

THIRD STATE OBLIGATIONS AND THE ENFORCEMENT OF INTERNATIONAL LAW

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I. INTRODUCTION

When one State violates the legal rights of another, what (if anything) are third States legally obligated to do? Is there some general duty to come to the aid of the State whose rights were violated? What if it is in the third State's interest to support the State that committed the wrong?

Faced with such situations, Louis Henkin once observed, States typically do nothing:

For most international norms or obligations there is no judgment or reaction by the community to deter violation. The ordinary violation of law or treaty is not yet a "crime" against the society to be vindicated by the society. It is unusual for nations not directly involved to respond to a violation even of a widely accepted norm—say, Egypt's alleged violation of the immunities of French diplomats in 1961.¹

Henkin did not seem concerned about communal passivity in the face of sister-State violations. Nor did he address the possibility that, if a third State supported the violator, then this might count as somehow compounding the violation. Most other international law scholars take essentially the same position—to the extent that they address the issue at all.²

1. LOUIS HENKIN, *HOW NATIONS BEHAVE* 58 (2d ed. 1979).

2. For a discussion of the conventional position in contemporary international law, see *infra* notes 38–84, 97–101 and accompanying text. The standard situations where the obligations of non-parties are already taken into account include protection of human rights, rights of refugees, rights of peoples to self-determination, and the prevention of mass atrocities. Monica Hakimi, *State Bystander Responsibility*, 21 *EUR. J. INT'L L.* 341, 342–44 (2010).

Jonathan Charney—one of the few scholars that addressed issues about third States—argued forcefully against the existence of third State obligations. See Jonathan I. Charney, *Third State Remedies in International Law*, 10 *MICH. J. INT'L L.* 57, 101 (1989) (arguing that “[d]espite the values of more aggressive law enforcement, the international legal system might not tolerate a substantial expansion of international law remedies to give third states a significant role” and cautioning that, “[u]ltimately, such third state remedies might erode, rather than enhance, obedience to the rule of law.”) However, Charney's article is primarily concerned with the question of when third States' remedies are *permissible*. That question is very different.

International legal theorists have always had substantial interest in what can be called the “first party” question: whether States themselves are obliged to obey international law.³ But discussion of non-party responsibilities—what we analyze here as “third State” obligations—is very limited.⁴ There are a small number of exceptional situations (mostly involving human rights norms characterized as *jus cogens* or *erga omnes*) where non-parties are already recognized as having affirmative legal obligations to become involved; but there are no general legal duties that apply across the board.⁵ This state of affairs presents something of a puzzle: If we assume that the parties to a conflict are bound by the international legal norms that govern the dispute, then why aren’t third States?

Third State obligations are potentially of immense importance. Consider these examples:

- Israeli settlements on occupied territory are widely understood to be illegal.⁶ The United States has chosen to continue substantial amounts of economic and military

To our knowledge, no scholar takes the position that we have adopted here, namely that there are general third State obligations to the victim, even in issue areas outside of the human rights context. Elena Katselli Proukaki has recently considered the role of the “non-injured State”—in our parlance the third State—in the enforcement of international law. Like Charney, however, she is interested in a different question, namely, whether or not third States have the *right* to take action. See generally ELENA KATSELLI PROUKAKI, *THE PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW: COUNTER-MEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY* (2010).

3. Among the many theorists that have engaged the question “is international law really law, and does it give rise to an obligation to obey?” are Anthony D’Amato, *Is International Law Really “Law”?*, 79 Nw. U. L. Rev. 1293, 1293 (1985) and J. L. BRIERLY, *THE LAW OF NATIONS* 68-69 (Humphrey Waldock ed., Oxford University Press 1963).

4. For an explanation about the terminology we employ, including the terms “non-party obligations,” “third State obligations,” “State bystander obligations” and “first party obligations,” see *infra* notes 36–43 and accompanying text.

5. See *infra* notes 51–63 and accompanying text.

6. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 120 (Jul. 9) (finding that Israel breached international law by constructing Israeli settlements in the Occupied Palestinian Territory).

aid despite Israel's continued building.⁷ Does the continuation of American aid to Israel violate any international legal obligation to help minimize violations of international law? If the United States is basing its decision purely on internal political considerations, is that unlawful?

- Several States and the United Nations had advance warning of the 1994 Rwandan genocide and took no action; appeals continued to go out during the killing but were largely ignored.⁸ To what extent did these States have a legal obligation to step in?
- When Iraq invaded and attempted to annex Kuwait in 1991, the United States lost no time preparing its military response. Did the United States (or any other States) have a legal obligation to assist Kuwait?⁹ Might there have been some other kind of obligation?

In situations like these, the victim's calls for help cannot be met as they might be in the domestic context, by saying "call the police" or "take it to court." These options are rarely available internationally.¹⁰

7. The aid given by the United States to Israel is in the order of \$3 billion in grants annually. JEREMY M. SHARP, CONG. RESEARCH SERV., RL 33222, U.S. FOREIGN AID TO ISRAEL 22 (2010).

8. For an account of the failure of the international community in general and the United Nations in particular, *see generally* PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998); ROMEO DALLAIRE AND BRENT BEARDSLEY, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2003).

9. *See* President George H.W. Bush, Address to Joint Session of Congress After the End of the Gulf War (Mar. 6, 1991) (transcript available at <http://www.nytimes.com/1991/03/07/us/after-war-president-transcript-president-bush-s-address-end-gulf-war.html>) ("The recent challenge could not have been clearer. Saddam Hussein was the villain, Kuwait the victim. To the aid of this small country came nations from North America and Europe, from Asia and South America, from Africa and the Arab world, all united against aggression."). Countries coordinated to pay the war effort to assist Kuwait, with the Japanese and German governments raising tax rates in their respective countries to raise their share of the contributions. David E. Rosendaum, *War in the Gulf: Financing; U.S. Has Received \$50 Billion in Pledges for War*, N.Y. TIMES, Feb. 11, 1991, <http://www.nytimes.com/1991/02/11/world/war-in-the-gulf-financing-us-has-received-50-billion-in-pledges-for-war.html>.

10. International courts can assert jurisdiction only by the method of state consent. For example, article 36 of the Statute of the International Court of Justice defines its competence in terms of consent, expressed either

Understandably, the victim typically feels that the legal merit of its claim entitles it to the world community's support. The third States to which it appeals, on the other hand, feel absolutely within their legitimate prerogatives in ignoring the legal merits and pursuing their own national interests. The victim thinks that the key issue is what international law says about the merits of its claim, but the third States deny that international law has anything useful to contribute. The victim and the third State are speaking different languages: the latter the language of international power politics and the former the language of international law.

Our position is that international law does have something important to say about third State obligations. Non-parties, in our view, are under a legal obligation not to contribute to another State's violation of international law.¹¹ This obligation is satisfied if either the third State has no involvement at all in the dispute or it is involved on the side of the victim. This position is grounded on the substantive international law that gives the victim its rights—the norm that is being violated—together with doctrines regarding State responsibility of “secondary” actors.¹² This approach is quite different from the closest existing analog—what we call the “State bystander” model—which is limited to specific issue areas, such as human rights, and which rests on debatable premises concerning affirmative obligations.¹³

In making our case, we first sketch the basic contours of a general theory of third State obligations and then assess State bystander models, under which somewhat similar obligations are already recognized.¹⁴ We next identify the practical and theoretical problems that might seem to plague any proposal to assign legal responsibilities to non-parties.¹⁵ We show that

in a treaty agreeing to I.C.J. jurisdiction as a general matter, a special agreement to take the particular case to the I.C.J., or as part of the substantive agreement that created the legal right in the first place. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1031.

