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Toward a Legal Theory on the Responsibility to Protect

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Article

Toward a Legal Theory on the Responsibility to Protect

Monica Hakimi†

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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

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1. See, e.g., RUTI G. TEITEL, *HUMANITY’S LAW* 9, 37 (2011); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 872 (1990).

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.³ The U.N. Secretary General has made R2P a top priority and issued multiple reports on the topic.⁴ The U.N. Security Council has recognized R2P in both thematic⁵ and case-specific resolutions.⁶ Civil society groups have invoked R2P to demand action in places like Libya and Syria.⁷ And the scholarly literature on R2P—in law, philosophy, and international relations—has mushroomed.⁸

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.⁹ First, each state must protect its population from atrocities. This proposition is well established in international law,¹⁰ 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.¹¹ And

3. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

4. U.N. Secretary-General, *Responsibility to Protect: State Responsibility and Prevention: Rep. of the Secretary-General*, U.N. Doc. A/67/929-S/2013/399 (July 9, 2013); U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response: Rep. of the Secretary-General*, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012); U.N. Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/65/877-S/2011/393 (June 27, 2011); U.N. Secretary-General, *Early Warning, Assessment and the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/64/864 (July 14, 2010); U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, *supra* note 2.

5. S.C. Res. 1894, ¶ 3, U.N. Doc. S/RES/1894 (Nov. 11, 2009) (regarding the protection of civilians in armed conflict); S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (same).

6. *See, e.g.*, S.C. Res. 1970, ¶ 12, U.N. Doc. S/RES/1970 (Feb. 26, 2011) (Libya); S.C. Res. 1706, ¶ 12(a), U.N. Doc. S/RES/1706 (Aug. 31, 2006) (Darfur).

7. *See, e.g.*, Kenneth Roth, Op-Ed, *How to Ease Syrian Suffering*, N.Y. TIMES, Feb. 8, 2013, <http://www.nytimes.com/2013/02/09/opinion/global/how-to-ease-syrian-suffering.html>; Press Release, Amnesty Int'l USA, *Blocking of Security Council Resolution on Syria a "Shocking Betrayal"* Says Amnesty International (Oct. 5, 2011), <http://www.amnestyusa.org/news/press-releases/blocking-of-security-council-resolution-on-syria-a-shocking-betrayal-says-amnesty-international>; *Libya: Benghazi Civilians Face Grave Risk*, HUMAN RIGHTS WATCH (Mar. 17, 2011), <http://www.hrw.org/news/2011/03/17/libya-benghazi-civilians-face-grave-risk>; *Urgent Appeal to Stop Atrocities in Libya: Sent by 70 NGOs to the US, EU, and UN Watch*, U.N. WATCH (Feb. 21, 2011), <http://www.unwatch.org/site/c.bdKISNqEmG/b.1289203/apps/s/content.asp?ct=9135143>.

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).

9. *See, e.g.*, INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT ¶¶ 2.30-31 (2001) [hereinafter ICISS REPORT]; 2005 World Summit Outcome Document, *supra* note 3, ¶¶ 138-39; *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, *supra* note 2, ¶ 11.

10. *See infra* Section IV.A.

11. Gareth Evans & Ramesh Thakur, Correspondence, *Humanitarian Intervention and the Responsibility to Protect*, 37 INT'L SECURITY 199, 205 (2013) ("R2P argues for a political responsibility on the part of the international community to help populations at risk of atrocity and creates no new legal obligation whatsoever."); Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J.

the extent to which it otherwise influences outside states is, at best, speculative and contested.¹²

Part of R2P's challenge is conceptual.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.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.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.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.¹⁷ In particular, an outside state should be responsible as a re-

INT'L L. 319, 338-39 (2012) (“[R2P] remains merely a concept, with no independent legal force . . .”); Neomi Rao, *The Choice to Protect: Rethinking Responsibility for Humanitarian Intervention*, 44 COLUM. HUM. RTS. L. REV. 697 (2013) (arguing that any 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”).

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 has helped shape a “new” politics of protection that might affect the response to particular crises), with Saira Mohamed, *Shame in the Security Council*, 90 WASH. U. L. REV. 1191, 1251 (2013) (doubting that “shaming based on the notion of a responsibility to protect yields productive results”), and David Rieff, Op-Ed., *R2P, R.I.P.*, N.Y. TIMES, Nov. 7, 2011, <http://www.nytimes.com/2011/11/08/opinion/r2p-rip.html> (arguing that using R2P to justify regime change in Libya delegitimized the concept and damaged its “prospects of becoming a global norm”).

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 RtoP . . .”); 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.”).

14. See *infra* Part III.

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/newsmakers.asp?NewsID=38> (“Many people think that responsibility to protect is all about the use of military force after the bodies start piling up.”).

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.”).

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.¹⁸ The duties are legally operative, however, only when responsibility can be pinned on particular states at a time.¹⁹

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.²⁰

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,²¹ 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.

19. A note on terminology might be useful here. The R2P literature uses the word “responsibility” to suggest some kind of moral or legal duty. In international law, “responsibility” usually means not the duty itself but the consequence of failing to satisfy a duty; a state that violates a duty is responsible for that violation. See Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, arts. 1-2, in Rep. of the Int’l Law Comm’n, 53d Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, ¶¶ 76-77, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter Draft Articles on State Responsibility]; Alain Pellet, *The Definition of Responsibility in International Law*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 3, 8-9 (James Crawford et al. eds., 2010). I use “responsibility” in this latter sense. Nevertheless, I use “R2P” for the idea that states should protect at-risk populations.

20. An extensive literature now examines the mechanisms by which international law can influence states’ human rights practices. See, e.g., BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 357 (2009) (“[R]atified [human rights] treaties provide highly legitimate focal points that help to clarify reasonable demands, support the legitimacy of those demands, and contribute to the political and legal resources [domestic] stakeholders can bring to bear in the quest to realize treaty rights.”); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (examining coercion, persuasion, and acculturation as three separate mechanisms for influencing states); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1402 (2005) (offering empirical evidence that “international civil society has been using the legitimacy of human rights [law] to pressure governments to improve human rights practices”). On the more basic point that law can shape attitudes or conduct, see Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1651 (2000); and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

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.²² Second, international law never requires—and is skittish even about permitting—cross-border violence.²³ 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 II briefly describes the emergence and development of R2P. Part III argues that framing R2P as a collective duty saps the idea of its legal potential. Part IV 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.²⁴ 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.²⁵ Such interventions are controversial—many would say unlawful—without authorization from the U.N. Security Council or consent from the territorial state.²⁶ 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-

right when they act pursuant to such authorization. See U.N. Charter ch. VII; 2005 World Summit Outcome Document, *supra* note 3, ¶¶ 138–39.

