship with the perpetrators. These factors justify pinning responsibility on those outside states, even if not on all others.

Second, some have proposed grounding outside state responsibility in each state’s positive capacity to help the at-risk population. 102 This proposal arguably finds support in the Genocide Case. Recall that the ICJ interpreted the Genocide Convention to require outside states to try to prevent genocide. The ICJ then asserted that this duty is contingent on each state’s “capacity to influence” the perpetrators. 103 Yet the ICJ did not define capacity in terms of the state’s overall military, financial, or diplomatic might. It defined capacity in relational terms:

This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State’s capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State’s capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger. . . . 104


102. See Pattison, supra note 8, at 36-38, 182 (arguing for assigning the duty primarily on the basis of each actor’s capacity to achieve good consequences); Luke Glanville, supra note 17, at 494-96 (arguing that emergent norms assign the duty on the basis of a state’s capacity or historical ties to the population); see also Arbour, supra note 30, at 455 (arguing that states “with the capacity to project power and mobilise resources” have particular duties and that “powerful States may be reasonably expected to play a leading role in bolstering appropriate measures of prevention, dissuasion and remedy . . . commensurate with their weight, wealth, reach, and advanced capabilities”).


104. Id.
The nature of the state’s relationship with the perpetrators affects whether the state can and should exert its influence over them.

In the Genocide Case, the ICJ was clearly focused on that relational question. The ICJ underscored that, even though the perpetrators were not Serb agents, they received immense guidance and support from Serbia.\footnote{105} Serbia’s dubious conduct—its support for an armed group in another state\footnote{106}—gave it a unique relationship with that group. Precisely for that reason, Serbia both could have and should have tried to restrain the group’s members from committing genocide. I return to the Genocide Case and its lessons for R2P below. The point here is that, although the judgment used the word “capacity,” it provides at best mild support for grounding responsibility in a state’s positive capacity to help. The judgment is instead consistent with my approach. Serbia’s responsibility is justifiable because of a messy mix of its conduct and relationship with the Bosnian Serbs.

In any event, grounding responsibility primarily in each state’s positive capacity would be misguided. States that are especially capable would repeatedly carry a disproportionate R2P burden, even if their involvement in the situation would lack legitimacy,\footnote{107} even if other states are also highly capable (but less so),\footnote{108} and even if those other states actually contributed to the problem. Moreover, grounding responsibility primarily in each state’s positive capacity would absolve states that are incapable, rather than encourage these states to develop some capacity.\footnote{109} Of course, states are disparately capable and should
not have to do more than they can reasonably bear. An outside state that cannot satisfy an R2P duty unless it abandons other, more important duties might have a more lenient R2P duty or be excused altogether from a particular duty. But if the vast majority of outside states can reasonably satisfy a duty, then their responsibilities should not be allocated on the basis of their positive capacities.

B. An Exemplary Bundle of R2P Duties

A foundation for outside state responsibility exists in international law but must be further developed to support R2P. I outline below four plausible bases for holding an outside state responsible—when it: (1) participates in extraterritorial atrocities, (2) does not make reasonable efforts to restrain third-party participants, (3) obstructs a third party’s protective measures, or (4) does not help lessen the risk of atrocities breaking out. These four bases vary in the extent to which they are already established in international law. But each builds on the law’s existing foundation and pins responsibility on particular outside states by virtue of their own conduct or relationships.

To be clear, my goal here is not to delineate precisely when outside states are or should be responsible. Neither is it to endorse this particular bundle of duties, or even to suggest that every duty in this bundle is realizable. My goal is to show that my vision for R2P—which would establish multiple R2P duties and assign responsibility on the basis of each state’s conduct or relationships—has roots in and can continue to build on international law.

