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Distributing the Responsibility to Protect

Monica Hakimi*

1. 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 abuses – genocides, ethnic cleansings, crimes against humanity, and systemic war crimes – occur with alarming frequency. 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 simply by R2P. R2P stands for two basic propositions.² First, each state must protect its population from atrocities. This proposition is well established in international law, but experience demonstrates that states sometimes fail their own populations. R2P’s key innovation is its second proposition: that the broader international community should step in, when necessary, to help at-risk populations. Unlike the first proposition, the second one is widely understood not to be legally operative.³ And the extent to which it otherwise influences outside states is, at best, speculative and contested.⁴

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¹ See, e.g., R. Teitel, *Humanity’s Law* (Oxford: OUP, 2011), at 9, 37.

² See, e.g., International Commission on Intervention and State Sovereignty (ICISS), ‘Report on the Responsibility to Protect’ UN Doc. A/57/303 (2001), Annex, paras. 2.30-2.31 (ICISS Report); UN Secretary-General, ‘Implementing the Responsibility to Protect’, UN Doc. A/63/677 (12 January 2009), para. 11.

³ See, e.g., G. Evans and R. Thakur, ‘Correspondence, Humanitarian Intervention and the Responsibility to Protect’ (2013) 37 IS 199, at 205; C. Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (2007) 101 AJIL 99, at 109.

⁴ Compare, e.g., A.J. Bellamy and P.D. Williams, ‘The new politics of protection? Côte d’Ivoire, Libya and the responsibility to protect’ (2011) 87 IA 825, at 826 (arguing that R2P has helped shape a ‘new politics of protection’ that might affect the response to particular crises); with S. Mohamed, ‘Shame in the Security Council’ (2013) 90 Wash LR 1191, at 1251 (doubting that ‘shaming based on the notion of a responsibility to protect yields productive results’); and D. Rieff, ‘R2P, R.I.P.’, Op-Ed., New York Times, 7 November 2011 (arguing that using R2P to justify regime change in Libya delegitimised the concept and damaged its ‘prospects of becoming a global norm’).

Part of R2P's challenge is conceptual. The United Nations (UN) 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 favour their collective action. 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. 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 UN has shifted to the varied non-forcible and proactive measures for trying to prevent atrocities from breaking out.⁵ Such measures include, for example, programmes 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.⁶

This Chapter 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.⁷ In particular, an outside state should be responsible as a result 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 current trajectory is to continue expanding these duties. The duties are legally operative, however, only when responsibility can be pinned on particular states at a time.

⁵ UN Secretary-General, 'Responsibility to Protect: State Responsibility and Prevention', UN Doc. A/67/929 (9 July 2013), paras. 30-64; UNSG, 'Implementing the Responsibility to Protect', n. 2, para. 44.

⁶ See, e.g., A.J. Bellamy, 'The Responsibility to Protect – Five Years On' (2010) 24 EIA 143, at 144: 'profound disagreements persist about the function, meaning, and proper use of R2P.'; H. Cuyckens and P. De Man, 'The Responsibility to Prevent: On the Assumed Legal Nature of Responsibility to Protect and its Relationship with Conflict Prevention', in J. Hoffman and P.A. Nollkaemper (eds.), *Responsibility to Protect: From Principle to Practice* (Amsterdam: Amsterdam University Press, 2012), 111, at 111: describing 'a conceptual entanglement that significantly compounds the practical operationalisation of the RtoP concept'.

⁷ Some philosophers have argued that a moral duty to intervene militarily can fall on specific outside states. See, e.g., J. Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford: OUP, 2010), 182; L. Glanville, 'On the Meaning of "Responsibility" in the "Responsibility to Protect"' (2011) 20 Grif LR 482, at 494-96. 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.

My goal in this Chapter 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 behaviour of outside states, or legitimise efforts to hold particular outside states responsible.⁸

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,⁹ any duty to use armed force would be completely out of touch with current expectations. First, the duty would be extraordinarily onerous if it were assigned to only one or a small handful of states. Second, international law never requires – and is skittish even about permitting – cross-border violence.¹⁰ Still, states might have to use other levers of power, like economic or diplomatic measures, to benefit 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.

Before I proceed, one note about terminology might be helpful. The R2P literature uses the word ‘responsibility’ to suggest some kind of moral or legal duty. However, as André Nollkaemper and Dov Jacobs explain in their concept paper, international law usually uses ‘responsibility’ as a term of art not for the duty itself but for the consequence of not satisfying a duty; a state that vio-

⁸ An extensive literature now examines the mechanisms by which international law might influence states’ human rights practices. See, e.g., B.A. Simmons, ‘Mobilizing for Human Rights: International Law in Domestic Politics’ (New York: CUP, 2009), 357; and R. Goodman and D. Jinks, ‘How to Influence States: Socialization and International Human Rights Law’ (2004) 54 DLJ 621.