22. Cf. Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 300-01 (2013) ("Absent strong reciprocal commitments and other institutional assurances, sovereigns are subject only to certain minimal obligations that do not impose substantial burdens on them and that may actually assist them in adopting optimal policies."); Thomas Pogge, *Moralizing Humanitarian Intervention: Why Jurying Fails and How Law Can Work*, in NOMOS XLVII: HUMANITARIAN INTERVENTION, *supra* note 17, at 158, 166-67 (discussing the unwillingness of states to commit resources for humanitarian interventions).

23. U.N. Charter art. 2, para. 4; *id.* ch. VII.

24. See ICISS REPORT, *supra* note 9, ¶¶ 1.1-.4.

25. See, e.g., Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L. J. 703, 708 (2006) (describing the emergence of R2P in the aftermath of Kosovo).

26. See, e.g., Miguel d'Escoto Brockmaun, Statement at the Opening of the Thematic Dialogue of the General Assembly on the Responsibility to Protect (July 23, 2009), <http://www.un.org/ga/president/63/statements/openingr2p230709.shtml> (reflecting developing states' skepticism of unilateral humanitarian interventions); Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 223 (Bruno Simma et al. eds., 3d ed. 2012) ("[T]here is no room for the concept of [unilateral] humanitarian intervention being deduced from the UN Charter . . .").

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., INDEP. 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.”).

31. ICISS REPORT, *supra* note 9, ¶¶ 3.1-43, 4.1-9.

32. U.N. Secretary-General, *A More Secure World: Our Shared Responsibility: Rep. of the Secretary-General's High-Level Panel on Threats, Challenges and Change*, ¶ 201, U.N. Doc. A/59/565 (Dec. 2, 2004) (asserting that the debate should focus not on “the ‘right to intervene’ of any State but the ‘responsibility to protect’ of every State”); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All: Rep. of the Secretary-General*, ¶¶ 132, 135, U.N. Doc. A/59/2005 (Mar. 21, 2005) (expressing “strong[] agree[ment]” with ICISS's approach and calling on the U.N. to “move towards embracing and acting on” R2P).

33. See Jutta Brunnée & Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?*, 2 GLOBAL RESP. TO PROTECT 191, 192 (2010) (describing the use of force as the most controversial aspect of R2P).

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.

36. See, e.g., *id.* at 328 (“The responsibility to protect emerged from the World Summit significantly bruised.”); Thomas G. Weiss, *R2P After 9/11 and the World Summit*, 24 WIS. INT’L L.J. 741, 750 (2006) (describing this formulation as “R2P-lite”).

37. 2005 World Summit Outcome, *supra* note 3, ¶ 139.

38. See *Our Work: R2P Focal Points*, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, http://www.globalr2p.org/our_work/r2p_focal_points (last visited Mar. 10, 2014).

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”).

40. See U.N. Office of the Special Adviser on the Prevention of Genocide, *Mission Statement*, UNITED NATIONS, <http://www.un.org/en/preventgenocide/adviser/> (last visited Mar. 10, 2014).

41. U.N. Secretary-General Ban Ki-moon, Remarks at Breakfast Roundtable with Foreign Ministers, The Responsibility to Protect: Responding to Imminent Threats of Mass Atrocities (Sept. 23, 2011), <http://www.un.org/sg/statements/?nid=5567>.

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

43. See Inis L. Claude, Jr., *Collective Legitimization as a Political Function of the United Nations*, 20 INT’L ORG. 367, 375 (1966).

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.”).

47. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) art. 1, Aug. 12, 1949, 6 U.S.T. 3316,

to mean that every party must try to avert ongoing war crimes, no matter where or by whom the crimes are committed.⁴⁸ State officials verbally endorse that interpretation⁴⁹ but regularly ignore it in practice.⁵⁰ 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.⁵¹ In the end, the draft articles declare that all "[s]tates shall cooperate to bring to an end . . . serious breach[es]" of peremptory norms.⁵² The category of peremptory norms is notoriously indeterminate but, by all accounts, includes mass atrocities.⁵³ 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.⁵⁴ The ILC does not identify what states must do in these

75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

48. See *Enforcement of International Humanitarian Law (Rules 144-148)*, in 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 509-10 (2005); Giorgio Gaja, *Do States Have a Duty to Ensure Compliance with Obligations Erga Omnes by Other States?*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 31, 33-34 (Maurizio Ragazzi ed., 2005).

49. See *Ensuring Respect for International Humanitarian Law Erga Omnes (practice relating to Rule 144)*, in 2 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3289-302 (2005) (collecting declarations).

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, pmb., 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 Organisations under the Law of International Responsibility*, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, *supra*

organizations, other than simply participate.⁵⁵ 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.⁵⁶

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.⁵⁷ This interpretation is progressive and potentially far-reaching.⁵⁸ 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.⁵⁹ 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.⁶⁰ 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.⁶¹ Some have argued for requiring the Council to act in humanitarian crises,⁶² 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.").

57. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 47, ¶ 438 (Feb. 26). Serbia inherited this case when the Federal Republic of Yugoslavia (FRY) dissolved. Although the court assessed the conduct of the FRY and not of Serbia as such, I use "FRY" interchangeably with "Serbia" for ease of reference.

58. *Id.*; see also WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 545-46 (1st ed. 2000) (describing as "progressive" any interpretation that "requires States to take action not just within their own borders but outside them"); Marko Milanovic, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT'L L. 669, 687 (2007) (describing the ICJ's interpretation as "extremely progressive").

59. Application of Convention on Prevention and Punishment of Crime of Genocide, 2007 I.C.J. ¶ 430.

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).

62. See, e.g., U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century: Rep. of the Secretary-General*, ¶ 219, U.N. Doc. A/54/2000 (Mar. 27, 2000) ("Where such

for restricting the use of the veto in such cases.⁶³ 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.⁶⁴

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.⁶⁵

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.⁶⁶ This does not mean that IOs may do whatever they please.⁶⁷ For example, the U.N. Security Council is generally

crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community.”); ICISS REPORT, *supra* note 9, ¶ 6.24 (arguing that R2P requires the Security Council to practice “clear and responsible leadership . . . especially when significant loss of human life is occurring or is threatened”); Arbour, *supra* note 30, at 454; *cf.* Neville F. Dastoor, *The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect*, 22 HARV. HUM. RTS. J. 25, 30-32, 48-56 (2009) (arguing for a new Security Council committee to help implement R2P).