11. See *infra* text accompanying notes 100–02.

12. See *infra* text accompanying notes 108–22.

13. For a summary of these areas and a defense of what we call the “State bystander” model, see Monica Hakimi, *State Bystander Responsibility*, *supra* note 2; see *infra* notes 36–53 and accompanying text.

14. See *infra* text accompanying notes 22–50.

15. See *infra* text accompanying notes 103–06.

third State obligations, as we have defined them, are less vulnerable to these challenges than extending the existing State bystander models to cover a wider range of issue areas.¹⁶

The influence that a powerful State has through its control over the conduct of third States is probably as great as, or even greater than, the influence it exerts through its own direct compliance with international standards.¹⁷ General recognition of third State obligations could, for this reason, contribute greatly to an atmosphere of obedience of law. The challenges ahead are to show where third State obligations fit in the general theoretical framework of international law and why they should be recognized and respected by the international community.

II. GENERAL OBSERVATIONS ABOUT THIRD STATE OBLIGATIONS

Although rarely addressed directly in either case reports or scholarly literature, there is an implicit assumption in international law that community action in response to international law violations is above and beyond the call of duty.¹⁸ Taking the side of the violator is not itself a violation, and neither is failure to act at all. In specific situations, an authoritative institution such as the UN Security Council can instruct the international community to take measures against some violator.¹⁹ But in such cases, the obligation to take action arises from the fact that the Security Council has spoken, rather than from general principles of international law alone. Legal obli-

16. See *infra* text accompanying notes 97–101.

17. See *infra* text accompanying notes 33–34.

18. In certain substantive areas exceptions are made; for an examination of the problems of genocide and related violations, see *infra* notes 44–53 and accompanying text.

19. See U.N. Charter art. 41–45 (dealing with mandatory measures that may be taken by the Security Council); *id.* art. 94 (“If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”); *id.* art. 2, para. 6 (“The Organization and its Members, in pursuit of the Purposes stated in article 1, shall act in accordance with the following Principles The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”).

gations do exist to respond to human rights crises or comparable situations; but these are understood to be exceptional cases of limited relevance that do not disprove the general rule.²⁰

The third State obligations proposed here are not limited to particular substantive areas, such as human rights or humanitarian law. Without denigrating the importance of these substantive areas or their need for special treatment, we argue that a separate obligation arises with regard to international substantive law more generally. The third State obligations with which we are concerned prohibit one State from contributing to another State's violation. A State may take the side of the innocent party, or may remain completely on the sidelines, but is not entitled to facilitate, support, or encourage the violation of international law. Third State obligations require that if a State does get involved, it should be on the side of the victim.

A. *Third State Obligations: The Basic Case*

States have traditionally been thought only to have legal responsibility for another State's injuries when they were the

20. See *infra* text accompanying notes 36–53; See also Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 154–55, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter ILC Report (2001)]. Paragraph 9 of the introductory comment to Chapter IV (Responsibility of a State in Connection with the Act of Another State) reads:

It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State Secondly, special obligations of cooperation in putting an end to an unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

violator of the other party's substantive legal rights; it was not enough simply to be in a position to assist the victim.²¹ States were not thought to have legal interests of their own in the lawful treatment of other States; self-interest in obtaining vindication of their own rights was the extent of their legitimate concern. Neither failure to come to a State's aid when its rights were violated, nor actually taking the side of the rights violator, was considered a violation of international law. It follows that a non-party has the complete discretion to make its decision how to act based on its own national interests and to turn a deaf ear on the victim's pleas for help. It is free to attach conditions or demand concessions in exchange for helping the victim vindicate its rights; or it may choose to side with the violator; or it may just do nothing.

Our proposal for third State obligations attaches considerable importance to the expectations of the victims of legal violations; it justifies doing so through appeals to rational self-interest in long-range community lawfulness. From this perspective, third States have legal obligations of their own: most importantly, the obligation not to contribute to violations of the victim's legal rights.

21. The liability of States for wrongful acts is the subject of the International Law Commission's Articles on State Responsibility. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 43, U.N. Doc. A/56/10; GAOR, 5th Sess., Supp. No. 10 (2001) [hereinafter Articles on Responsibility of States (2001)]. A State is responsible for its own acts or acts "attributable to" it. According to article 1 ("Responsibility of a State for its internationally wrongful acts"), "Every internationally wrongful act of a State entails the international responsibility of that State." *Id.* Article 2 ("Elements of an internationally wrongful act of a State") provides:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Id. Chapter IV deals with "Responsibility of a State for Acts Undertaken in Connection with Another State." *Id.* art. 16–19. As will be discussed below, such responsibility is limited and does not generally entitle the victim to assistance. See *infra* text accompanying note 68.

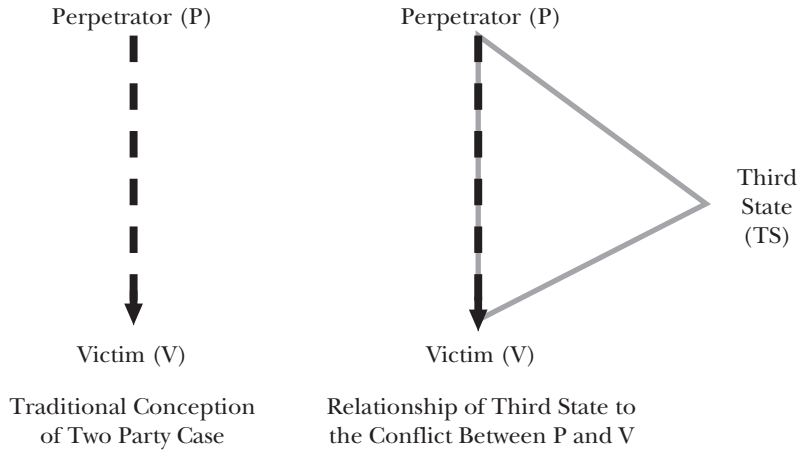
1. *First Party and Third State Perspectives*

States, generally speaking, have two different means of supporting international law. The first is direct: a State respects international law in its own dealings with other States. In the discussion below, we refer to this direct responsibility as involving the State's "first party" obligations: international law obligates every State to comply with the duties placed on it by substantive international legal norms.

The second is indirect: a State respects international law by basing its positions on disputes between other States on what international law requires. We argue that, in certain circumstances, there is a legal obligation to ascertain and respect the legal rights of the innocent party, and we refer to these responsibilities as "third State" obligations. We do not call these "third party" obligations—which would be parallel with "first party" obligations—because, although the first State is truly a party to a dispute, the third State is not, strictly speaking, a party. The terminological difference between "third State" obligations and "first party obligations" is intended as a reminder that, under conventional approaches, the position of the third State is distinct from the position of the parties to the dispute. Third State obligations deal with a State's responsibility in a dispute involving two or more other States, in which one or more of the others is claimed to have violated international law. The test that we propose is that the third State should not contribute to the problem by facilitating, encouraging, or otherwise supporting another state's commission of a violation of international law.