1. Duty to Respect

To begin, outside states might be responsible for participating in atrocities. This responsibility might seem obvious because it already has solid support in international law, but it is completely absent from the R2P discourse. The R2P literature typically asserts a duty to respect only for the territorial state. The omission for other states might be an unfortunate oversight, or it might reflect a lingering discomfort with applying human rights duties extraterritorially. In either event, responsibility for participating in extraterritorial atrocities exists or could easily develop in international law.

As discussed, the treaties that specifically address atrocities—the Geneva and Genocide Conventions—are not geographically limited. War crimes and genocide are prohibited no matter where they occur. Yet because international
law regulates atrocities piecemeal, the grounds for prohibiting other extraterritorial atrocities are murkier. In particular, some conduct that qualifies as a crime against humanity might fall through the law’s regulatory cracks. Crimes against humanity are catchall prohibitions that developed in customary law, primarily to penalize individuals.\textsuperscript{111} State officials who perpetrate these crimes are individually responsible. But for the state to be responsible, the conduct must violate one of its obligations.\textsuperscript{112} Although a state that commits crimes against humanity in its own territory clearly violates its human rights duties, the extent to which these duties apply extraterritorially is contested. The duties almost certainly apply when a state controls either foreign territory or persons on foreign soil, but the duties do not necessarily apply when the state’s situational control is more tenuous.\textsuperscript{113} For example, a state that sprays toxic chemicals over a foreign city or shares intelligence in order to assist with extraterritorial killings might not exercise the kind of control that clearly triggers human rights law.

The territorial limits in human rights law thus raise a conceptual question for R2P: why would duties to respect ever be territorially limited? In other words, why wouldn’t international law always prohibit a state from intruding on human rights, no matter the state’s location or level of control? The best answer is that most duties to respect balance the interest in protecting people from state intrusions against countervailing interests that justify such intrusions. The duty not to kill permits killings to protect innocents.\textsuperscript{114} The duty not to restrict religious expressions permits restrictions for public safety.\textsuperscript{115} Extraterritorial duties to respect are justifiably limited, then, if the balance that has been struck for a domestic setting is off-kilter for an extraterritorial one. A state that acts extraterritorially and without control might lack the tools and institutions that, back home, enable it to satisfy its legitimate interests with only minimal intrusions on individual liberties.

This rationale for limiting duties to respect does not warrant giving states unbounded discretion to harm people abroad. It warrants accommodating the extraterritorial element by reddefining the point at which a state intrusion is justifiable.\textsuperscript{116} Atrocities are, by definition, monstrous in kind or scale, so they


\textsuperscript{112} See Draft Articles on State Responsibility, \textit{supra} note 19, art. 2., cmt. 7 & art. 58.

\textsuperscript{113} See \textit{supra} notes 88-89 and accompanying text.


\textsuperscript{115} See ICCPR, \textit{supra} note 80, art. 18; European Convention on Human Rights, \textit{supra} note 114, art. 9.

\textsuperscript{116} Most of the literature on the extraterritorial application of human rights law assumes that, if a duty to respect applies extraterritorially, the duty requires what it would domestically. \textit{See}, e.g., \textit{Al-Jedda v. United Kingdom}, App. No. 27021/08, Eur. Ct. H.R. ¶¶ 97-110 (2011); \textit{Noam Lubell},
cannot plausibly be justified by any countervailing interest. And indeed, it is
difficult to imagine any state claiming a right to participate in atrocities just
because it acts abroad. The best rationale for limiting duties to respect in more
run-of-the-mill cases is inapt in cases of atrocity.

Under the Draft Articles on State Responsibility, a state would violate its
R2P duty to respect not only by itself perpetrating atrocities but also by assist-
ing the perpetrators “with a view to facilitating” the atrocities. An assisting
state would be responsible if its agents had something between the intent to
commit atrocities and the knowledge that atrocities would be committed. In
the above examples, purposefully spraying chemicals over a foreign population
or sharing intelligence to facilitate atrocities would render the outside state
responsible.