63. *See, e.g.,* Costa Rica, Jordan, Liechtenstein, Singapore, & Switzerland, Draft Res.: Improving the Working Methods of the Security Council, Annex, ¶ 13, U.N. Doc. A/60/L.49 (Mar. 17, 2006) (“A permanent member of the Security Council using its veto should explain the reason for doing so”); *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, *supra* note 2, ¶ 61 (urging the permanent members not to threaten or use the veto in “situations of manifest failure to meet obligations relating to the responsibility to protect”); ICISS REPORT, *supra* note 9, ¶ 6.21 (“[A] permanent member, in matters where its vital national interests [are] not claimed to be involved, [should] not use its veto to obstruct the passage of what would otherwise be a majority resolution.”); Ariela Blätter & Paul D. Williams, *The Responsibility Not to Veto*, 3 GLOBAL RESP. TO PROTECT 301, 313-20 (2011) (reviewing proposals to restrict the veto and arguing for an “unofficial agreement” among the permanent members not to use the veto); Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513, 539 (2009) (“The endorsement of R2P as a legal principle fully thought through means that a permanent member’s exercise of the veto power in an R2P case would be illegal.”).

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 RtoP 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).

65. *Cf.* Draft Articles on the Responsibility of International Organizations with Commentaries, art. 40, cmt. 1, in Rep. of the Int’l Law Comm’n, 63d Sess., Apr. 26-June 3, July 4-Aug. 12, 2011, ¶¶ 87-88, U.N. Doc. A/66/10, GAOR, 66th Sess., Supp. No. 10 (2011) [hereinafter Draft Articles on IO Responsibility] (“International organizations having a separate legal personality are in principle the only subjects that bear international responsibility for their international wrongful acts.”). *But cf.* Anne Peters, *The Security Council’s Responsibility to Protect*, 8 INT’L ORG. L. REV. 1, 29-35 (2011) (arguing that, as a practical matter, the Security Council’s responsibility would attach to U.N. member states).

66. *See* Nico Krisch, *Article 39*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1272, 1275-76 (Bruno Simma et al. eds., 2012); Natalino Ronzitti, *The Current Status of Legal Principles Prohibiting the Use of Force and Legal Justifications of the Use of Force*, in REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR 91, 108 (Michael Bothe et al. eds., 2005); Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 NW. J. INT’L HUM. RTS. 24, 38 (2007) (“Amongst the international legal community, it is widely accepted that a Council determination or inaction under Article 39 . . . is nonjusticiable.”).

67. *See, e.g.,* ANTONIOS TZANAKOPOULOS, DISOBEYING THE SECURITY COUNCIL 202 (2011)

expected to account for human rights interests when it makes decisions.⁶⁸ But the Council has considerable discretion to weigh those interests against the countervailing considerations that favor or disfavor a particular decision.⁶⁹ Proposals to further constrain the Council's discretion,⁷⁰ including proposals on R2P,⁷¹ 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."⁷²

Third, even if IOs had an R2P duty, the extent to which it could meaningfully be enforced is unclear.⁷³ IOs are rarely held responsible for international legal violations.⁷⁴ 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.")

68. See, e.g., Daniel W. Drezner, *Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice*, 13 INT'L STUD. REV. 96, 104 (2011) (explaining that the Council has shifted from comprehensive to more targeted sanctions to account for human rights interests); Nico Krisch, *Article 41*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 66, at 1317 ("[T]he [Security Council] has recognized that, when taking action under Art. 41, it is bound to take into account the humanitarian consequences and human rights implications . . ."); cf. U.N. Secretariat, *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, § 1.1, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999) ("[F]undamental principles of international humanitarian law . . . are applicable to United Nations forces [under U.N. command and control] when in situations of armed conflict."). The Council is expected to account for human rights interests, even though the specific bases for assigning it legal duties are uncertain and contested. See, e.g., Vera Gowlland-Debbas, *The Security Council and Issues of Responsibility*, 105 AM. SOC'Y INT'L L. PROC. 348, 349 (2011); Frédéric Mégret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314 (2003); August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOBAL GOVERNANCE 131 (2001).

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.")

70. See, e.g., BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO 263-75 (1998) (describing proposals to restrain the use of the veto); Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L L. 275, 303-07 (2008) (arguing for a set of procedural reforms to decrease the Council's "deliberative deficit" and increase its legitimacy).

71. See sources cited *supra* notes 62-63; ICISS REPORT, *supra* note 9, ¶¶ 6.13-27; Special Rapporteur on Resp. of Int'l Orgs., *Third Rep. on Responsibility of International Organizations*, ¶ 10, Int'l Law Comm'n, U.N. Doc. A/CN.4/553 (May 13, 2005) (by Giorgio Gaja) (suggesting that the U.N. is responsible for failing to address atrocities).

72. José E. Alvarez, *The Schizophrenias of R2P*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 275, 282 (Philip Alston & Euan MacDonald eds., 2008).

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.⁷⁵ 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.⁷⁶ 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.

the United Nations sometimes compensates states or individuals for particular kinds of harms. *See, e.g.*, G.A. Res. 63/253, Annex I, U.N. Doc. A/RES/63/253 (Mar. 17, 2009) (employment-related harms); Special Representative of the Secretary-General, United Nations Interim Administrative Mission in Kosovo, Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel, ¶ 1.2, U.N. Doc. UNMIK/REG/2006/12 (Mar. 23, 2006) (rights-related harms); 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, ¶ 16, U.N. Doc. A/CN.4/637/Add.1 (Feb. 17, 2011) [hereinafter U.N. Comments on Draft Articles on IO Responsibility] (economic harms). But even when the United Nations makes such payments, it typically preserves its discretion not to make them and denies that they are legally obligated. *See* U.N. Secretary General, *Secretary General's Bulletin: Financial Regulations and Rules of the United Nations*, Rule 105.12, U.N. Doc. ST/SGB/2003/7 (May 9, 2003) ("Ex gratia payments may be made in cases where, although in the opinion of the Legal Counsel there is no clear legal liability on the part of the United Nations, payment is in the interest of the Organization."); José E. Alvarez, *Revisiting the ILC's Draft Rules on International Organization Responsibility*, 105 AM. SOC'Y INT'L L. PROC. 344, 347 (2011); Hemi Mistry, *International Law Meeting Summary: The Kosovo Human Rights Advisory Panel Chatham House*, CHATHAM HOUSE 10 (Jan. 26, 2012), http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/60112_summary.pdf.

75. *See, e.g.*, Statute of the International Court of Justice art. 34, § 1, June 26, 1945, 59 Stat. 1055 ("Only states may be parties in cases before the Court."); General Agreement on Privileges and Immunities of the Council of Europe art. 3, Sep. 2, 1949, 250 U.N.T.S. 14; Convention on the Privileges and Immunities of the Specialized Agencies, Annexes 1-18, Nov. 21, 1947, 33 U.N.T.S. 261; Convention on the Privileges and Immunities of the United Nations art. II, § 2, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15; Reinisch, *supra* note 68, at 139-41; Holder, *supra* note 74, at 244. The jurisdictional limits do not provide the full answer, however, because third-party dispute resolution bodies sometimes have jurisdiction over IOs. *See, e.g.*, Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, U.S.-U.N., art. 8, § 21(a), June 26, 1947, 61 Stat. 3416; Convention on the Privileges and Immunities of the United Nations, *supra*, art. VIII, § 30.