Diagram 1 is a schematic depiction of how the general party structure of third State obligations (right side) compares to the standard two-party structure of a dispute as traditionally understood (left side). For both, the first party is the perpetrator ("P")—a State that is alleged to be doing something contrary to international law. Next is P's victim or set of victims ("V") whose substantive interests international law was designed to protect. The victim might be either a State or an individual; although, historically, international law was con-

cerned exclusively with disputes between States, this is no longer the case.²²



Third State obligations diverge from the standard two-State structure through the addition of one further element: a State or group of States (“third States,” or “TS”), whose own legal rights are not at stake but who might have some influence in preventing or stopping P’s unlawful action against V. TS’s relationship with V potentially involves a duty to assist; TS’s relationship with P potentially involves a duty to pressure, threaten, or otherwise induce it to conform its behavior to the requirements of international law. Although TS did not cause the problem of P’s violation of international law, and TS may not stand to gain directly from P being brought into compliance, the principle of third State obligations could put a potentially serious responsibility on it to assist in defending V against P’s violation.

These third State relationships are essentially a byproduct of a dispute over what legal obligations exist as between P and

22. MALCOLM N. SHAW, *INTERNATIONAL LAW* 232 (5th ed. 2003) (noting, “individuals have become increasingly recognized as participants and subjects of international law . . . primarily but not exclusively through human rights law”). See also Giorgio Gaja, *The Position of Individuals in International Law: An ILC Perspective*, 21 *EUR. J. INT’L L.* 11, 11–14 (2010) (discussing the ILC’s recognition of individual rights under international law).

V.²³ They do not alter or replace first party legal obligations and are not inconsistent with them. Nor do they interfere with the small number of provisions, which we will discuss below, by which special obligations to become involved are created in particular substantive legal instruments.²⁴ Third State obligations are more an addition to standard international discourse than a replacement. First party obligations are not affected by this addition, and the compliance or noncompliance of third States with their own third State responsibilities does not excuse the State whose unlawful conduct caused the violation in the first place.

2. *The Normative Basis of Third State Obligations*

Third party obligations to support the enforcement of international law reflect the principle that States have an interest in the general lawfulness of the international community, even when their own rights are not directly and immediately implicated. This interest that States all have in a general climate of lawfulness justifies the burden that they all share of contributing to the community's general security and the rule of law.

The assumption of a shared interest in lawfulness is neither naïve nor irrational. The degree to which international law is respected affects the security and stability of all States, no matter how self-sufficient and well-insulated from conflict they might otherwise appear. The consequences of a conflict are not limited to the States that are technically the legal parties to it; conflict is likely to affect neighbors, trading partners, and any other States with strong relationships to one or both sides of the dispute. It is obvious that States benefit generally from international stability and the rule of law, and suffer generally from political chaos and war.

History abounds with examples of the consequences that follow when the international community ignores victimization. Among the more notorious examples are the appeasement of Hitler and the refusal of the League of Nations to act

23. Third State obligations are, by definition, obligations that arise when some other State is engaged in a violation of international law. For a third State obligation to exist, that is to say, some other State must be violating international law, meaning that the other State must have a first party obligation.

24. *See infra* text accompanying notes 44–53.

upon Mussolini's invasion of Ethiopia, both at the start of the Second World War.²⁵ Also familiar are the consequences of unwillingness to make a strong stand in favor of human rights at the outset of a massive violation, when a small show of power in service of principle would be effective. The Rwandan genocide and the wars in the former Yugoslavia are famous failures of the international community to take seriously its obligation to act.²⁶

Even without the aid of historical examples, however, the consequences of treating assistance to victims of lawlessness as optional are easy to predict. Small or powerless States are systematically disadvantaged because they have no one to turn to when larger and more powerful ones violate their rights. Powerful States demand concessions (in effect, side payments) when smaller States need assistance in vindicating what is legally owed to them. Leaving victimized States to their own devices effectively privatizes international law enforcement, and it is to be expected that (as with any other privatization) the quality of the final product that a State receives will be a function of the power and wealth that the State already has.

Third State obligations, like first party obligations, are explicable in terms of the basic logic of collective action.²⁷ While

25. For a discussion of the failure of the League of Nations to deal effectively with the Italian invasion of Ethiopia, see Q. Wright, *The Test of Aggression in the Italo-Ethiopian War*, 30 AM. J. INT'L L. 55–56 (1936), and J. Spencer, *The Italian-Ethiopian Dispute and the League of Nations*, 31 AM. J. INT'L L. 614 (1937), both cited in LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 323 n.368 (1995). See also Orde F. Kittrie, *Progress in Enforcing International Law Against Rogue States?: Comparing the 1930s with the Current Age of Nuclear Proliferation*, in *PROGRESS IN INTERNATIONAL LAW* 679 (Russell A. Miller & Rebecca M. Bratspies eds., 2008) (noting that the failure of the international community and the League of Nations in enforcing international law “against Germany, Italy and Japan contributed to World War II’s 60 million deaths in six years”).

26. See generally GOREVITCH, *supra* note 8, (detailing the 1994 Rwandan genocide); CHRISTOPHER BENNETT, *YUGOSLAVIA’S BLOODY COLLAPSE: CAUSES, COURSE AND CONSEQUENCES* 236 (1995) (concluding that, “[i]n retrospect, it is difficult to envisage a worse strategy towards the Yugoslav wars than that the international community has thus far pursued. . . . [I]nternational attempts to halt the fighting have been farcical.”).

27. For development of the basic logic of collective action in the context of the international law of first party obligations, see ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE ANALYSIS* 68 (2008) (citing “multilateral environmental agreements (where the harms of noncompli-

States all benefit from general lawfulness, individual States generally lack sufficient incentive to comply on their own. Each would prefer that the burden of producing the “public good” of general lawfulness be borne by someone else.²⁸ As a result, a suboptimal quantity of the good is produced: there is too much lawlessness and too little compliance. All States, therefore, benefit from creation of a legal system and an enforcement structure to ensure compliance with its norms.²⁹

International law is notoriously problematic for its absence of a formal centralized sanctioning scheme.³⁰ One can question how such a faulty mechanism can ensure sufficient enforcement to resolve collective action problems and overcome States’ enticements to “cheat.” But third State obligations are not necessarily any worse off in that regard than first party obligations. Given that the reasons for having some form of third State obligations are essentially the same as for first party obligations, it can be argued, a *prima facie* case exists for treating the two as comparable.

3. *Third State Influence on International Law*

It seems entirely likely that a powerful State’s greatest contribution to international law occurs through pressure or persuasion directed towards other States’ conduct, rather than through the direct effect of its own compliance. When a powerful State complies with international law, this fact may go

ance are truly felt by many states), human rights agreements, and many multilateral arms control agreements” as examples of the provision of public goods being suboptimal because of the collective action problems involved and because “threats of reciprocal withdrawal of compliance and threats of retaliation . . . normally lack credibility”).

28. *See id.* at 65, 68 (noting that when public goods are involved, collective action problems become harder to overcome even with the traditional tools of retaliation and reciprocity).

29. Indeed, even the third State that wrongfully contributes to other States’ violations of their obligations may have an interest in lawful behavior, because the more States that violate the norm, the more likely that its status as international law will erode. The third State simply deems its assistance to the violator to be a higher priority than maintaining norms of international law. The authors thank Carlos Vazquez for his helpful discussion of this point.