2. Duty to Protect

An outside state that does not itself participate in atrocities might have to
try to restrain third-party participants; it might have an extraterritorial duty to
protect. Such duties have already begun to emerge in international law. So far,
they appear to be triggered by two kinds of relationships. An outside state
might have these duties if it either exercises governmental authority over or
substantially supports a third-party perpetrator.

An outside state with governmental authority over an area might have to
take measures to restrain the inhabitants from committing atrocities—as it
would in its own territory. The ICJ’s Armed Activities decision is a case in
point. The ICJ determined that Uganda had occupied portions of the Demo-
cratic Republic of the Congo (DRC) and, therefore, had “to protect the inhab-
nants of the occupied territory against acts of violence, and not to tolerate such
violence by any third party.” An occupying state, by definition, exercises
governmental authority over foreign inhabitants. The fact that the state al-
ready exercises such authority justifies requiring it to exercise that authority in a particular way—to prevent the inhabitants from intruding on one another’s

---

EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 205 (2010); Saldías de López v.
spect might apply in a greater range of extraterritorial settings, but these duties would be less onerous in
certain extraterritorial settings than in ordinary, domestic settings.

117. Draft Articles on State Responsibility, supra note 19, art. 16, cmt. 5.

118. See id. art. 16, cmt. 4 (positing that the assisting state must “be aware of the circumstances
making the conduct of the assisted State internationally wrongful”); see also Lea Brilmayer & Isaias
Yemane Tesfaldet, Third State Obligations and the Enforcement of International Law, 44 N.Y.U. J.
Int’l L. & Pol’y 1, 37-51 (2011) (arguing that states should be obligated not to facilitate, support, or en-
courage violations and acknowledging that international law already “go[es] a long way towards estab-
lishing [that] sort of general obligation”).

168 (Dec. 19).

120. Id. ¶ 178.

121. Regulations Respecting the Laws and Customs of War on Land art. 42, annexed to Conven-
tion Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631
(“Territory is considered occupied when it is actually placed under the authority of the hostile army. The
occupation extends only to the territory where such authority has been established and can be exer-
cised.”).
Much of the legal literature articulates a slightly different proposition: that extraterritorial duties to protect are triggered by a state’s physical control over foreign territory.123 States that control foreign territory through their police or military forces often also exercise governmental authority. For example, the ICJ determined in Armed Activities that Ugandan forces “were not only stationed in particular locations but also . . . substituted their own authority for that of the Congolese Government.”124 In particular, Uganda appointed a governor to administer the occupied area.125 By contrast, duty-to-protect claims against states that exercise physical control without administrative authority have been unsuccessful.

Consider two high-profile decisions of the European Court of Human Rights. In Behrami v. France, the petitioners argued that France should have done more to protect two children from unexploded ordnance in post-conflict Kosovo.126 French troops were stationed in the area, but a U.N. organ administered it and was in charge of the demining effort.127 The court did not hold France responsible.128 Likewise, in Cyprus v. Turkey, the petitioners sought to hold Turkey responsible for not restraining private actors who committed abuses in northern Cyprus.129 The court declined to do so.130 Although Turkish troops were stationed in northern Cyprus, most governance authority rested with the local Turkish Cypriot administration (the Turkish Republic of Northern Cyprus or TRNC).131

Neither Behrami nor Cyprus offers a coherent account of why the duty-to-protect claims failed.132 The European Court of Human Rights itself asserts