76. *See* Draft Articles on IO Responsibility, *supra* note 65, art. 51, cmts. 4, 6 (recognizing that the "[p]ractice 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.⁷⁷ 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-forcible measures, without going through an IO, to help at-risk populations.⁷⁸ The question is when to convert that right into a duty—when to require outside states to take measures that they might otherwise forego. 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.⁷⁹ 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-

77. Cf., e.g., G.A. Res. 53/141, para. 8-2, U.N. Doc. A/RES/53/141 (Mar. 8, 1999) (rejecting “unilateral coercive measures . . . as tools for political or economic pressure against any country”); Special Rapporteur on State Responsibility, *Fourth Rep. on the Content, Forms and Degrees of Int'l Resp. (Part 2 of the Draft Articles)*, Int'l Law Comm'n, ¶ 100, U.N. Doc. A/CN.4/366 (Apr. 14-15, 1983) (by Willem Riphagen) (“[T]he presence of a collective interest . . . should imply a collective decision-making machinery as regards reprisals . . .”).

78. International law differentiates between non-forcible measures that comply with the acting state's legal obligations and non-forcible 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 *ERGA 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 208-51; 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).

79. See *infra* Section IV.B.

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.⁸⁰ It then assigns states three kinds of duties to help realize those rights.⁸¹ *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.⁸²

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 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.⁸³

80. See, e.g., International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

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 Mazdoorsamity 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.⁸⁴ Yet this trend is contested⁸⁵ and deeply under-theorized.⁸⁶ 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.⁸⁷ 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;⁸⁸ on whether factors other than control can trigger these duties;⁸⁹ and on whether the duties are always triggered simultane-

rights of individuals “within its territory and subject to its jurisdiction”); Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 109 (July 9) (“[T]he jurisdiction of States [for purposes of applying human rights law] is primarily territorial”); *Al-Skeini v. United Kingdom*, App. No. 55721/07, 2011 Eur. H.R. Rep. ¶¶ 131-32 (explaining that state obligations under the European Convention on Human Rights are “primarily territorial” and apply extraterritorially only in “exceptional circumstances”).

84. See MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 1 (2011) (“[T]he impact of human rights treaties in an extraterritorial context is growing”); John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context*, 40 ISR. L. REV. 396, 431-36 (2007) (arguing that recent ICJ jurisprudence suggests a “trend in favor of more relaxed standards for extraterritorial application” of the ICCPR).

85. See, e.g., Human Rights Comm., *Second and Third Periodic Reports of the United States of America Submitted Under Article 40 of the Covenant on Civil and Political Rights*, Annex I, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005) (“[T]he obligations assumed by a State Party to the [ICCPR] apply only within the territory of the State Party”); Human Rights Comm., *Information Received from the United Kingdom of Great Britain and Northern Ireland on the Implementation of the Concluding Observations of the Human Rights Committee*, ¶ 24, U.N. Doc. CCPR/C/GBR/CO/6/Add.1 (Nov. 3, 2009) (“[T]he Covenant could only have effect outside the territory of the UK in very exceptional circumstances.”).

86. MILANOVIC, *supra* note 84, at 264 (describing the relevant decisions—particularly the decisions of the European Court of Human Rights—as so “unprincipled and unworkable” that they “cannot be fixed with a minor ‘clarification’ here or a ‘distinguishing’ there” because “[w]hat it needs is radical surgery”).

87. See *infra* notes 88-89 and accompanying text.

88. Human rights duties probably apply when a state controls foreign territory or has physical custody over someone on foreign soil. See, e.g., *Loizidou v. Turk.*, App. No. 15318/89, Ser. A, No. 310, Eur. Ct. H.R. ¶¶ 62-64 (1995) (control over territory); *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 216 (Dec. 19) (same); *Al-Saadoon v. United Kingdom*, App. No. 61498/08, 51 Eur. H.R. Rep. 212, ¶ 57 (2010) (control over person); Comm. on Econ., Soc. & Cultural Rights, Rep. on its 18th and 19th Sess., Apr. 27-May 15, Nov. 16-Dec. 4, 1998, ¶¶ 232, 234, U.N. Doc. E/1999/22, E/C.12/1998/26, Supp. No. 2 (1999) (control over territories or populations). However, it is not clear what other kinds of control suffice—and particularly, whether duties to respect *always* apply extraterritorially on the ground that a state is always presumed to control its own conduct. Compare, e.g., Human Rights Comm., *Saldías de López v. Uruguay*, ¶ 12.3, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981) (“[A] State party [may not] perpetrate violations . . . on the territory of another State, which violations it could not perpetrate on its own territory.”), and *Issa v. Turk.*, App. No. 31821/96, 41 Eur. H.R. Rep. 567, 588 (2004) (same), and *Alejandro v. Cuba*, Case 11.589, Inter-Am. Comm’n H.R., Report No. 86/99, OEA/Ser.L/V/II.106 doc. 6 rev. ¶ 25 (1999) (same), with, e.g., *Al-Skeini*, 53 Eur. H.R. Rep. ¶ 131 (“[A]cts of the Contracting States performed . . . outside their territories can [trigger human rights duties] only in exceptional cases.”).

89. Compare, e.g., Cordula Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 325-35 (2007) (reviewing cases and concluding that “the basic requirement for extraterritorial application . . . is effective control, either over a territory or over a person”), and sources cited *supra* note 88 (predicating extraterritorial application on indicia of control), with, e.g., *Saldaño v. Argentina*, Petition, Inter-Am. Comm’n H.R., Report No. 38/99, OEA/Ser.L/V/II.102, doc. 6 rev. ¶ 17 (“[A] state . . . may be responsible under certain circumstances for the acts and omissions of its agents which produce effects . . . outside that state’s own territory.”), and *De Schutter et al.*, *supra* note 81, at 1149-54 (asserting that duties to fulfill apply extraterritorially on the basis of states’ capacities).

ously or can be triggered piecemeal, depending on the circumstances of a case.⁹⁰ 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.⁹¹ 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.⁹² 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 malfasant, or a messy combination of both.

To start, consider a state's well-established duty not to commit atrocities in its territory.⁹³ 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 extraterritorially . . . 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”).

91. 1949 Geneva Conventions, *supra* note 47, arts. 2-3; Application of Convention on Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43, ¶ 183 (Feb. 26); Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Yugo.*), Judgment on Preliminary Objections, 1996 I.C.J. 595, ¶ 31 (July 11).

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.⁹⁴ 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.⁹⁵ 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.⁹⁶ If the state effectively controls someone’s conduct, the person becomes an agent while committing the conduct.⁹⁷

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,⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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

94. On the muddiness between international law’s primary and secondary rules, see André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT’L L. 359, 408-15 (2013).