⁹ Although international lawyers debate whether outside states may use military force for humanitarian ends without the UN Security Council’s authorisation, states clearly have this right when they act pursuant to such authorisation. Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, 1 UNTS 16 (UN Charter), ch. VII.

¹⁰ Article 2(4) UN Charter, *ibid.*

lates a duty is responsible for that violation.¹¹ I use ‘responsibility’ in this latter sense. Nevertheless, I use ‘R2P’ for the idea that states should protect at-risk populations.

2. 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. To use the concept paper’s terminology, this claim is for states’ *shared* responsibility: responsibility would be pinned on every state that does not do enough for the at-risk population. The second claim is for states’ *collective* responsibility: responsibility for not satisfying a duty would fall not on states themselves but on their collective organisations, like the UN. Neither of these claims on R2P is likely to gain legal traction in the near term.

2.1 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. 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 is responsible when that population suffers. 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’.¹² To appreciate the problem, consider three discrete contexts in which the claim appears, plus evidence that it is inoperative.

¹¹ P.A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *MIJIL* 359, at 365.

¹² D. Miller, *National Responsibility and Global Justice* (Oxford: OUP, 2007), 98; see also A.J. Bellamy, ‘Conflict Prevention and the Responsibility to Protect’ (2008) 14 *Glob Gov* 135, at 147.

First, the 1949 Geneva Conventions require states to ‘ensure respect’ for the Conventions ‘in all circumstances’.¹³ This language is widely interpreted to mean that every party must try to avert ongoing war crimes, no matter where or by whom the crimes are committed.¹⁴ State officials verbally endorse that interpretation¹⁵ but regularly ignore it in practice.¹⁶ Moreover, states that stand by in the face of ongoing war crimes are rarely, if ever, held responsible.¹⁷

Second, the Articles on State Responsibility, which the International Law Commission (ILC) adopted in 2001,¹⁸ aim to identify when states are responsible for violating international law and what follows from these violations. The ILC spent decades developing the Articles and, from early on, sought to attach special consequences to especially egregious violations. In the end, the Articles declare that all ‘[s]tates shall cooperate to bring to an end (...) serious breach[es]’ of peremptory norms.¹⁹ The category of peremptory norms is notoriously indeterminate but, by all accounts, includes mass atrocities.²⁰ Thus, any duty to cooperate on peremptory norms should come into play in scenarios that implicate R2P.

¹³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31 (First Geneva Convention), Article 1; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 85 (Second Geneva Convention), Article 1; Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135 (Third Geneva Convention), Article 1; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287 (Fourth Geneva Convention), Article 1 (collectively 1949 Geneva Conventions).

¹⁴ J.-M. Henckaerts and L. Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law* (New York: OUP, 2005), 509; G. Gaja, ‘Do States Have a Duty to Ensure Compliance with Obligations *Erga Omnes* by Other States?’, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden: Brill, 2005), 31, at 33-34.

¹⁵ See the customary international humanitarian law database of the International Committee of the Red Cross (ICRC), Rule 144 at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule144.

¹⁶ See, e.g., International Committee of the Red Cross, ‘Improving Compliance with International Humanitarian Law: ICRC Expert Seminars’ (October 2003), at 3-8; C. Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ (2010) 21 EJIL 125.

¹⁷ See, e.g., T. Pfanner, ‘Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims’ (2009) 91 IRRC 279, at 305-306.

¹⁸ Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).

¹⁹ Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), Commentary to Articles 1-2.

²⁰ *Ibid.*, Commentary to Article 40 ARSIWA, paras. 2-6; A. Orakhelashvili, *Peremptory Norms in International Law* (New York: OUP, 2006), at 50-66.

Yet the ILC's 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 clearly assumes that most cooperation will occur through international organisations.²¹ The ILC does not identify what states must do in these organisations, other than simply participate.²² 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.²³

Finally, in its 2008 judgment in the *Genocide* case, the International Court of Justice (ICJ or Court) determined that the Genocide Convention²⁴ obligates states to try to avert genocidal conduct in and by third states.²⁵ This interpretation is progressive and potentially far-reaching. It arguably requires every party to the Convention to act in the face of genocide. After all, every party has the same obligation under the Convention's text. However, the ICJ limited that expansive implication. The Court explained that the duty to prevent genocide requires different measures of each state, depending on that state's particular tools for addressing a crisis.²⁶ 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.²⁷ The claim that every state must try to avert genocide seems more expansive than the ICJ's own interpretation and is, in any event, unsupported by state practice. Here again, the claim that a legal duty attaches to all outside states simultaneously is inoperative.