122. See Geneva Convention IV, supra note 47, art. 27; see also Hans-Peter Gasser & Knut Döremann, Protection of the Civilian Population, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 231, 277 (Dieter Fleck ed., 2d ed. 2008) (“The occupying power must also take all measures to protect the inhabitants of occupied territories from violence by third parties.”).
123. Decisions commonly assert that a state’s control over territory triggers its human rights obligations. See, e.g., sources cited supra notes 88-89; sources cited infra note 133. For the claim that territorial control does or should trigger a duty to protect, in particular, see Milanovic, supra note 84, at 263; and John Cerone, Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations, 39 Vand. J. Transnat’l L. 1447, 1498-1505 (2006).
124. Armed Activities on the Territory of the Congo, 2005 I.C.J. 168, ¶ 173 (identifying this standard); id. ¶ 176 (concluding that the standard was satisfied).
125. Id. ¶ 175.
127. Id. ¶¶ 123-27. It was not clear whether the troops’ conduct was attributable to France or to the North Atlantic Treaty Organization (NATO) because it was not clear which entity exercised operational control over the troops. Id. ¶¶ 75-79. 140. The court avoided the duty-to-protect claim and thus did not reach the question of which entity—France or NATO—would be responsible if the troops failed to satisfy that duty.
128. Id. ¶ 153.
130. Id. ¶¶ 80-81, 272, 324, 347-48, 376.
131. Id. ¶¶ 76-77.
that control over foreign territory triggers the state’s human rights duties. But the results in Behrami and Cyprus suggest that territorial control is by itself insufficient. Likewise, the results suggest that the state’s positive capacity does not trigger the duties. After all, states with troops on the ground presumably can act to restrain third parties. The two decisions are instead consistent with my approach. Duties to protect reflect a normative judgment that a particular state should act, given its relationship with the third party. The duties are appropriate—in other words, the state should try to exert its power over the third party—if a governance relationship already exists. The duties become more suspect, however, if satisfying them would require an outside state to displace the entity that ordinarily or more legitimately governs, as the United Nations did in Kosovo and the TRNC did in northern Cyprus.

Separately, a state’s extraterritorial duties to protect might be triggered if it substantially supports the third party that perpetrates atrocities. Cyprus is again instructive. Although the Cyprus court dismissed the claims arising out of the abuses by private actors, it held Turkey responsible as a result of the TRNC’s abuses. Again, the court’s reasoning was unsatisfying. At some points, the court suggested that the TRNC was a Turkish agent, despite the TRNC’s evident independence from Turkey. At other points, the court suggested that Turkey’s territorial control triggered its duties to protect. But if Turkey’s territorial control triggered these duties, then why wouldn’t the duties apply to the alleged abuses by private actors? All of the alleged abuses occurred in the same physical space. The bottom line is that, although the TRNC was not a Turkish agent under the general law on state responsibility, the TRNC did receive immense support from Turkey. Turkey propped up and supported the TRNC, so Turkey could not lawfully stand by in the face of the TRNC’s violations.

Cyprus is not alone in enforcing extraterritorial duties to protect where a state substantially supports a non-state group that violates rights. Recall that,

133. See Oona A. Hathaway et al., Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?, 43 ARIZ. ST. L.J. 389, 404-05 (2011) (“The European Court of Human Rights has consistently held that obligations under human rights treaties are active wherever governments have ‘effective control’ over territories outside of their borders.”).


135. See, e.g., id. ¶ 77 (“Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration . . . .”).

136. See, e.g., id. ¶ 76 (“It is not necessary to determine whether . . . Turkey actually exercises detailed control over the policies and actions of the authorities of the ‘TRNC’.” (quoting Loizidou v. Turkey, App. No. 15318/89, ser. A, no. 310, Eur. Ct. H.R. ¶ 56 (1995))); id. ¶¶ 76-77 (using language indicative of a duty to protect when asserting that Turkey had to “secure” rights).