30. Anthony D’Amato, *supra* note 3, at 1293 (1985) (noting that lack of effective enforcement mechanisms is the main criticism levied against international law).

unnoticed or may be taken for granted and not attributed to the State's respect for its obligation to obey. However, when it uses its influence over other contrary-minded States to pressure them to comply, the attempt to change their behavior is likely to be more visible. In such situations, the demonstration effect can be considerable.³¹

For example, when the United States complies with its obligations under international human rights law, this fact may go unnoticed and unremarked.³² Given its role in proselytizing the promotion of "human rights" and "democracy" around the world, the United States' compliance with its own human rights obligations is usually taken as a given. Decisions impacting human rights are likely to be made within government channels, so that there is little or no reason that other members of the international community would even know that noncompliance was under consideration.

The opposite is true when the United States sets out to influence other States to comply, as exemplified in the cases of North Korea, China, or Iran. If nothing else, there are many more of these other States, increasing the probability that in at least one such case the pressure will be visible to the rest of the world. Noncompliance, in particular, often precedes U.S. attempts at influence, thus drawing attention to the problem. The human rights records of North Korea, China, and Iran have been fully aired in the American media. American attempts at pressure have been fought out publicly in the international arena, rather than behind closed doors in the top echelons of the U.S. government.³³ When unfriendly States

31. Needless to say, the demonstration effect will be considerably watered down when there is serious dispute over the facts. For example, if the third State defends its unwillingness to pressure an alleged violator by denying that there was a violation, and if the average State is unwilling or unable to make an accurate factual determination on its own, then it will be difficult for that average State to draw correct conclusions about the commitment of the international community (more specifically, the commitment of the third State) to show respect for the substantive rule in question.

32. Unfortunately, failure of the United States to comply can be extremely visible and for that reason quite influential. The Guantanamo detainee cases and torture of terror suspects ("enhanced interrogation techniques"), illustrate how the United States has set a bad example for repressive regimes around the world.

33. Discussions of how the United States aims to influence respect for human rights in the rest of the world is the mainstay of news outlets from

such as Iran or North Korea are treated one way, while allies such as Saudi Arabia are treated another, the dissonance may be particularly visible.³⁴ The perception of general lawfulness suffers from inconsistent treatment and recovers if consistency is restored; the important point is that the evidence of consistency or inconsistency is relatively available publicly.

Powerful States, including the United States, have an important effect on international law when they evenhandedly pressure or cajole less powerful States to comply. Purporting to act as global hegemon, the United States has a moral obligation to use its authority consistently and for the good of the international community.³⁵ The function of third State obligations is to promote community lawfulness as a general matter, for the benefit of both the victim and also the remaining States of the world. The closest analogs in contemporary law and theory—what we refer to as “State bystander” approaches—while serving an important function, are very different.

B. *The Current State of International Law and Theory:
“State Bystanders”*

Because contemporary international law places considerable importance on protecting individuals from state abuse, the question of whether there is an obligation to assist victims of genocide and similar crimes has received substantial attention.

television stations to various types of electronic media. A simple Google search brings up thousands of news items on the subject.

34. See, for example, the inconsistent and selective responses of the United States and European Union members to the revolutions in the Middle East and North Africa. Although these do not exactly fit our “third State” obligations model, they are illustrative of the phenomena with which we are dealing here. The response by the United States and European Union to the events that are still unfolding in the Middle East and North Africa illustrates the demonstration effects that we refer to here and the doubts raised as to the seriousness of the countries involved about their commitment to the enforcement of international law. See, e.g., Ian Black, *Barack Obama Signals Selective Response to ‘Arab Spring’: President Declares Support for Human Rights in Middle East Speech but Makes No Mention of Saudi Arabia*, THE GUARDIAN, May 19, 2011, <http://www.guardian.co.uk/world/2011/may/19/barack-obama-response-arab-spring> (highlighting Obama’s inconsistent treatment of Saudi Arabia and Syria).

35. LEA BRILMAYER, *AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE-SUPERPOWER WORLD* 112–40 (1994) (arguing that “American leadership in the post-Cold War period should be treated as a public good”).

The issue is therefore a familiar one to legal scholars, philosophers, political scientists, and foreign policy decision makers.

A point on terminology may be helpful here. The question of obligations to assist in protection of human rights has, until recently, been addressed in literature most frequently under the rubric of “humanitarian intervention.”³⁶ The reason that we do not adopt this terminology, despite its considerable usefulness, is that discussions of humanitarian intervention do not necessarily deal with the legal obligation to assist in the vindication of the victims’ legal rights. Instead, they tend to revolve around the impingement on the violator State, whose sovereignty may be threatened by the “humanitarian intervention” under consideration.

A more descriptive term for present purposes was recently coined by Monica Hakimi: “State bystander” obligations.³⁷ We adopt her terminology by referring to existing conventional approaches as the “State bystander model.”³⁸ The State bystander model competes with our own proposed approach—“third State model”—as the explanation for what we call “non-party obligations.” “Non-party obligations” is the general term referring to the obligations of all states that are technically not parties to the dispute.

Using this “State bystander” terminology, Hakimi usefully summarizes the existing rules governing failure to act in the face of human rights violations. Identifying those areas where substantive international law already imposes State bystander obligations to protect individuals from abuse, she lists:

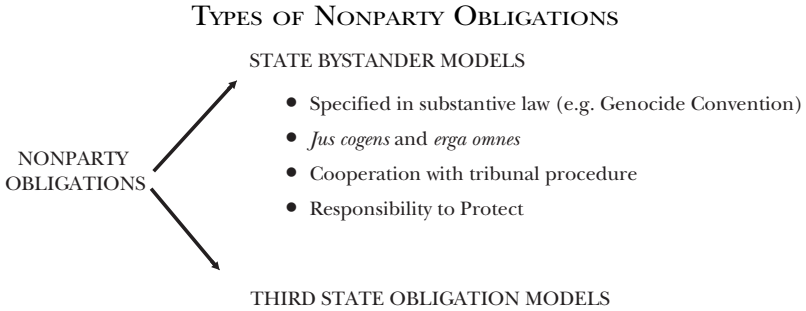
- obligations of States not to forcibly return people to their home countries where they may face harm (*non-refoulement*);³⁹

36. See generally Gareth Evans & Mohamed Sahnoun, *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, INT’L DEV. RES. CTR. (2001) (discussing the right of humanitarian intervention); Stephen P. Mark & Nicholas Cooper, *The Responsibility to Protect: Water-shed or Old Wine in A New Bottle?*, 2 JINDAL GLOBAL L. REV. 86 (considering adoption of the responsibility to protect at the 2005 World Summit).

37. Hakimi, *supra* note 2.

38. See *infra* notes 39–43 and accompanying text.

39. Hakimi, *supra* note 2, at 343 nn.8–9 (citing conventions relating to torture, status of refugees, cases decided in national courts according to these conventions and Human Rights Committee reports and communications).



- obligations to protect people against acts of genocide by or in another State and against conduct that violates self-determination of peoples;⁴⁰
- obligations of States to protect persons from abuses committed by private actors;⁴¹
- responsibility to protect foreign nationals from injury by private parties;⁴² and
- obligations emanating from the concept of the “Responsibility to Protect.”⁴³

We divide these “State bystander” issues into four categories, which will be discussed in the following sections. First are obligations that emanate from specific substantive laws, such as the Genocide Convention. Second are *jus cogens* norms and norms *erga omnes*. Third are norms requiring third States to cooperate with international tribunals; and the fourth includes the newly recognized category of “Responsibility to Protect.” There is a fifth category as well, but it is considerably less well established than the first four. We examine, but ultimately do not include, the argument that some states of affairs are null and void because of their unlawful origin.