²¹ ARSIWA Commentary, n. 19, Article 41 ARSIWA, para. 2; see also N.H.B. Jørgensen, 'The Responsibility to Protect and the Obligations of States and Organisations under the Law of International Responsibility', in J. Hoffman and P.A. Nollkaemper (eds.), *Responsibility to Protect: From Principle to Practice* (Amsterdam: Amsterdam University Press, 2012), 125, at 129.

²² ARSIWA Commentary, n. 19, Article 41, para. 2.

²³ *Ibid.*, Article 41, para. 3.

²⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277 (Genocide Convention).

²⁵ *Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, para. 438 (*Genocide* case). 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 'Serbia' interchangeably with the 'FRY' for ease of reference.

²⁶ *Genocide* case, *ibid.*, para. 430.

²⁷ But cf. *The Netherlands v. Nuhanović*, ECLI:NL:HR:2013:BZ9225 (Supreme Court of the Netherlands, 6 September 2013), finding that Dutch peacekeepers unlawfully evicted from their base Bosnian men who were later killed in Srebrenica.

2.2 Assigning R2P to international organisations

An alternative claim seeks to attach the R2P duty not to individual states but rather to their collective organisations. The claim that international organisations must implement R2P is usually directed at the UN Security Council (Council) and reflects, at least in part, R2P's historic association with the use of force.²⁸ Some have argued for requiring the Council to act in humanitarian crises,²⁹ or for restricting the use of the veto in such cases.³⁰ Yet the claim against international organisations is not directed exclusively at the Council. For instance, the UN Secretary-General has identified varied proactive measures that different kinds of organisations might coordinate or implement.³¹

The claim that an R2P duty attaches to international organisations is likely to confront serious hurdles in the near term. First, the UN 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 organisations? 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 organisation's veil.

Second, the relevant bodies in these organisations 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.³² This does not mean that international organisations may do whatever

²⁸ For the argument that regional organisations should have a residual duty that kicks in if the Security Council does not act, see ICISS Report, n. 2, paras. 6.28, 6.31-6.35; and K.M. Haugevik, 'Regionalising the Responsibility to Protect: Possibilities, Capabilities and Actualities' (2009) 1 GR2P 346, at 350-51.

²⁹ See, e.g., UN Secretary-General, 'We the Peoples: The Role of the United Nations in the 21st Century', UN Doc. A/54/2000 (27 March 2000), para. 219; ICISS Report, n. 2, para. 6.24; L. Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 RIS 445, at 454.

³⁰ See, e.g., UNSG 'Implementing the Responsibility to Protect', n. 2, para. 61; ICISS Report, n. 2, para. 6.21; A. Blätter and P.D. Williams, 'The Responsibility Not to Veto' (2011) 3 GR2P 301, at 313-320; Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 EJIL 513, at 539.

³¹ UNSG, 'Implementing the Responsibility to Protect', n. 2, paras. 28-48; see also A.J. Bellamy, 'Making RtoP a Living Reality: Reflections on the 2012 General Assembly Dialogue on Timely and Decisive Response' (2013) 5 GR2P 109, at 122-24.

³² N. Krisch, 'Article 39', in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed. (Oxford: OUP, 2012), 1272, at 1275-76.

they please. For example, the UN Security Council is generally expected to account for human rights interests when it makes decisions.³³ But the Council has considerable discretion to weigh those interests against the countervailing considerations that favour or disfavour a particular decision.³⁴ Proposals to further constrain the Council's discretion,³⁵ including proposals on R2P,³⁶ 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.'³⁷

Third, even if international organisations had an R2P duty, the extent to which the duty could meaningfully be enforced is unclear. International organisations are rarely held responsible for international legal violations.³⁸ Part of the reason for the dearth of relevant practice is that international and national courts commonly lack jurisdiction over claims against international organisations.³⁹ However, even the more informal enforcement tools that are used against scofflaw states – like countermeasures or verbal denunciations – might be maladapted for international

³³ N. Krisch, 'Article 41', in *The Charter of the United Nations: A Commentary*, *ibid.*, 1305, at 1317: 'the [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'.

³⁴ N. Krisch, 'Introduction to Chapter VII: The General Framework', in *The Charter of the United Nations: A Commentary*, n. 32, 1237, at 1258.