137. Id. ¶ 77 (“[T]he local administration . . . survives by virtue of Turkish military and other support.”).

in the *Genocide Case*, the ICJ highlighted Serbia’s support for the Bosnian Serbs who committed genocide.\(^{139}\) Serbia was responsible for not trying harder to prevent the genocide. In *Ilașcu v. Moldova*, the European Court of Human Rights found that Russia had a similar relationship with Moldovan groups that violated rights in Moldova.\(^{140}\) According to the court, these groups “survive[d] by virtue of [Russia’s] military, economic, financial and political support.”\(^{141}\) The court held Russia responsible.\(^{142}\) In *Georgia v. Russia*, Georgia claimed that Russia likewise supported groups that violated rights in Georgia.\(^{143}\) The ICJ dismissed Georgia’s case on jurisdictional grounds,\(^{144}\) but an order on provisional measures directed the parties to “do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in . . . racial discrimination.”\(^{145}\) The influence language hints at an extraterritorial duty to protect. Even if Russia did not control the groups’ conduct so as to create an agency relationship and trigger a duty to respect, Russia should have satisfied a duty to protect. It should have pressured the groups not to violate rights.

Comparable relationships can also exist between two states. Consider France’s extensive financial and military aid to the Rwandan regime that perpetrated genocide. Much of France’s aid predated the genocide,\(^{146}\) but some of it seems to have continued thereafter.\(^{147}\) To the extent that France aided the regime “with a view to facilitating” genocide, it violated a duty to respect.\(^{148}\) But even if France did not itself participate in genocide, its substantial support might have triggered an extraterritorial duty to protect. Indeed, France was heavily criticized for not doing enough in Rwanda.\(^{149}\) And though France de-

---

141. Id. ¶ 392.
142. Id. ¶¶ 393-94. As in *Cyprus*, the court’s logic in *Ilașcu* is unclear. The court sometimes suggested that Russia was directly responsible for the abuses. See id. ¶ 393 ("[T]here was [a] continuous and uninterrupted link of responsibility on the part of the Russian Federation . . . ."). But the court also described Russia’s failings with language that is indicative of a duty to protect; Russia did not “attempt to put an end to the . . . situation.” Id.
148. See supra note 117 and accompanying text.
nied any legal responsibility, it accepted that it was “involved too much and for too long” and that it had a “moral duty . . . to stop the genocide.”

In short, certain kinds of relationships already seem to trigger extraterritorial duties to protect. An outside state might have these duties if it exercises governmental authority over or substantially supports the perpetrators. The state would be responsible in these circumstances if it failed to exercise due diligence to restrain the perpetrators. The diligence that is due would depend on the circumstances but might entail taking economic, diplomatic, or criminal measures against the perpetrators, or putting in place standards or processes that inhibit atrocities. A particular outside state would have to take those measures, even though other outside states would not, because the one already involved itself in the situation and entangled itself with the third party.

3. Duty Not to Obstruct

No matter whether a state must actively try to restrain a third-party perpetrator, it might be prohibited from obstructing the protective measures that third parties pursue. A duty not to obstruct is, at best, nascent in current practice and so lacks precise content. But in essence, such a duty would prohibit outside states from impeding measures to protect at-risk populations. Because states can reasonably disagree about which such measures are appropriate, a state that obstructs one measure might be responsible only if it does not pursue a meaningful alternative, or only if it cannot justify its obstruction by a sufficiently weighty countervailing interest.

A duty not to obstruct would build on two claims that have become quite prominent in the R2P literature: (1) the claim that states must cooperate to end violations of peremptory norms and (2) the claim that the permanent members of the U.N. Security Council must not use their veto in R2P cases. First, a duty not to obstruct overlaps with the claimed duty to cooperate because, by definition, an obstructing state fails to cooperate. Still, the duty not to obstruct would be less onerous. An outside state would not have to take affirmative steps to cooperate; it simply would have to avoid getting in the way. Moreover, whereas not cooperating is often passive and pervasive, obstructing usually involves overt acts that can be identified and pinned on particular states.