40. *Id.* at 343 nn.10–11 (citing International Court of Justice determinations).

41. *Id.* at 342 nn.5–7 (citing human rights and “criminal law” treaties as well as reports and communications of human rights treaty bodies relating to elimination of discrimination against women, elimination of racial discrimination, rights of the child, rights of migrant workers and their family members, rights of persons with disabilities, suppression of unlawful acts against aviation safety, and suppression of terrorist bombings).

42. *Id.* at 342 nn.3–4 (citing academic secondary sources).

43. *Id.* at 343 n.12 (noting that the “Responsibility to Protect” has State, UN, NGO and scholarly support).

1. *Obligations Emanating from Human Rights Instruments*

The first example of something akin to third State obligations is the duty to help enforce that is inserted into particular substantive rules. Certain human rights instruments, typically a small number of the most important norms of human rights and humanitarian law, contain within them specific provisions for involvement by State bystanders.⁴⁴

The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 may be the best example. Article 8 provides:

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.⁴⁵

Article 8, as written, does not explicitly impose obligations to take positive action to enforce compliance, even on the States parties; its provisions merely authorize States parties to the Convention to “call upon the competent organs of the United Nations.” States parties are required only to include within the scope of their extradition law persons suspected of committing the crime of genocide, and to remove the crime of genocide and other enumerated acts from the category of political crimes “for the purpose of extradition.”⁴⁶

44. *See id.* at 342–44 (enumerating state obligations in specific provisions). We use the term “Human Rights Instruments” to refer to a range of international legal instruments including the traditional human rights conventions and covenants, international humanitarian law and international criminal law instruments.

45. Convention on the Prevention and Punishment of the Crime of Genocide art. 8, *opened for signature* Dec. 9 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

46. Article 7 reads

Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Id. see also W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT’L L. 57 (2008) (arguing that most of the articles of the Genocide Convention concern punishment rather than prevention of murder).

The right to call upon competent organs of the UN, obviously, existed prior to the Genocide Convention. It is, therefore, not entirely clear what this provision adds. Michael Reisman laments that “Article 8 was a timid and contingent treatment of the issue of preventing genocide” and observes, “[c]onsidering the gravity of the offense, it is astonishing that no provision in the Genocide Convention imposed an obligation *erga omnes* on each State party to act meaningfully to prevent or suppress acts of genocide.”⁴⁷

The International Court of Justice has somewhat extended the obligation of States under the Convention, enlarging the resulting responsibility for failure to assist. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court held Serbia liable for “fail[ing] to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention.”⁴⁸ The Court predicated its holding on the fact that Serbia was a party to the Dayton Agreement and a member of the United Nations⁴⁹ and explained the obligation to punish the crime of genocide in terms of article 1 and article 4 of the Genocide Convention.⁵⁰

Another provision widely regarded as requiring third States to assist in enforcing compliance with norms of international law is article 1 of the Fourth Geneva Convention. It pro-

47. Reisman, *supra* note 46, at 63.

48. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, ¶ 450 (Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

49. *Id.* ¶ 449.

50. Regarding the Srebrenica massacres, which took place outside the territory of Serbia, the Court held that “an obligation to try the perpetrators of the Srebrenica massacre in Serbia’s domestic courts cannot be deduced from Article VI.” *Id.* ¶ 442. The Court goes on:

Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

The Court also found that the Respondent was in breach of its obligation to cooperate with the International Criminal Tribunal for the Former Yugoslavia (ICTY). See *infra* note 72 and accompanying text.

vides “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”⁵¹

It is unclear from the text whether article 1 was actually intended by its drafters to impose on States the duty to ensure compliance by other States. That interpretation, however, is widely accepted today. Giorgio Gaja writes:

Although the original meaning of this provision was arguably not that of imposing on a State a duty to ensure compliance by other States, the currently prevailing view, which is shared by the International Committee of the Red Cross, is that Article 1 imposes on States parties also the duty to ensure that other States comply with their obligations under the Convention.⁵²

The ICJ has endorsed this interpretation of the Convention in the *Wall Advisory Opinion*, declaring the illegality of an Israeli-built separation barrier that encroached on Palestinian territory, holding that,

All the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.⁵³

The Geneva and Genocide Conventions are almost unique in the special provisions they make for non-party affirmative duties. To generate a comparable obligation for norms without

51. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 75 U.N.T.S. 287.

52. 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* 33 (Maurizio Ragazzi ed., 2005).

53. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 159 (July 9). The ICJ was requested by the United Nations General Assembly to give its advisory opinion on the legal consequences of the construction of a wall by Israel in the Occupied Palestinian Territories by a communication from the Secretary-General of the United Nations pursuant to the United Nations General Assembly Resolution ES-10/14 adopted on 8 December 2003.

such special provision, one must turn to general doctrines of international law: *jus cogens* or obligations *erga omnes*.

2. *Peremptory Norms and Obligations Erga Omnes*

Somewhat similar in effect to this first group, obligations emanating from human rights instruments, are two other special categories of rules. The categories are, first, those which “[b]y their very nature . . . are the concern of all States”—norms *erga omnes* and, second, norms from which no derogation are allowed—*jus cogens* norms.⁵⁴ For norms that fall into either or both of these categories, bystander obligations are generated more or less automatically, without the need for the sort of separately expressed provisions contained in the Genocide and Geneva Conventions.

A peremptory, or *jus cogens*, norm is one that is understood by the international community as not permitting derogation. The norms most commonly cited as falling into this category are: the prohibitions of genocide, piracy, slaving and slavery, torture, and wars of aggression or for territorial expansion. Enforcement of peremptory norms is addressed in Chapter III of the International Law Commission’s Articles on State Responsibility.⁵⁵ Article 41 provides that

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.⁵⁶

The Commentary to Article 41 elaborates somewhat:

Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could

54. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5) (internal citations omitted).

55. Articles on Responsibility of States (2001), *supra* note 21, art. 40–41. Chapter III of Part II is entitled Serious Breaches of Obligations Under Peremptory Norms of General International Law.

56. *Id.* art. 41.

possibly be involved, the provision does not prescribe in detail what form this cooperation should take.⁵⁷

A “serious” breach is defined in article 40 as one that “involves a gross or systematic failure by the responsible State to fulfill the obligation.”