³⁵ See, e.g., B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (New York: Springer, 1998), 263-75 (describing proposals to constrain the veto); I. Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 *AJIL* 275, at 303-07 (arguing for a set of procedural reforms to decrease the Council's 'deliberative deficit' and increase its legitimacy).

³⁶ See, e.g., ICISS Report, n. 2, paras. 6.13-6.27.

³⁷ J.E. Alvarez, 'The Schizophrenias of R2P', in P. Alston and E. MacDonald (eds.), *Human Rights, Intervention, and the Use of Force* (New York: OUP, 2008), 272, at 275, 282.

³⁸ Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), Commentary to Article 2, para. 5: '[o]ne of the main difficulties in elaborating rules concerning the responsibility of international organizations is due to the limited availability of pertinent practice'. Note that the United Nations sometimes compensates states or individuals for particular kinds of harms, but when it makes such payments, it typically preserves its discretion not to make them and denies that they are legally required. See Secretary-General's Bulletin: 'Financial Regulations and Rules of the United Nations', Rule 105.12, UN Doc. ST/SGB/2003/7 (9 May 2003); J.E. Alvarez, 'Revisiting the ILC's Draft Rules on International Organization Responsibility' (2011) 105 *ASILP* 344, at 347; A. Telestsky, 'Binding the United Nations: Compulsory Review of Disputes Involving UN International Responsibility Before the International Court of Justice' (2012) 21 *Minn JIL* 75, at 87-88.

³⁹ See A. Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 *Glob Gov* 131, at 139-41. The jurisdictional limitations do not provide the full answer because third-party dispute resolution bodies sometimes have jurisdiction to adjudicate claims against international organisations. See, e.g., Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, U.S.-UN, 26 June 1947, approved by the UNGA on 31 October 1947, 61 Stat. 3416, Article 8, Section 21(a); Convention on the Privileges and Immunities of the United Nations, New York, 13 February 1946, in force 17 September 1946, 1 *UNTS* 15, Article 8, Section 30.

organisations.⁴⁰ International organisations are likely to be less responsive to such enforcement than are individual states because international organisations are more diverse and less unified. A claimant who tries to enforce an R2P duty against an organisation presumably would have to convince many states, not just one, to take that duty seriously.

3. The potential of individual duties

The claim that outside states should together implement R2P translates poorly to international law. No matter whether the claim is directed at all outside states simultaneously or at states' collective organisations, 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 traction going forward.

Some readers might instinctively worry about encouraging outside states to act individualistically. Working through an international organisation or with other states can curb a state's opportunistic impulses or legitimise 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.⁴¹ They may take non-forcible measures, without going through an international organisation, to help at-risk populations. The

⁴⁰ See ARIO Commentary, n. 38, Article 51, paras. 4, 6.

⁴¹ International law differentiates between non-forcible measures that comply with an acting state's legal obligations and non-forcible measures that do not comply. Compliant measures are lawful. ARSIWA Commentary, n. 19, ch. II, para. 2. Non-compliant measures are usually unlawful but might be excused as countermeasures, if 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 E.K. Proukaki, *The Problem of Enforcement in International Law* (London: Taylor and Francis, 2010), at 204-207; C.J. Tams, *Enforcing Obligations Erga Omnes In International Law* (Cambridge: CUP, 2005), at 208-51.

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. 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.

3.1 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 duties: human rights law and the law on state responsibility. These two bodies of law provide a foundation for assigning states duties that benefit foreign populations, and then for allocating the associated responsibilities.

3.1.1 The seeds for crafting R2P duties

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 recognises a broad range of rights – for instance, rights to life, liberty, health,

and food.⁴² It then assigns states three kinds of duties to help realise those rights.⁴³ *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 intentionally starving people. *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 realise positive liberties. These duties are unlike the other two in that they do not assume a single, identifiable abuser. Fulfilling the right to life might mean guaranteeing emergency medical care or responding competently to a natural disaster.

That taxonomy of human rights duties is conceptually useful for R2P. It reminds us that one objective – like avoiding unnecessary losses of life – can justify multiple duties. States might have to achieve that objective in different ways. Moreover, disaggregating the objective might make it more manageable. Rather than establish one daunting duty to avoid unnecessary losses of life, human rights law establishes three more concrete duties. 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.⁴⁴ The current trend is to expand the extraterritorial scope of application of human

⁴² See, e.g., International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 199 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3 (ICESCR).

⁴³ See, e.g., O. De Schutter et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1084, at 1090.