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 danger¹⁰⁴

101. See, e.g., ICISS REPORT, *supra* note 9, ¶ 2.15; *Rep. of the Secretary-General's High-Level Panel on Threats, Challenges and Change*, *supra* note 32, ¶ 29; see also Michael Ignatieff, *Intervention and State Failure*, DISSENT, Winter 2002, at 114, 119 ("[S]tate sovereignty, instead of being the enemy of human rights, has to be seen as their basic precondition."). This idea has deep roots in political theory. See, e.g., THOMAS HOBBS, LEVIATHAN 153 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT §§ 7-13, 123-30 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 24-25 (1974); MICHAEL WALZER, THINKING POLITICALLY 251-62 (2007); see also Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 512-20 (1991) (reviewing political theories).

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").

103. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 47, ¶ 430 (Feb. 26).

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.¹⁰⁵ Serbia's dubious conduct—its support for an armed group in another state¹⁰⁶—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,¹⁰⁷ even if other states are also highly capable (but less so),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.¹⁰⁹ Of course, states *are* disparately capable and should

105. *Id.* ¶¶ 422, 434-38; see also Prosecutor v. Tadic, Case No. IT-94-I-A, Appeals Chamber Judgment, ¶ 156 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

106. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 205 (June 27) (explaining that the customary principle of non-intervention prohibits states from supporting “subversive or terrorist armed activities within another State”).

107. Cf. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 68-69, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (arguing that a capacity-based framework improperly assumes that “can implies ought”).

108. Tan, *supra* note 17, at 102.

109. Perhaps for these reasons, human rights bodies generally assume that states either have or can develop the capacity to secure basic rights, at least in their own territories. See, e.g., Assanidze v. Georgia, App. No. 71503/01, 2004-II Eur. Ct. H.R. 221, ¶ 139 (explaining that control over an autonomous republic in the state's territory created a “presumption of competence”). For example, these bodies commonly recommend the same measures to states with vastly different capacities. Compare, e.g., Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Germany*, ¶ 18, U.N. Doc. CERD/C/DEU/CO/18 (Aug. 21, 2008) (recommending that Germany “prevent and punish perpetrators of racially motivated acts of violence”), with, e.g., Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Cote d'Ivoire*, ¶ 12, U.N. Doc. CERD/C/62/CO/1 (June 3, 2003) (recommending that Cote d'Ivoire “prevent a repetition of [racial and xenophobic] violence and punish the persons responsible for it”). Moreover, treaty bodies are generally unsympathetic to the idea that a state is absolved of its human rights duties by virtue of its incapacity. See, e.g., Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee: Algeria*, ¶ 3, U.N. Doc. CCPR/C/79/Add.95 (Aug. 18, 1998) (noting that “a general climate of violence heighten[s] [rather than mitigates] the responsibilities of the State party to re-establish and maintain the conditions necessary for the enjoyment and protection of fundamental rights . . .”); Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of*

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.¹¹⁰ 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

the Convention: Comments of the Human Rights Committee: United Republic of Tanzania, ¶ 5, U.N. Doc. CCPR/79/Add.12 (Dec. 28, 1992) (emphasizing that a reduction in available resources “does not exempt the State party from the full and effective application of the Covenant”). Indeed, even the treaty body that oversees the ICESCR, which expressly defines states’ duties by reference to capacity, *see* ICESCR, *supra* note 80, art. 2, § 1, assumes that all states can and must realize a minimum core of ICESCR rights, *see* Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations*, ¶ 10 (Dec. 14, 1990), *reprinted in* 1 INT’L HUMAN RIGHTS INSTRUMENTS, COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES 7, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008).

110. *Cf.* James W. Nickel, *How Human Rights Generate Duties to Protect and Provide*, 15 HUM. RTS. Q. 77, 81 (1993) (“When we ask whether a certain party can bear a burden, we really want to know whether that party can bear that burden without abandoning other responsibilities that ought not be abandoned.”).

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.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.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.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.¹¹⁴ The duty not to restrict religious expressions permits restrictions for public safety.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 redefining the point at which a state intrusion is justifiable.¹¹⁶ Atrocities are, by definition, monstrous in kind or scale, so they

111. See STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 48-51 (3d ed. 2009); Leila Nadya Sadat, *Crimes against Humanity in the Modern Age*, 107 AM. J. INT'L L. 334, 337-40 (2013).

112. See Draft Articles on State Responsibility, *supra* note 19, art. 2., cmt. 7 & art. 58.

113. See *supra* notes 88-89 and accompanying text.

114. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, opened for signature Nov. 4, 1950, 213 U.N.T.S. 122 [hereinafter European Convention on Human Rights]; Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, ¶ 9, U.N. Doc. A/CONF.144/28/Rev.1, U.N. Sales No. 91.IV.2 (1991) (“[I]ntentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”).

115. See ICCPR, *supra* note 80, art. 18; European Convention on Human Rights, *supra* note 114, art. 9.

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. See, e.g., Al-Jedda v. United Kingdom, App. No. 27021/08, Eur. Ct. H.R. ¶¶ 97-110 (2011); 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 assisting the perpetrators “with a view to facilitating” the atrocities.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ The ICJ determined that Uganda had occupied portions of the Democratic Republic of the Congo (DRC) and, therefore, had “to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.”¹²⁰ An occupying state, by definition, exercises governmental authority over foreign inhabitants.¹²¹ The fact that the state already 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. Uruguay, ¶ 12.3, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981). Under my approach, duties to respect 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 Tesfalidet, *Third State Obligations and the Enforcement of International Law*, 44 N.Y.U. J. INT’L L. & POL. 1, 37-51 (2011) (arguing that states should be obligated not to facilitate, support, or encourage violations and acknowledging that international law already “go[es] a long way towards establishing [that] sort of general obligation”).

119. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168 (Dec. 19).

120. *Id.* ¶ 178.

121. Regulations Respecting the Laws and Customs of War on Land art. 42, annexed to Convention 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 exercised.”).

rights.¹²²

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 Dörmann, *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.

126. *Behrami v. France* (Dec.), App. No. 71412/01, ¶¶ 5-7 (Eur. Ct. on H.R. May 5, 2007).

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.

129. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1.

130. *Id.* ¶¶ 80-81, 272, 324, 347-48, 376.

131. *Id.* ¶¶ 76-77.

132. On *Behrami*, see Hakimi, *supra* note 100, at 354, 359-60, 379. On *Cyprus*, see *infra* notes 135-136 and accompanying text; Marko Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, 8 HUM. RTS. L. REV. 411, 422-26, 434-46 (2008).

that control over foreign territory triggers the state's human rights duties.¹³³ 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.¹³⁴ 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.¹³⁵ At other points, the court suggested that Turkey's territorial control triggered its duties to protect.¹³⁶ 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.¹³⁷ 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.¹³⁸ 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.").

134. *Cyprus*, 2001-IV Eur. Ct. H.R. 1, ¶¶ 136, 150, 158, 175, 194, 254, 269-70, 296, 301, 311, 324, 359.