Overlapping with this category of *jus cogens* norms is the category of obligations *erga omnes*. The concept of norms *erga omnes* dates to the *Namibia* advisory opinion,⁵⁸ in which the ICJ provided “[t]he first indication that in certain cases States have a duty to react to infringements of *erga omnes* obligations.”⁵⁹ In the well-known *Barcelona Traction* case the International Court of Justice defined the concept of norms *erga omnes* as follows:

By their very nature the former [obligations of a State towards the international community as a whole] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁶⁰

The precise characteristics of obligations *erga omnes* are disputed. For example, it is not entirely clear whether States are merely empowered to enforce *erga omnes* norms (as per *Barcelona Traction*’s assertion that “all States can be held to have a legal interest in their protection”⁶¹) or whether they are required to. There is likewise no consensus as to what specific norms carry with them obligations *erga omnes*. As examples of obligations *erga omnes*, the ICJ listed obligations deriving from “outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the

57. ILC Report (2001), *supra* note 20, at 286.

58. Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

59. Gaja, *supra* note 52, at 32.

60. *Barcelona Traction*, 1970 I.C.J. 3, ¶ 33 (internal citations omitted). The case was brought by Belgium on behalf of Belgian nationals, shareholders in a company incorporated in Canada, seeking reparations for damage allegedly sustained as a result of acts committed by organs of the Spanish state in contravention of international law. For a critical analysis of the ICJ’s interpretation of *erga omnes* in the *Barcelona Traction* case, see MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS Erga Omnes* 1–5 (2000).

61. *Barcelona Traction*, 1970 I.C.J. 3, ¶ 33.

human person, including protection from slavery and racial discrimination.”⁶²

The Court has not, in either these cases or others, identified the kinds of remedial measures third States are permitted or required to take in the event that *jus cogens* or *erga omnes* obligations are violated. In *Namibia*, the Court merely noted that, once declared illegal, a situation “cannot remain without consequence”:

A binding determination made by a competent organization of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end.⁶³

Similarly in the *Wall Advisory Opinion*, the Court indicated that “all States” had an obligation to see that “any impediment, resulting from the construction of the wall . . . is brought to an end”:

It is also for all States, while respecting the United Nations Charter and international law, to see to it

62. *Id.* ¶ 34 (citing Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 23 (May 28)). See also Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 29 (June 30) (stating in a dictum “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character . . .”, citing the *Namibia* and *Western Sahara* advisory opinions). However, the Court declined to rule on Portugal’s argument that since “the rights which Australia allegedly breached were rights *erga omnes* . . . Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner” on procedural grounds. *Id.* According to the Court:

[T]he *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.

Id. See, however, the dissenting opinion of Judge Weeramantry, arguing the opposite. *Id.* at 178 (dissenting opinion of Judge Weeramantry).

63. *Continued Presence of South Africa in Namibia*, 1971 I.C.J. 19, ¶ 117.

that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its rights to self-determination is brought to an end.⁶⁴

In the same paragraph, the Court stipulated that States were “under an obligation not to recognize the illegal situation . . . [and] not to render aid or assistance in maintaining the situation created by such construction”:

[T]he Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.⁶⁵

These principles were recognized as not being absolute; the Court qualified its holding by subordinating them to unspecified provisions in the United Nations Charter and “international law.”⁶⁶ The reference, presumably, is to articles 2(4) and 2(7) of the United Nations Charter, which prohibit threat or use of force and intervention in the domestic jurisdiction of States.⁶⁷ Other limitations regarding the suitability of certain remedies may also apply, such as the principle that one State’s breach of a human rights agreement does not entitle other States to breach in retaliation.⁶⁸ How much of a limitation

64. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 159 (July 9).

65. *Id.*

66. *Id.*

67. Article 2(4) states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, para. 4.

Article 2(7) states that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. Charter art. 2, para. 7.

68. See generally Lea Brilmayer, *From Contract to Pledge: The Structure of International Human Rights Agreements*, 77 BRIT. Y.B. OF INT’L L. 163, 164–65

these qualifications would impose, in practice, is unclear. In any event, obligations that meet the test of *erga omnes* or *jus cogens* may be the closest existing analogy to third State obligations.

3. *Obligations to Cooperate with International Tribunals*

The constitutive instruments of several international tribunals impose procedural obligations on States to cooperate with such institutions and their decisions. While some of these instruments impose such obligations only on States parties to the dispute, others apply more generally. The Statutes of the International Criminal Tribunal for the Former Yugoslavia and Rwanda, for example, require all members of the United Nations to assist the tribunals in the arrest and surrender of individuals suspected of committing the crimes falling under their jurisdiction.⁶⁹ They also empower the tribunals' Prosecutors to seek assistance from State authorities in conducting their functions.⁷⁰

(2006) (noting, "[the] exchange model of treaty relationships . . . is not well suited to human rights agreements."). See also Guzman, *supra* note 7, at 68. Human rights treaties are also unusual in that according to the ILC Articles on State Responsibility counter-measures are available only to the "injured state." See Articles on Responsibility of States (2001), *supra* note 21, art. 49–51. This result has been criticized as out of step with contemporary state practice. See Carlos Vazquez, *Trade Sanctions and Human Rights – Past, Present, and Future*, 6 J. OF INT'L ECON. L. 797, 800 n.9 (2003); Charney, *supra* note 2, at 101.

69. See S.C. Res. 955, ¶ 2, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the ICTR adopted by the Security Council Resolution at its 3453rd meeting); S.C. Res. 827, ¶ 4, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the ICTY adopted by the Security Council at its 3217th Meeting). The two resolutions have identical wording, stating that the Security Council:

[D]ecides that all States shall cooperate fully with the International Tribunal and its organs . . . all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber.

70. Statute of the International Criminal Tribunal for Rwanda art. 17(2) (Investigation and Preparation of Indictment), 28 (Cooperation and Judicial Assistance) (originally adopted at S.C. Res. 955 annex, U.N. Doc. S/RES/955 (Nov. 8, 1994)); Statute of the International Tribunal for the Former Yugoslavia art. 18(2) (Investigation and Preparation of Indictment), 29 (Cooperation and Judicial Assistance) (originally adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), text at U.N. Doc. S/25704 at 36, annex

These two particular tribunals, however, were established in the distinctive context of the UN Security Council acting under Chapter VII of the Charter. It is therefore not possible to generalize from these examples to the authority of other international courts to order cooperation by States that are not party to a dispute. The authority of Chapter VII tribunals to compel cooperation was the subject of the Court's attention in the *Genocide* case, in which the ICJ found Serbia to be in breach of its obligations to cooperate with the ICTY. The Court formulated the issue in the following terms: "[I]s the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of the Security Council resolution which established it, or of some other rule of international law?"⁷¹ Even though Serbia was not found to have committed the crime of genocide itself, its failure to meet its obligations to prevent and to punish as well as to cooperate with the ICTY was sufficient to engage its international responsibility.⁷²

(May 25, 1993)). The relevant articles of the Statutes of the two tribunals have identical provisions.

71. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, ¶ 446 (Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

72. According to the Court, "the obligation [to prevent] is one of conduct and not one of result." *Id.* ¶ 430. The Court further explained, "a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible." *Id.*

In finding Serbia's failure to prevent, the Court considered as relevant whether Serbia had in its power the capacity to influence—to take reasonable measures. In assessing whether a State had the capacity to influence, two sets of criteria are involved: material and legal. According to the Court, the material aspect "varies greatly from one State to another", and "is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide." *Id.* The Court further elaborated:

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.