⁴⁴ See, e.g., Article 2(1) ICCPR, n. 42; *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para. 109 (*Wall* advisory opinion); *Al-Skeini and others v. the United Kingdom*, App. no. 55721/07 (ECtHR, 7 July 2011), paras. 131-32.

rights law.⁴⁵ Yet this trend is contested and deeply under-theorised.⁴⁶ Most decisions that apply human rights law extraterritorially do so by reference to state control. The more control a state exercises in an extraterritorial setting, the greater the likelihood that the state will be held to its human rights duties. But the relevant decisions lack a coherent account of when and why control matters.⁴⁷ These decisions vary on the kinds of extraterritorial control that trigger a state's human rights duties;⁴⁸ on whether factors other than control can trigger these duties;⁴⁹ and on whether the duties are always triggered simultaneously or can be triggered piecemeal, depending on the circumstances of a case.⁵⁰ 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

⁴⁵ See M. Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford: OUP, 2011), 1; J. Cerone, 'Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context' (2007) 40 Isr LR 396, at 431-36.

⁴⁶ See, e.g., Human Rights Committee, '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, UN Doc. CCPR/C/USA/3 (28 November 2005); Human Rights Committee, 'Information Received from the United Kingdom of Great Britain and Northern Ireland on the Implementation of the Concluding Observations of the Human Rights Committee', UN Doc. CCPR/C/GBR/CO/6/Add.1 (3 November 2009), para. 24.

⁴⁷ Milanović, *Extraterritorial Application of Human Rights Treaties*, n. 45, at 264.

⁴⁸ The question here is 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 Committee, *Delia Saldías de López v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979 (29 July 1981), para. 12.3: '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 and others v. Turkey*, App. no. 31821/96 (ECtHR, 16 November 2004) (same); and *Alejandro and others v. Cuba*, Case 11.589, Inter-American Commission on Human Rights, Report No. 86/99, Case 11.589, OEA/Ser.L/V/II.106 doc. 6 rev. (1999), para. 25 (same); with, e.g., *Al-Skeini*, n. 44, para. 131: 'acts of the Contracting States performed (...) outside their territories can [trigger human rights duties] only in exceptional cases'.

⁴⁹ Compare, e.g., C. Droegge, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Isr LR 310, at 325-35 (reviewing cases and concluding that 'the basic requirement for extraterritorial application (...) is effective control, either over a territory or over a person'); with, e.g., *Victor Saldaño v. Argentina*, Petition, Inter-American Commission on Human Rights, Report No. 38/99, OEA/Ser.L/V/II.102 doc. 6 rev. (1998), para. 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, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', n. 43, at 1149-54 (asserting that duties to fulfill apply extraterritorially on the basis of states' capacities).

⁵⁰ Compare, e.g., *Banković and others v. Belgium and 16 other states*, App. No. 52207/99 (ECtHR, 12 December 2001), para 65: asking about 'the scope and reach of the entire Convention system of human rights' protection', with, e.g., *Al-Skeini*, n. 44, para. 137: explaining that a state might have a duty to secure rights 'that are relevant to the situation of [a particular] individual', and that '[i]n this sense, (...) the Convention rights can be "divided and tailored"'.

limited.⁵¹ Thus, R2P might build on human rights law but needs more conceptual work. R2P must justify assigning duties to outside states in cases of atrocity.⁵²

Likewise, R2P might build on the law on state responsibility. Recall that the 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.⁵³ 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 its own conceptual work.

3.1.2 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 malfeasant, or a messy combination of both.

To start, consider a state's well established duty not to commit atrocities in its territory. A territorial state that commits atrocities violates this duty and is responsible. But of course, the state cannot itself commit atrocities; the state is just a concept. A more accurate formulation is that the state is responsible if *its agents* commit atrocities. That formulation highlights three important points relating to state responsibility. First, state responsibility results from the concurrent application of so-called primary rules and secondary rules. The primary rules in human rights law pre-

⁵¹ Articles 2-3 of the 1949 Geneva Conventions, n. 13; *Genocide* case, n. 25, para. 183; and *Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, ICJ Reports 1996, 595, para. 31.

⁵² M.E. Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World', in P.A. Nollkaemper and D. Jacobs (eds.), this volume, at ____.

⁵³ See ARSIWA Commentary, n. 19, Article 12, para. 7.

scribe 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, as Nollkaemper and Jacobs demonstrate, the doctrinal distinction between the law's primary and secondary rules is not always crisp.⁵⁴ One set of rules sometimes turns on the other. For example, any duty to cooperate on enforcement under the law on state responsibility would kick in for only some primary rules – namely, the primary rules on peremptory norms. Likewise, the duty to respect in human rights law requires 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.⁵⁵ So do people who are not formally officials but nevertheless act on the state's behalf. For example, the Articles on State Responsibility posit that, when a state effectively controls someone's conduct, the person becomes an agent while committing that conduct.⁵⁶

Third, a state is responsible for its agent's misconduct because the state 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,⁵⁷ 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.⁵⁸ The whole point of this responsibility regime is to encourage the state to establish control over its agents.