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.").

138. *Armed Activities* is a contrary decision. Uganda seems to have had a similar relationship with rebel groups throughout the DRC. See Johan Pottier, *Roadblock Ethnography: Negotiating Humanitarian Access in Ituri, Eastern DR Congo, 1999–2004*, 76 J. INT'L AFR. INST. 151, 157-59 (2006); Koen Vlassenroot & Timothy Raeymaekers, *The Politics of Rebellion and Intervention in Ituri: The Emergence of a New Political Complex?*, 103 AFR. AFF. 358, 395 n.37, 397-410 (2004). However, the court assigned Uganda duties to protect only in the occupied areas. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168 (Dec. 19).

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 *Ilaşcu 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-

139. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 47, ¶¶ 434-38 (Feb. 26).

140. *Ilaşcu v. Moldova*, App. No. 48787/99, 2004-VII Eur. Ct. H.R. 179.

141. *Id.* ¶ 392.

142. *Id.* ¶¶ 393-94. As in *Cyprus*, the court's logic in *Ilaşcu* 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.*

143. Application of International Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures, 2008 I.C.J. 353, ¶ 13 (Oct. 15).

144. Application of International Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment on Preliminary Objections, 2011 I.C.J. 70, ¶¶ 156-85 (Apr. 1).

145. *Application of International Convention, Provisional Measures*, 2008 I.C.J. 353, ¶ 149.

146. *See* DANIELA KROSLAK, THE ROLE OF FRANCE IN THE RWANDAN GENOCIDE 103-08, 114-26, 135-39, 142-52 (2007); Mel McNulty, *French Arms, War and Genocide in Rwanda*, 33 CRIME L. & SOC. CHANGE 105, 108-15 (2000).

147. *See* ANDREW WALLIS, SILENT ACCOMPLICE: THE UNTOLD STORY OF FRANCE'S ROLE IN THE RWANDAN GENOCIDE 114-18 (2006); McNulty, *supra* note 146, at 115-20.

148. *See supra* note 117 and accompanying text.

149. REPUBLIQUE DU RWANDA, RAPPORT DE LA COMMISSION NATIONALE INDÉPENDANTE CHARGÉE DE RASSEMBLER LES PREUVES MONTRANT L'IMPLICATION DE L'ÉTAT FRANÇAIS DANS LE GÉNOCIDE PÉPÉTRÉ AU RWANDA EN 1994 (2007) (criticism from the new Rwandan government); ORG. OF AFR. UNITY, INT'L PANEL OF EMINENT PERSONALITIES, RWANDA: THE PREVENTABLE GENOCIDE ¶ 15.58 (2002) (criticism from the Organization of African Unity); Javier Alcalde & Caroline Bouchard, *Human Security and Coherence within the EU: The Case of the 2006 UN Small Arms Conference*, 3 HAMBURG REV. SOC. SCI. 142, 163 (2008) (criticism from French civil society groups); DES FORGES, *supra* note 28, at 2, 6-7, 16-21, 175-76, 654-58, 688-91 (criticism from international human rights groups).

nied any legal responsibility, it accepted that it was “involved too much and for too long”¹⁵⁰ and that it had a “moral duty . . . to stop the genocide.”¹⁵¹

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,¹⁵² and (2) the claim that the permanent members of the U.N. Security Council must not use their veto in R2P cases.¹⁵³ 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.¹⁵⁴ Se-

150. Thomas Hirenee Atienga, *France Denies Responsibility for Rwanda Genocide*, IPS-INTER PRESS SERVICE, Dec. 16, 1998 (quoting French parliamentary report); see also ASSEMBLÉE NATIONALE, RAPPORT D'INFORMATION DÉPOSÉ EN APPLICATION DE L'ARTICLE 145 DU RÈGLEMENT PAR LA MISSION D'INFORMATION DE LA COMMISSION DE LA DÉFENSE NATIONALE ET DES FORCES ARMÉES ET DE LA COMMISSION DES AFFAIRES ÉTRANGÈRES, SUR LES OPÉRATIONS MILITAIRES MENÉES PAR LA FRANCE, D'AUTRES PAYS ET L'ONU AU RWANDA ENTRE 1990 ET 1994 [NATIONAL ASSEMBLY, INFORMATIONAL REPORT FILED UNDER ARTICLE 145 OF THE RULES BY THE FACT-FINDING MISSION OF THE COMMISSION OF NATIONAL DEFENSE AND THE ARMED FORCES AND THE COMMISSION ON FOREIGN AFFAIRS, ON MILITARY OPERATIONS BY FRANCE, OTHER COUNTRIES AND THE U.N. IN RWANDA BETWEEN 1990-1994] (1998) (Fr.) (parliamentary report).

151. See GÉRARD PRUNIER, *THE RWANDA CRISIS* 296 (1995) (quoting a report on Prime Minister Edouard Balladur's July 12, 1994, speech to the United Nations).

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 presidential¹⁵⁸ and press¹⁵⁹ statements on Syria.¹⁶⁰

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 Assembly¹⁶¹ and Human Rights Council¹⁶² 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”).

156. See U.N. SCOR, 67th Sess., 6810th mtg., U.N. Doc. S/PV.6810 (July 19, 2012) (record of Council meeting at which Russia and China vetoed a draft resolution); S.C. Draft Res. 2012/538, U.N. Doc. S/2012/538 (July 19, 2012) (text of vetoed resolution); U.N. SCOR, 67th Sess., 6711th mtg., U.N. Doc. S/PV.6711 (Feb. 4, 2012) (record of Council meeting at which China and Russia vetoed a draft resolution); S.C. Draft Res. 2012/77, U.N. Doc. S/2012/77 (Feb. 4, 2012) (text of vetoed resolution); U.N. SCOR, 66th Sess., 6627th mtg., U.N. Doc. S/PV.6627 (Oct. 4, 2011) (record of Council meeting at which China and Russia vetoed a draft resolution); S.C. Draft Res. 2011/612, U.N. Doc. S/2011/612 (Oct. 4, 2011) (text of vetoed resolution).

157. S.C. Res. 2043, U.N. Doc. S/RES/2043 (Apr. 21, 2012); S.C. Res. 2042, U.N. Doc. S/RES/2042 (Apr. 14, 2012).

158. S.C. Pres. Statement 2012/10, U.N. Doc. S/PRST/2012/10 (Apr. 5, 2012); S.C. Pres. Statement 2012/6, U.N. Doc. S/PRST/2012/6 (Mar. 21, 2012); S.C. Pres. Statement 2011/16, U.N. Doc. S/PRST/2011/16 (Aug. 3, 2011).