Id. The legal aspect, on the other hand, depends on what a State may do "within the permitted limits of international law." *Id.* Hence, the Court reasoned "a State's capacity to influence may vary depending on its particular

4. *The Responsibility to Protect*

Another obligation somewhat similar to the one that we propose is the so-called “Responsibility to Protect” (often referred to as “R2P”). R2P was first authoritatively enunciated by the International Commission on Intervention and State Sovereignty (ICISS) sponsored by the Canadian government.⁷³ ICISS was an ambitious attempt at codifying obligations on all States and the international community as a whole to assist in the enforcement of international norms when mass atrocities occur.⁷⁴ The R2P principle was later endorsed and adopted by the UN General Assembly in its World Summit Outcome document.⁷⁵

As with previous approaches to the obligation of non-parties, the focus is on the rights of individuals not to be abused by States, rather than on public international law generally. Paragraph 138 of the Outcome Document specifies the content of the obligation: “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.”⁷⁶ Paragraph 139 of the World Summit Outcome recites the obligations of the international community to “to use appropriate diplomatic, humanitarian, and other peaceful means . . . to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁷⁷

legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.” *Id.*

73. See Evans & Sahnoun, *supra* note 36.

74. *Id.*; See also Arpad Prandler, *The Concept of ‘Responsibility to Protect’ as an Emerging Norm Versus ‘Humanitarian Intervention’*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: Festschrift in Honour of Gerard Hafner (Isabell Buffard et al., eds. 2008).

75. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–40, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

76. *Id.* ¶ 138.

77. *Id.* ¶ 139. The full text of Paragraph 139 reads:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapter VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and deci-

Paragraph 139 then pledges States to take collective action through the Security Council. It also, as a general background matter, commits all States to support General Assembly consideration and State capacity-building to protect against these crimes.⁷⁸

In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁷⁹

Despite its lofty purpose and clear language, this principle suffers from the same challenges as faced by earlier formulations of a similar duty, the one commonly referred to as the theory of “humanitarian intervention.” Many commentators have

sive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

Id.

78. *Id.*

79. *Id.*

shown the difficulties of putting it into practice,⁸⁰ and for some it is “old wine in new bottles.”⁸¹

Finally, the Constitutive Act of the African Union (AU), successor to the Organization of African Unity (OAU), incorporates something akin to the principle of responsibility to protect. The Act recognizes

the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.⁸²

The Constitutive Act of the African Union is the first such instrument to expressly make allowance for such authority.

The authority has been exercised in a number of situations on the continent, albeit with mixed results.⁸³ However,

80. See, e.g., Mehrdad Payandeh, Note, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469 (2010) (arguing that Responsibility to Protect is a fluid and nebulous concept that cannot be characterized as a specific legal norm).

81. Mark & Cooper, *supra* note 36, at 86–130 (arguing that “[R2P] is not a radical departure on the role of international community regarding mass atrocities, but a codification of pre-existing concepts of ‘just war’ and humanitarian intervention, and a call to ensure their consistent application”). For further discussion by Gareth Evans, co-chair of ICISS and one of R2P’s foremost proponents, arguing that R2P is a new concept with much broader application than the traditional humanitarian intervention, see generally Gareth Evans, *The Responsibility to Protect: Holding the Line*, OPENDEMOCRACY, Oct. 8, 2008, <http://www.gevans.org/opeds/oped96.html> (discussing R2P’s emergence, acceptance, and need for reaffirmation and clarification); UN Press Conference, *The Responsibility to Protect*, July 23, 2009, YOUTUBE, http://www.youtube.com/watch?v=RS9bSUDW6b4&feature=Playlist&p=FF755F2208DE4CD6&playnext=1&playnext_from=PL&index=14 (discussing the General Assembly’s dialogue on R2P with a panel that included Noam Chomsky, Jean Brimont, and Ngugi wa Thiong’o). For a list of Gareth Evans’ publications, presentations and speeches, see <http://www.gevans.org/index.html> (last visited Feb. 1, 2011).

82. Protocol on Amendments to the Constitutive Act of the African Union, art. 4, Feb. 3–July 11, 2003, available at <http://www.au.int/en/content/protocol-amendments-constitutive-act-african-union>.

83. The AU has carried out intervention and peace keeping operations in Burundi, Somalia, Sudan, Comoros Islands and most recently in Ivory

all of the situations in which the African Union has intervened involved conflicts between various domestic actors; none involved violations of international law by one State against another.⁸⁴ Hence, it remains to be seen whether AU members would be willing to use this provision to enforce international law against their recalcitrant neighbors.

5. “Null and Void” States of Affairs

The *Namibia* and the *Wall* cases, discussed above, might be read as recognizing a fifth category, one that in principle applies to a broad range of substantive legal norms rather than only to human rights and humanitarian law. In some circumstances, it might be argued, the actions of a State are so completely contrary to international law as to have no legal effect.⁸⁵ If recognized, this fifth category would include all violations of international law that result in a “null and void” state of affairs.

Coast. See INST. OF SECURITY STUDIES, PEACE AND SECURITY COUNCIL Report No. 19, at 11–15 (2011), available at <http://www.iss.co.za/default.php>. In the Comoros Islands, the AU Members have conducted a military intervention, known as Operation Democracy, on the Comorian island of Anjouan. For a detailed description of the operations, see EMMA SVENSSON, THE AFRICAN UNION’S OPERATIONS IN THE COMOROS: MAES AND OPERATIONS DEMOCRACY (2008).

84. For an account of the AU’s interventions see Frederik Soderbaum & Bjorn Hettne, *Regional Security in a Global Perspective*, in AFRICA’S NEW PEACE AND SECURITY ARCHITECTURE: PROMOTING NORMS, INSTITUTIONALIZING SOLUTIONS 13, 19–23 (Ulf Engel & João Gomes Porto eds. 2010). See also JENNIFER L. DE MAIO, CONFRONTING ETHNIC CONFLICT: THE ROLE OF THIRD PARTIES IN MANAGING AFRICA’S CIVIL WARS 200–01 (2009) (listing instances where AU and African sub-regional organizations have intervened in AU Member States—all of them involving some sort of civil war but not interstate conflict).

85. Relevant parallels can be found in domestic law. Such examples include denying the proceeds of illegal activity in criminal law and in cases where a contract is deemed null and void *ab initio*, thus unenforceable, because of its illegal object and purpose. See, e.g., The Proceeds of Crime Act, 2002, c. 29 §§ 142–43 (Scot.) (making a person liable for benefits obtained as a result of “criminal lifestyle” as defined in the Act); VA. CODE ANN. §§ 59.1-335.9(B) (2006) (“Any contract . . . that does not comply with the applicable provisions of [the relevant] chapter shall be void and unenforceable as contrary to the public policy of the Commonwealth.”).

The authors wish to thank Professor Michael Reisman for bringing the possibility of “null and void” states of affairs to their attention.

The position that states of affairs brought about by unlawful conduct are null and void reflects the Latin maxim *ex injuria jus non oritur*: illegal acts cannot establish rights. For present purposes, the central point is that if a state of affairs were truly null and void, then all States would be bound to treat it as such. Third States would, effectively, be required to cooperate in enforcing the rules of international law because they would be required to deny the offending State the fruits of its illegal actions. A case in point is the creation of the State of Manchukuo by Japan during the inter-war period.

The problem started in 1932 when Japan invaded the Chinese province of Manchuria and set up the puppet state of Manchukuo.⁸⁶ The United States Secretary of State at the time, Henry L. Stimson, sent diplomatic notes to the Chinese and Japanese governments, stating that the United States “does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.”⁸⁷ The League of Nations’ Special Assembly adopted a resolution on March 11, 1932 almost identical to Secretary Stimson’s declaration. It stated that the Assembly

proclaims the binding nature of the principles and provisions referred to above [i.e. the Pact of Paris and Article 10 of the Covenant] and declares that it is incumbent upon the Members of the League of Nations not to recognize any situation, treaty or agreement, which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris.⁸⁸

A draft report of the Committee of Nineteen reached the same conclusion: “[T]he maintenance and recognition of the existing regime in Manchuria, . . . [is] incompatible with the fundamental principles of existing international obligations

86. For the history of the State of Manchukuo’s creation see David Turns, *The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law*, 2 CHINESE J. INT’L. L. 105, 107–10 (2003).