⁵⁴ Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 11.

⁵⁵ ARSIWA Commentary to Article 4, n. 19.

⁵⁶ *Ibid.*, Commentary to Article 8.

⁵⁷ *Ibid.*

⁵⁸ ARSIWA Commentary to Article 4, n. 19, para. 9: 'it 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'. *Ibid.*, Article 5, para. 7: 'there is no need to show that the conduct was in fact carried out under the control of the State'; *ibid.*, Article 7, para. 2, asserting that the state is responsible even where the agent 'has manifestly exceeded its competence'.

I have argued in another work that human rights duties to protect reflect a similar logic.⁵⁹ 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 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 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 people. States exist, at least in part, to maintain order and enforce the law against inhabitants who might intrude on individual liberties.

I demonstrate below that, where international law already renders 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 the state’s positive capacity to help the at-risk population.⁶⁰ 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.⁶¹ Yet the ICJ did not understand capacity to mean the state’s overall military, financial, or diplomatic might. It understood capacity in relational terms:

⁵⁹ M. Hakimi, ‘State Bystander Responsibility’ (2010) 21 EJIL 341.

⁶⁰ See, e.g., Pattison, *Humanitarian Intervention and the Responsibility to Protect*, n. 7, at 182; Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’, n. 29, at 455.

⁶¹ *Genocide* case, n. 25, para. 430.

This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger.⁶²

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.⁶³ Serbia's dubious conduct – its support for an armed group in another state – 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. 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, even if other states are also highly capable (but less so),⁶⁴ 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.⁶⁵ Of course,

⁶² Ibid.

⁶³ Ibid., paras. 422, 434-38; see also *Prosecutor v. Tadić*, Judgement, ICTY Case No. IT-94-1-A, 15 July 1999, para. 156.

⁶⁴ K.-C. Tan, 'The Duty to Protect', in T. Nardin and M.S. Williams (eds.), *Humanitarian Intervention: Nomos XLVII* (New York: New York University Press, 2006), at 84, 102.

⁶⁵ 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 (ECtHR, 8 April 2004), para. 139: explaining that the territorial state's control over an autonomous republic created a 'presumption of competence'. Moreover, these bodies are generally unsympathetic to the idea that a state is absolved of

states *are* disparately capable and should not have to do more than they can reasonably bear. An outside state that cannot satisfy an R2P duty unless it abandons other, more important duties might have a more lenient R2P duty or be excused altogether from a particular duty. But if the vast majority of outside states can reasonably satisfy a duty, then their responsibility should not be allocated on the basis of their positive capacities.

3.2 Preliminary remarks on the R2P bundle

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. 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 review comprehensively the law on outside state responsibility. Neither is it to endorse this particular bundle of duties, or even to suggest that every duty in this bundle is realisable. My goal is simply 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.

3.2.1 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,⁶⁶ but it is complete-

its human rights duties by virtue of its incapacity. See, e.g., Human Rights Committee, 'Comments: United Republic of Tanzania', UN Doc. CCPR/79/Add.12 (28 December 1992), para. 5: emphasising that a reduction in available resources 'does not exempt the State party from the full and effective application of the Covenant'. Indeed, even the body that oversees the ICESCR, which expressly defines states' duties by reference their capacities, see ICESCR, n. 42, Article 2(1), assumes that all states can and must realise a minimum core of ICESCR rights. See Committee on Economic, Social and Cultural Rights, 'General Comment No. 3: The Nature of States Parties Obligations', E/1991/23 (14 December 1990), para. 10 (CESCR General Comment 3).

⁶⁶ Articles 2-3 of the 1949 Geneva Conventions, n. 13 (not limiting obligations geographically); *Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montene-*

ly 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. Indeed, it is difficult to imagine any state claiming a right to participate in atrocities just because it acts abroad.

3.2.2 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. First, an outside state that exercises governmental authority over an area might have to take measures to restrain the inhabitants from committing atrocities – as it would in its own territory.⁶⁷ The ICJ's *Armed Activities* decision is a case in point. 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.'⁶⁸ An occupying state, by definition, exercises governmental authority over foreign inhabitants.⁶⁹ 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 rights.

gro), Preliminary Objections, n. 51, para. 31 (finding that the obligations under the Genocide Convention are not geographically limited).