159. Press Release, Security Council, Security Council Press Statement on Ceasefire in Syria, U.N. Press Release SC/10800 (Oct. 24, 2012); Press Release, Security Council, Security Council Press Statement on Shelling of Turkish Town by Syrian Forces, U.N. Press Release SC/10783 (Oct. 4, 2012); Press Release, Security Council, Security Council Press Statement on Attacks in Syria, U.N. Press Release SC/10658 (May 27, 2012); Press Release, Security Council, Security Council Press Statement on Syria, U.N. Press Release SC/10564 (Mar. 1, 2012). *But cf.*, e.g., Neil MacFarquhar, *Push in U.N. for Criticism of Syria is Rejected*, N.Y. TIMES, Apr. 28, 2011, at A12 (reporting that Western nations failed to secure the unanimity for a Council press statement that would have called on the Assad regime to stop using violence against its people); *Insights on Syria*, WHAT'S IN BLUE: INSIGHTS ON THE WORK OF THE UN SECURITY COUNCIL (Apr. 28, 2011, 10:55 AM), <http://www.whatsinblue.org/2011/04/insights-on-syria-2.php> (reporting that objections from Russia and Lebanon prevented the Council from issuing a press statement on Syria).

160. As a matter of practice, these statements are made by unanimous decision. See *Major Types of Actions Taken by the Security Council*, in U.N. SECURITY COUNCIL, THE SECURITY COUNCIL: WORKING METHODS HANDBOOK, U.N. Sales No. 11.VII.1 (2011), <http://www.un.org/en/sc/inc/pages/pdf/methods/actions.pdf>.

161. See, e.g., U.N. GAOR, 66th Sess., 124th plen. mtg., U.N. Doc. A/66/PV.124 (Aug. 3, 2012) (vote of 133-12-31); U.N. GAOR, 66th Sess., 97th plen. mtg., U.N. Doc. A/66/PV.97 (Feb. 16, 2012) (vote of 137-12-17).

162. See, e.g., Human Rights Council Res. S-19/1, The Deteriorating Situation of Human Rights in the Syrian Arab Republic and the Recent Killings in El-Houleh, 19th Special Sess., June 1, 2012, U.N. Doc. A/HRC/RES/S-19/1 (June 4, 2012) (vote of 41-3-2); Human Rights Council Res. 19/22, Situation of Human Rights in the Syrian Arab Republic, 19th Sess., Mar. 23, 2012, U.N. Doc.

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.¹⁶³ Further, although China and Russia largely synchronized their positions in multilateral arenas, Russia did more of the dirty work.¹⁶⁴ Russia's early support for Assad undermined efforts to isolate him and lessened the likelihood that his regime would buckle under outside pressure.¹⁶⁵ Moreover, Russia continued to ship military equipment to the regime after its atrocities were apparent.¹⁶⁶ 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

A/HRC/RES/19/22 (Apr. 10, 2012) (vote of 41-3-2); Human Rights Council Res. 19/1, *The Escalating Grave Human Rights Violations and Deteriorating Humanitarian Situation in the Syrian Arab Republic*, 19th Sess., Mar. 1, 2012, U.N. Doc. A/HRC/RES/19/1 (Apr. 10, 2012) (vote of 37-3-3).

163. See, e.g., Ministry of Foreign Affairs of the Russian Federation, Answer of the Spokesman of the Ministry of Foreign Affairs of Russia A.K. Lukashevich to the Media Question Regarding to Next Meeting of the Syrian Opposition (Dec. 11, 2012), http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/7cdd356506c7827c44257ada004640f6!OpenDocument (discussing Russia's decision not to attend a "Friends of Syria" meeting in Morocco); Ministry of Foreign Affairs of the Russian Federation, Comment of the Russian Foreign Ministry Spokesman Alexander Lukashevich in Relation to the Meeting of "Friends of Syria" in Paris (July 6, 2012), http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/462ce2c8456b8b1144257a38003006ef!OpenDocument (on Russia's and China's decisions not to attend the meeting in Paris); Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on March 26, 2012 (Mar. 27, 2012), <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t918088.shtml> (discussing China's decision not to attend the meeting in Istanbul).

164. See, e.g., Yekaterina Kudashkina, *Obama is Under Increasing Pressure on Syria*, THE VOICE OF RUSSIA (Dec. 9, 2012, 10:51 AM), http://english.ruvr.ru/2012_12_09/Obama-is-under-increasing-pressure-on-Syria ("[China] is not in the news every day and it is not materially giving assistance to the Syrian Government as Russia does."); Evan Osnos, *Why China Will Back Assad—Until it Won't*, NEW YORKER.COM (July 20, 2012), <http://www.newyorker.com/online/blogs/evanosnos/2012/07/how-long-will-china-back-assad.html>.

165. See, e.g., Ellen Barry, *As Nations Line Up Against Syrian Government, Russia Sides Firmly with Assad*, N.Y. TIMES, Jan. 28, 2012, at A8; *Russia "Will Not Even Read" Tough Resolution on Syria*, RT.COM (May 27, 2011), <http://rt.com/politics/russia-syria-ryabkov-resolution/>; *Foreign Minister Sergey Lavrov Makes Remarks and Answers Questions at Joint Press Conference Following Talks with El Salvador Foreign Minister Hugo Martinez, San Salvador, August 22, 2011*, MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FED'N (Aug. 23, 2011), http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/8184743ea10aa0fdc32578f500557169!OpenDocument ("I've already talked about the need for all external players to not interfere with or disturb the national dialogue."); *Comment by Press and Information Department of Russian Foreign Ministry on a Question from Interfax News Agency Regarding the Situation in Syria*, MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FED'N (Aug. 19, 2011), http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/14928ffe24bdd3a0c32578f100538f00!OpenDocument ("Our position on the events in [Syria] is that the leadership of the country headed by President Bashar al-Assad has to be given more time to carry out the declared major program of political and economic reforms. Recently, Damascus has taken very substantial steps toward that end."); *Russian MFA Spokesman Alexander Lukashevich's Comment Regarding the Speech of Syrian President Bashar al-Assad*, MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FED'N (June 21, 2011) ("Moscow regards President al-Assad's speech as an important constructive step . . ."); Briefing by Alexei Sazonov, Deputy Director of the Press and Information Department of the Russian Foreign Ministry, MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FED'N (Apr. 14, 2011), http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/cc03ab3b7bfc3eb7c325787300457253!OpenDocument (calling Syria an "old friend and partner," supporting Assad's "political reforms," stressing that the regime's actions "maintain law and order," and emphasizing Russia's opposition to external interference in Syria).