152. See Draft Articles on State Responsibility, supra note 19, art. 41, § 1.

153. See supra note 63 and accompanying text.

154. Cf. Marcus G. Singer, *Negative and Positive Duties*, 15 PHIL. Q. 97, 103 (1965) ("[P]ositive duties, when they have no corresponding or equivalent negative duties, are relatively less
cond, a duty not to obstruct overlaps with the claimed duty not to veto. Using the veto might be obstructive; it might prevent the Council from acting to protect an at-risk population.\(^{155}\) Yet the veto is only one of many ways in which states can act obstructively.

The early stages of the recent crisis in Syria illustrate these points. In the U.N. Security Council, China and Russia repeatedly vetoed or threatened to veto resolutions that would have put pressure on the Assad regime.\(^{156}\) This conduct might be evidence of obstruction but is not dispositive. States could reasonably disagree about what to do in Syria and, therefore, about the content of particular Security Council resolutions. Indeed, China and Russia used their vetoes on some Syria resolutions even as they allowed others to pass.\(^{157}\) These two states also acquiesced in the Council’s various presidential\(^{158}\) and press\(^{159}\),\(^{160}\) statements on Syria.

Looking outside the Council reveals a broader pattern of obstructionism. China and Russia were consistently among a handful of states in the U.N. General Assembly\(^{161}\) and Human Rights Council\(^{162}\) that voted against resolutions determinate than negative duties.”).  

155. See, e.g., Arbour, supra note 30, at 453 (arguing for restricting the use of the veto on the ground that the permanent members should not “inhibit[] other States from discharging their duty to protect when those States are willing and able to discharge their obligations”).


condemning the Assad regime. These two states also declined to participate in multilateral meetings that sought to pressure Assad either to step down or to find a political solution to the crisis. Further, although China and Russia largely synchronized their positions in multilateral arenas, Russia did more of the dirty work. Russia’s early support for Assad undermined efforts to isolate him and lessened the likelihood that his regime would buckle under outside pressure. Moreover, Russia continued to ship military equipment to the regime after its atrocities were apparent. This broader pattern of behavior suggests that China might have acted obstructively and that Russia very likely did.

The Syria case is also illustrative because it suggests that a duty not to obstruct might be developing informally. States and other actors persistently

---


pressed Russia167 and, to a lesser extent, China168 to stop obstructing international action in Syria. This pressure arguably yielded modest results. Some have speculated that, in December 2011, Russia proposed a Security Council resolution because “human rights organizations . . . made Russia seem like a partner in the Syrian regime’s crimes.”169 Yet no matter whether Russia or China altered its behavior, the fact that other actors applied this pressure suggests that they understood the two states—and especially Russia—to be acting reprehensibly. Further, the fact that these other actors pressured Russia and China, but not states that neither obstructed nor cooperated in any international action, demonstrates that a duty not to obstruct might gain traction even if a duty to cooperate cannot.

4. Duty to Assist

Finally, outside states might have to help foster conditions that are inhospitable to atrocities. The nature of this assistance can vary, from transferring material resources, to training local actors, to rebuilding domestic institutions. Such assistance is similar in kind to that which satisfies human rights duties to fulfill. The R2P duty would differ from a duty to fulfill because the R2P duty would focus on realizing negative, not positive, liberties. The goal would be to shield people from third-party harms by reducing the risk of atrocities breaking out. Still, the hurdles that have confronted extraterritorial duties to fulfill would almost certainly confront this R2P duty, as well.

The claim that states must give foreign assistance to help people abroad has circulated for decades, usually in the context of pressuring developed states to alleviate severe poverty in developing states. The claim arguably finds support in the text of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which requires states to “take steps, individually and through international assistance and co-operation,” to help realize rights.170 The body that monitors the ICESCR interprets that text to mean that “economically developed States parties have a special responsibility and interest to assist the poorer developing States” by providing “resources, financial and technical assistance and co-operation.”171