⁶⁷ 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. I explain why that articulation is descriptively inaccurate and perhaps undesirable in Hakimi, 'Toward a Legal Theory on the Responsibility to Protect', n. *, at 270-71.

⁶⁸ *Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, para. 178.

⁶⁹ Article 42 of the Regulations concerning the Laws and Customs of War on Land, annexed to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 1 Bevans 631.

Second, a state's extraterritorial duties to protect might be triggered if it substantially supports the third party that perpetrates atrocities. Recall that, in the *Genocide* case, the ICJ highlighted Serbia's support for the Bosnian Serbs who committed genocide. Serbia was responsible for not trying harder to prevent genocide. Similar relationships – in which a state gives a non-state group considerable support but does not actually participate in the group's conduct – are, unfortunately, common. In *Ilaşcu v. Moldova*, the European Court of Human Rights found that Russia had such a relationship with Moldovan groups that violated rights in Moldova; Russia was responsible.⁷⁰ In *Georgia v. Russia*, Georgia claimed that Russia likewise supported groups that violated rights in Georgia. The ICJ dismissed Georgia's case on jurisdictional grounds,⁷¹ but an order on provisional measures suggested that, 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.⁷² It should have pressured the groups not to violate rights.

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 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.

⁷⁰ *Ilaşcu and others v. Moldova and Russia*, App. No. 48787/99 (ECtHR, 8 July 2004), paras. 392-94. The Court's justification for holding Russia responsible is unclear. The court sometimes suggested that Russia was responsible for the abuses themselves. See *ibid.*, para. 393: 'there [was] a continuous and uninterrupted link of responsibility on the part of the Russian Federation'. But the Court also described the duty with language indicative of a duty to protect – i.e., as a duty that required the state to 'attempt to put an end to the (...) situation'. *Ibid.*

⁷¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, ICJ Reports 2011, 70, paras. 156-85.

⁷² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, ICJ Reports 2008, 353, para. 149.

3.2.3 Duty not to obstruct

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

A duty not to obstruct would build on two claims that have become quite prominent in the R2P literature: (1) the claim that states must cooperate to end violations of peremptory norms, and (2) the claim that the permanent members of the UN Security Council must not use their veto in R2P cases. First, a duty not to obstruct overlaps with the claimed duty to cooperate because, by definition, an obstructing state fails to cooperate. Still, the duty not to obstruct would be less onerous. An outside state would not have to take affirmative steps to cooperate; it simply would have to avoid getting in the way. Moreover, whereas not cooperating is often passive and pervasive, obstructing usually involves overt acts that can be identified and pinned on particular states. Second, 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.⁷³ 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 UN Security Council, China and Russia repeatedly vetoed or threatened to veto resolutions that would have put pressure on the Assad regime.⁷⁴ 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. Looking outside the Council reveals a broader pattern of

⁷³ See, e.g., Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' n. 29, at 453 (arguing for reassessing the use of the veto on the ground that states should 'cease inhibiting other states from discharging their duty to protect when those states are willing and able to discharge their obligations').

⁷⁴ See, e.g., UN SCOR, 67th Sess., 6810th meeting, UN Doc. S/PV.6810 (19 July 2012) (record of Council meeting at which Russia and China vetoed a draft resolution); UN SCOR, 67th Sess., 6711th meeting, UN Doc. S/PV.6711 (4 February 2012) (same).

obstructionism. China and Russia were consistently among a handful of states in the UN General Assembly⁷⁵ and Human Rights Council⁷⁶ that voted against resolutions 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.⁷⁷ Further, although China and Russia largely synchronised their positions in multilateral arenas, Russia did more of the dirty work. For example, Russia repeatedly shipped military equipment to the regime even after its atrocities were apparent.⁷⁸ This broader pattern of behaviour 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 pressured Russia⁷⁹ and, to a lesser extent, China⁸⁰ to stop obstructing international action in Syria. Even if this pressure failed to yield any results, the fact that others applied the pressure suggests that they understood the two states, and especially Russia, to be acting reprehensibly. Further, the fact that these other actors pressured

⁷⁵ See, e.g., UN GAOR, 66th Sess., 124th plenary meeting, UN Doc. A/66/PV.124 (3 August 2012) (vote of 133-12-31); UN GAOR, 66th Sess., 97th plenary meeting, UN Doc. A/66/PV.97 (16 February 2012) (vote of 137-12-17).

⁷⁶ See, e.g., Human Rights Council Res. 21/26, 'Situation of Human Rights in the Syrian Arab Republic', 21st Sess., 28 September 2012, UN Doc. A/HRC/RES/21/26 (17 October 2012) (vote of 41-3-3); Human Rights Council Res. 20/22, 'Situation of Human Rights in the Syrian Arab Republic', 20th Sess., 6 July 2012, UN Doc. A/HRC/RES/20/22 (16 July 2012) (vote of 41-3-3).