166. See, e.g., Michael R. Gordon & Eric Schmitt, *Russia Signals Syrian Support with Missiles*, N.Y. TIMES, May 17, 2013, at A1; Andrew E. Kramer, *Russia Sending Missile Systems to Shield Syria*, N.Y. TIMES, June 16, 2012, at A1.

pressured 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, however, 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

167. See, e.g., Ellen Barry & Rick Gladstone, *Russia Says Syrian Plane Impounded by Turkey Had Radar Gear, Not Arms*, N.Y. TIMES, Oct. 13, 2012, at A6 (reporting on Turkey’s confrontation with Russia concerning Russia’s supplies to Syria); Steven Erlanger, *Merkel and Sarkozy Share Anger Over Syria Stalemate and Urgency Over Greece*, N.Y. TIMES, Feb. 7, 2012, at A12 (reporting that Western leaders publicly criticized Russia); Rick Gladstone & Annie Lowrey, *Amid Reports of a New Massacre, Nations Seek to Step Up Pressure on Syria*, N.Y. TIMES, June 7, 2012, at A8 (reporting on U.S. pressure); Nicholas Kulish & Neil MacFarquhar, *Putin Rejects Intervention But Fears Civil War in Syria*, N.Y. TIMES, June 2, 2012, at A8 (reporting on French and German pressure); Neil MacFarquhar, *Residents Flee Damascus as Battle Enters its Fifth Day*, N.Y. TIMES, July 20, 2012, <http://www.nytimes.com/2012/07/20/world/middleeast/syria-clashes-continue-after-bombing-kills-key-assad-aides.html> (reporting on U.K. pressure).

168. See, e.g., James Kanter, *China Assures Europe on Debt Aid*, N.Y. TIMES, Sept. 21, 2012, at A11 (reporting on pressure from the European Union); Steven Lee Myers & Jane Perlez, *No Movement on Major Disputes as Clinton Meets with Chinese Leaders*, N.Y. TIMES, Sept. 6, 2012, at A10 (reporting on U.S. pressure).

169. Nada Bakri, *Protesters Convulse Several Cities in Syria, as Russia Offers New U.N. Resolution*, N.Y. TIMES, Dec. 17, 2011, at A10 (quoting a member of an opposition group in Syria).

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,

171. Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 15 (2002): The Right to Water*, ¶¶ 30, 34, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) (outlining state duties on water resources); see also, e.g., Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health*, ¶ 45, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (emphasizing that an extraterritorial duty to fulfill is “particularly incumbent” on states and other actors “in a position to assist”).

172. See, e.g., Office of the U.N. High Comm’r for Human Rights, *Report on the Relationship Between Climate Change and Human Rights*, ¶¶ 84-85, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

173. See, e.g., International Development Strategy for the Second United Nations Development Decade, G.A. Res. 2626 (XXV), ¶ 43, U.N. Doc. A/RES/2626 (Oct. 24, 1970); *A More Secure World: Our Shared Responsibility: Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change*, *supra* note 32, Annex I, ¶ 2; World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, Annex, ¶ 85, U.N. Doc. A/CONF.199/20*.

174. International Conference on Financing for Development, Monterrey, Mex., Mar. 18-22, 2002, *Monterrey Consensus of the International Conference on Financing for Development*, Annex, ¶ 42, U.N. Doc. A/CONF.198/11; Keeping the Promise: United to Achieve the Millennium Development Goals, G.A. Res. 65/1, ¶ 78(f), U.N. Doc. A/65/L.1 (Sept. 17, 2010).

175. See De Schutter et al., *supra* note 81, at 1094 (“[D]isagreement persists as to the legally binding nature of the obligation of international cooperation as expressed in the [ICESCR].”).

176. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 112 (July 9).

177. See, e.g., Comm’n on Human Rights, 61st Sess., Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Second Session, ¶ 76, U.N. Doc. E/CN.4/2005/52 (Feb. 10, 2005) (“The representatives of the United Kingdom, the Czech Republic, Canada, France and Portugal . . . did not interpret the Covenant to impose a legal obligation to provide development assistance or give a legal title to receive such aid.”); Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 777 (2005) (explaining that developed countries have “persistent[ly] reject[ed]” the claim that “any given country is obligated to provide specific assistance to any other country,” and noting “the failure of even the most generous of donors to locate their assistance within the context of such an obligation”). *But cf.* Food Assistance Convention art. 5, §§ 1, 13, Apr. 25, 2012, T.I.A.S. 13-101 (“[E]ach Party agrees to make an annual commitment of food assistance, set in accordance with its laws and regulations. . . . [and] shall make every effort to meet its minimum annual commitment.”).

178. See MDG GAP TASK FORCE, MILLENNIUM DEVELOPMENT GOAL 8: THE GLOBAL PARTNERSHIP FOR DEVELOPMENT: TIME TO DELIVER, at 4-6, U.N. Sales No. E.11.I.11 (2011); see also Mac Darrow, *The Millennium Development Goals: Milestones or Millstones? Human Rights Priorities for the Post-2015 Development Agenda*, 15 YALE HUM. RTS. & DEV. L.J. 55, 70 (2012) (bemoaning that the Millennium Development Goal on foreign assistance lacks “any basis to hold richer countries and donor organisations to account for poverty in low-income countries”).

few have actually achieved that goal.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.¹⁸⁰ Similarly, international trade law encourages developed states to give developing states technical assistance on implementing or adapting to trade law.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.¹⁸² Second, the extent to which foreign aid helps realize rights in recipient states is still hotly contested.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.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.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.

179. Only Sweden, Norway, Luxembourg, Denmark, and the Netherlands met the goal between 2009 and 2011. MDG GAP TASK FORCE, MILLENNIUM DEVELOPMENT GOAL 8: THE GLOBAL PARTNERSHIP FOR DEVELOPMENT: MAKING RHETORIC A REALITY, at 10 fig.2, U.N. Sales No. E.12.I.5 (2012).

180. See, e.g., Convention on Biological Diversity art. 20, § 4, June 5, 1992, 1760 U.N.T.S. 79; United Nations Framework Convention on Climate Change art. 4, § 7, May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107; Montreal Protocol on Substances that Deplete the Ozone Layer arts. 10, 10A, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 3.

181. World Trade Organization, Ministerial Decision of 14 November 2001: Implementation-Related Issues and Concerns, ¶¶ 3.6, 5.4, WT/MIN/(01)/17, 41 I.L.M. 757 (2002).

182. See Ado Caliani & 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).

183. See, e.g., WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006).

184. See Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. J. INT'L L. 446, 482-83 (2009); cf. Special Rapporteur on the Protection of Persons in the Event of Disasters, *Fifth Report on the Protection of Persons in the Event of Disasters*, Int'l Law Comm'n, ¶ 28, U.N. Doc. A/CN.4/652 (Apr. 9, 2012) (by Eduardo Valencia-Ospina) (“[A] number of States opposed the idea . . . [of] a legal obligation to seek external assistance in cases where a disaster exceeded [the state's] national response capacity. In their view, the imposition of such a duty constituted infringement of the sovereignty of States . . .”).

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”); Caliani & 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.¹⁸⁹ That level of commitment might not exist. But if it does—and there is some reason for optimism¹⁹⁰—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.