170. ICESCR, supra note 80, art. 2, § 1 (emphasis added); see also Convention on the Rights of the Child pmbl., art. 4, art. 24, § 4, adopted Nov. 20, 1989, 1577 U.N.T.S. 3.
assistance, and . . . aid when required.”171 Other U.N. organs have advanced a similar claim.172 Moreover, U.N. documents repeatedly urge developed countries to commit 0.7 percent of their gross domestic products to development aid173—a target that has been reinforced in recent years by the U.N. Millennium Development Goals, a high-profile effort to address severe poverty.174

Yet the claim that developed states must give human rights or development aid is still of questionable authority and has not been especially effective in practice.175 The ICJ recognized in its Wall opinion that the ICESCR—which includes duties to respect and protect but is driven by duties to fulfill—is “essentially territorial.”176 Further, developed states have consistently resisted the idea that they are obligated to give foreign assistance.177 Thus, although the Millennium Development Goals have received sustained and high-level attention, these goals do not recognize or create binding obligations for developed states.178 And although many states endorse the 0.7 percent figure discursively,
few have actually achieved that goal.\textsuperscript{179}

Claims relating to foreign assistance have been more successful in international environmental and trade law than they have been in human rights law. Some environmental treaties require developed states to transfer resources to developing states.\textsuperscript{180} Similarly, international trade law encourages developed states to give developing states technical assistance on implementing or adapting to trade law.\textsuperscript{181} These claims might be more effective than comparable claims in human rights law for various reasons. First, no single state is expected to care for the global environment or manage transnational trade. In contrast, each state generally is expected to provide for its own population.\textsuperscript{182} Second, the extent to which foreign aid helps realize rights in recipient states is still hotly contested.\textsuperscript{183} Third, human rights and development aid raise unique legitimacy concerns. Addressing the structural causes of poverty means reforming governmental institutions, establishing the rule of law, and targeting discriminatory cultural practices. This work strikes at the heart of a society’s political, economic, and social systems, and is deeply intrusive if it comes from external forces. Unsurprisingly, then, recipient states tend to bristle at restrictions on their aid that seem to intrude too heavily on their internal affairs.\textsuperscript{184}

Aid for R2P looks a lot like human rights and development aid. For example, the U.N. Secretary General has proposed using R2P aid to educate local actors about human rights, build domestic institutions, redress severe poverty, and enhance the positions of women and disadvantaged minorities.\textsuperscript{185} These proposals are unlikely to gain legal traction simply by linking them to R2P. On the contrary, the experience with the Millennium Development Goals demonstrates that developed states resist the claim that such assistance is obligatory even when the underlying policy objectives have broad and high-level support. The hurdles to establishing an R2P duty to assist are substantial.


\textsuperscript{182} See Ado Caliari & Mac Darrow, International Cooperation, MDG 8, and Human Rights, in THE MILLENNIUM DEVELOPMENT GOALS AND HUMAN RIGHTS: PAST PRESENT AND FUTURE 316, 326 (Malcolm Langford et al. eds., 2013).


\textsuperscript{185} Implementing the Responsibility to Protect: Rep. of the Secretary-General, supra note 2, ¶¶ 28-48.
For this duty to have any prospect of success, it must identify the grounds for holding specific tightfisted states responsible.186 Because an R2P duty to assist would entail redistributing wealth or expertise, it might account for states’ positive capacities in ways that other R2P duties do not. Still, positive capacity is an insufficient basis for assigning responsibility. In any given case, many outside states that have the capacity to give will not. Responsibility should instead be grounded in a state’s own conduct or relationships.187 For example, an outside state might be responsible for not helping a population if the state contributed to the risk of atrocities breaking out,188 or if the state has a unique relationship with the population, such as one rooted in a colonial past. The point is that grounding responsibility in the state’s conduct or relationships is consistent with the law’s theoretical foundations and thus a way to develop the law going forward.