⁷⁷ See, e.g., 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' (6 July 2012), at www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/462ce2c8456b8b1144257a38003006ef!OpenDocument (on Russia's and China's decisions not to attend the meeting in Paris, last accessed 5 July 2014).

⁷⁸ See, e.g., M.R. Gordon and E. Schmitt, 'Russia Signals Syrian Support with Missiles', *New York Times*, 17 May 2013, at A1.

⁷⁹ E. Barry and R. Gladstone, 'Russia Says Syrian Plane Impounded by Turkey Had Radar Gear, Not Arms', *New York Times*, 13 October 2012, at A6 (reporting on Turkey's confrontation with Russia concerning Russia's supplies to Syria); S. Erlanger, 'Merkel and Sarkozy Share Anger Over Syria Stalemate and Urgency Over Greece', *New York Times*, 7 February 2012, at A12 (reporting that Western leaders publicly criticised Russia); R. Gladstone and A. Lowrey, 'Amid Reports of a New Massacre, Nations Seek to Step Up Pressure on Syria', *New York Times*, 7 June 2012, at A8 (reporting on US pressure); N. Kulish and N. MacFarquhar, 'Putin Rejects Intervention But Fears Civil War in Syria', *New York Times*, 2 June 2012, at A8 (reporting on French and German pressure); N. MacFarquhar, 'Residents Flee Damascus as Battle Enters its Fifth Day', *New York Times*, 20 July 2012 (reporting on UK pressure).

⁸⁰ J. Kanter, 'China Assures Europe on Debt Aid', *New York Times*, 21 September 2012, at A11 (reporting on pressure from the European Union); S.L. Myers and J. Perlez, 'No Movement on Major Disputes as Clinton Meets with Chinese Leaders', *New York Times*, 6 September 2012, at A10 (reporting on US pressure).

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.

3.2.4 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 realising 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 the 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.⁸¹ However, the claim is still of questionable authority and has not been especially effective in practice.⁸² The ICJ recognised in its *Wall* advisory opinion that duties under the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸³ – which include duties to respect and protect but are paradigmatically duties to fulfill – are ‘essentially territorial’.⁸⁴ Further, developed states have consistently resisted the idea that they are obligated to give foreign

⁸¹ CESCR, ‘General Comment No. 15 (2002): The Right to Water’, UN Doc. E/C.12/2002/11 (20 January 2003), paras. 30, 34; Office of the UN High Commissioner for Human Rights, ‘Report on the Relationship Between Climate Change and Human Rights’, UN Doc. A/HRC/10/61 (15 January 2009), paras. 84-85. See also Salomon, ‘How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World’, n. 52, this volume at ____.

⁸² De Schutter, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, n. 43, at 1094: ‘disagreement persists as to the legally binding nature of the obligation of international cooperation as expressed in the [ICESCR]’.

⁸³ See n. 42.

⁸⁴ *Wall* advisory opinion, n. 44, para. 112.

assistance.⁸⁵ Although these states sometimes endorse the idea that 0.7 percent of their gross domestic products ought to go to development aid, few states have actually achieved that goal.⁸⁶

Aid for R2P looks a lot like human rights and development aid. For example, the UN 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.⁸⁷ These proposals are unlikely to gain legal traction simply by linking them to R2P. On the contrary, the experience with the UN Millennium Development Goals demonstrates that developed states resist the claim that foreign 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, in the end, substantial.

For this duty to have any prospect of success, it must identify the grounds for holding specific tightfisted states responsible. 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. For example, an outside state might be responsible for not helping a population if the state contributed to the risk of atrocities breaking out 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.

⁸⁵ See, e.g., Commission on Human Rights, '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', UN Doc. E/CN.4/2005/52 (10 February 2005), para. 76; P. 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' (2005) 27 HRQ 755, at 777.

⁸⁶ See Millennium Development Goal (MDG) Gap Task Force Report 2012, 'MDG 8: The Global Partnership for Development: Making Rhetoric a Reality', at 10, Fig. 2, (UN, 2012).

⁸⁷ See UNSG, 'Implementing the Responsibility to Protect', n. 2, paras. 28-48 (discussing proactive measures for satisfying R2P's objectives).

4. Conclusion

This Chapter 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 organisations, 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 UN Secretary-General's reports on 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. That level of commitment might not exist. But if it does – and there is some reason for optimism – then R2P should offer a vision that resonates with different actors and can actually gain legal traction.