V. CONCLUSION

This Article has proposed a new vision for R2P and presented a rudimentary framework for implementing that vision. I have argued that R2P should not posit an all-encompassing duty that falls, at once, on the entire international community. R2P should instead posit a bundle of more discrete duties, and responsibility for each duty should attach to specific outside states at a time. This latter vision is appealing because it is anchored in existing international law and follows the law’s current trajectory. As such, this vision has both descriptive and predictive value. It explains how international law already supports R2P and how international law might realistically develop to continue supporting R2P going forward.

Whether international law will actually develop along these lines is another question. States are highly unlikely to ratify a new treaty on R2P or to expand the jurisdiction of courts or other bodies that might develop and enforce new R2P duties. In the near term, any further prescription and enforcement on R2P is likely to occur informally—as states, international organizations, and civil society groups craft new norms on R2P and put pressure on states that deviate from those norms. These disparate actors might work together to articulate a set of non-binding norms on R2P. They might incorporate their preferred norms into official documents, like the U.N. Secretary General’s reports on

186. See Margot E. Salomon, Deprivation, Causation and the Law of International Cooperation, in GLOBAL JUSTICE, STATE DUTIES: THE EXTRA-TERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 259, 279 (Malcolm Langford et al. eds., 2013) (“It is difficult . . . to determine when an obligation of international assistance and/or cooperation has been breached, thereby giving rise to a claim of international legal responsibility . . . .”); Caliari & Darrow, supra note 182, at 324 (“No government, political group, or UN body has yet accepted the proposition that any given country is obligated to provide specific assistance to any other country, making it difficult to claim that such an obligation has become part of customary international law.”).

187. Cf. Salomon, supra note 186, at 280-282 (arguing that duties to fulfill economic and social rights might be assigned on a causal or historical basis).

188. Some philosophers argue that a state has the moral duty to alleviate poverty abroad if the state has directly or indirectly contributed to the poverty. The more direct and discrete a state’s contributions, the more feasible the effort to hold it legally responsible. See, e.g., Thomas Pogge, Severe Poverty as a Human Rights Violation, in FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR? 11, 44-48 (Thomas Pogge ed., 2007).
R2P. And they might apply these norms to sanction particular outside states.

The informality of that process presents both an opportunity and a challenge for R2P. The opportunity is that global actors who are committed to R2P can apply and enforce their preferred duties, even absent a clear consensus on what the duties require or whether the duties qualify as law. In other words, they can use my framework to try to push the law in their preferred direction. This is also R2P’s challenge. Operative R2P duties will not develop unless the commitment to them is sufficiently broad and deep that enough global actors decide either to satisfy the duties voluntarily or to enforce the duties against deviant states.\(^\text{189}\) That level of commitment might not exist. But if it does—and there is some reason for optimism\(^\text{190}\)—R2P should offer a vision that resonates with different actors and can actually gain legal traction.

---

\(^{189}\) See W. Michael Reisman, The Concept and Functions of Soft Law in International Politics, in 1 Essays in Honour of Judge Taslim Olawale Elias 135, 135-36 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992) (explaining that, in order for a norm to be accepted and treated as law, there must be an expectation that the norm will be “effectuated enough . . . to sustain belief in its effectiveness”).

\(^{190}\) First and as discussed, states have almost uniformly endorsed the R2P idea. See supra Part II. Second, states have established multiple international tribunals, including the now permanent International Criminal Court, to prosecute people who perpetrate atrocities. See Statute of the International Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598; Statute of the Special Court for Sierra Leone, Sierra Leone-U.N., Jan. 16, 2002, 2178 U.N.T.S. 138; Rome Statute of the International Criminal Court, supra note 2; Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1159. Third, states regularly take modest measures to enforce human rights norms in cases of especially egregious violations. See Proukaki, supra note 78, at 204-07 (reviewing practice); TAMS, supra note 78, at 208-51 (same); Dawidowicz, supra note 78 (same). Fourth, outside states might be vulnerable to such enforcement, even if the territorial state is not, because states are disparately receptive to rights-related pressures. See, e.g., Simmons, supra note 20, at 357-58.