87. *Id.* at 105.

88. League of Nations Official Journal Special Supp. No. 101, at 87–88 (1932), *quoted in* Turns, *supra* note 86, at 123 n.77.

. . . [and Members of the League] will continue not to recognize this regime either *dejure* or *defacto*.⁸⁹

The principle underlying this “doctrine of non-recognition” was explained by Hersch Lauterpacht: “Non-recognition is based on the view that acts contrary to international law are invalid and cannot become a source of legal rights for the wrongdoer. That view applies to international law as one of the “general principles of law recognised by civilised nations.”⁹⁰

Lauterpacht complained elsewhere about the consequences of “lawyers and statesmen” disregarding this “general principle of law recognized by all civilized nations”:

It would have been of advantage if lawyers and statesmen had not occasionally disparaged the principle and practice of non-recognition of situations brought about by means contrary to fundamental international obligations on the ground that law must follow facts. Apart from the basic consideration that an illegality confers no right, it is proper for the law-abiding not to attribute an undue probability of permanence to facts grounded in illegality.⁹¹

But whether such a duty of non-recognition exists in international law is doubtful. In the specific context of the Manchuko incident, Lauterpacht seemed elsewhere to distance himself from the position. By offering an alternative route to the same conclusion—that Manchuko should not be recognized—Lauterpacht avoided the necessity of reliance on the theory that unlawful acts are null and void. His alternative explanation was that the total control that Japan had over Manchuko disqualified Manchuko from being recognized as a State:

89. Draft Rep. of the “Committee of Nineteen,” formally adopted by the League of Nations Assembly, Feb. 24, 1933, *quoted in* Turns, *supra* note 86, at 127 n.88. The draft was adopted by 42 votes in favor, 1 abstention (Siam absent during the voting) and 1 against (Japan) on 24 February 1933. *Id.* at 127.

90. HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 420 (1978).

91. 2 HERSCH LAUTERPACHT, *INTERNATIONAL LAW: THE LAW OF PEACE*, pt. 1, at 36–37 (E. Lauterpacht ed., 1975).

The legal basis of non-recognition of Manchukuo as a State is apparently that it is not a State as, in view of its relations with Japan, it lacks actual independence. In so far as the doctrine of non-recognition applies in this case it is an announcement of the intention of non-recognition of any future situation amounting to formal incorporation of Manchuria as part of Japan.⁹²

Lauterpacht's treatment of the Manchuko incident squares with Chief Justice Taft's holding in the *Tinoco* arbitration between Great Britain and Costa Rica. In that case, Costa Rica argued that recognition of the Tinoco government violated the Treaty of Washington of December 20, 1907. The treaty provided that "contracting parties will not recognize any one who rises to power in any of the five republics in consequence of a coup d'état or by a revolution against a recognized government until the representatives of the people by free elections have reorganized the country in constitutional form."⁹³ President Wilson accordingly withheld recognition of the government of Frederico Tinoco, who had come to power by deposing the elected president Alfredo Gonzalez Flores.

Chief Justice Taft did not share Wilson's view, holding that third States could not be bound by the treaty:

Such a treaty could not affect the rights of subjects of a government not a signatory thereto, or amend or change the rules of international law in the matter of *de facto* governments. Their action under the treaty could not be of more weight in determining the existence of a *de facto* government under Tinoco than the policy of the United States, already considered.⁹⁴

Taft denied the existence of a legal principle such as Wilson's, asserting that it "has not been acquiesced in by all the nations of the world":

[H]owever justified as a national policy [of the United States] non-recognition on such a ground [illegal usurpation of power in an already existing

92. I HERSCH LAUTERPACHT, *INTERNATIONAL LAW: GENERAL WORKS* 339 (E. Lauterpacht ed., 1975).

93. *Aguilar-Amory and Royal Bank of Canada claims (Gr. Brit v. Costa Rica)*, 1 R.I.A.A. 369, 382 (1948).

94. *Id.*

State] may be, it certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law.⁹⁵

The *Tinoco* arbitration and Chief Justice Taft's holding are usually cited for the proposition that there is no obligation to withhold recognition because of the unlawful genesis of a regime.⁹⁶ *Tinoco* rejects the position that an illegitimate regime must be treated a nullity. The hypothesis that third State obligations require treating all acts that are contrary to international law as null and void would be even more ambitious, since it would apply not only to issues of recognition of new governments but potentially to other issue areas, as well. *A fortiori*, then, it is rejected by Taft's opinion in *Tinoco*.

At the end of the day, the *Tinoco* line of reasoning seems to have prevailed over the argument that states of affairs brought about by unlawful acts are null and void. Neither the broader nor the narrower version seems to be supported by state practice. Although the nullity hypothesis has clear potential, in theory, for general application, it therefore fails to rationalize a fifth category of cases in which third States are obliged to take action to prevent or redress a wrong done to another.

6. *Assessment of Current Practice*

Tied as they are to the specific issue areas of human rights, humanitarian law, and core international crimes, the four successful "State bystander" obligations are motivated by a common underlying policy of ending violations of human rights so egregious as to be an affront to the whole of humanity. While important in the areas that it covers, however, the State bystander model that forms the traditional approach to non-party obligations is of limited use to other sorts of problems. The State bystander model does not purport to

95. *Id.* at 381.

96. See, e.g., Odette Lienau, *Who Is the "Sovereign" in Sovereign Debt?: Reinterpreting a Rule-of-Law Framework from the Early Twentieth Century*, 33 YALE J. INT'L L. 63, 73 n.35–37 (2008) (noting that "Taft's award is the lead case cited for the dominant approach to sovereign recognition, which identifies the existence of a valid government on the basis of its 'effective control' of a state's territory and population," and citing examples).

ground a general theory of third State obligations. Indeed, the very fact that these special categories exist, and are singled out for special treatment in view of the importance of the rights involved, suggests quite clearly that third State obligations are the exception rather than the rule.⁹⁷

It should not be surprising that whatever progress has been made in establishing non-party obligations has been in the context of abuse of individuals. Human rights and humanitarian law focus on the legal relationship between a State and an individual, while most other areas of international law are structured as disputes between States.⁹⁸ Where mass atrocities occur, individuals would surely benefit from having a State to champion their cause and there may be no suitably placed State that is interested in protecting them. This is particularly so in cases where a State abuses its own citizens. Settled practice is for individuals to be represented by the State of which they are a national; however, if that State is the violator, and if this standard rule were followed, there might be no State with an interest in moving the complaint forward.⁹⁹ An exception must be made for human rights, and this requires authorizing

97. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

98. *See, e.g.*, Draft Articles on Diplomatic Protection with Commentaries, in Rep. of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006). In its Commentary on Article 1, the ILC notes, “Diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself.” *Id.* at 25. *See also* SHAW, *supra* note 22, at 232.

99. *See* the ILC Commentary on article 7 (Multiple Nationality and Claims Against a State of Nationality) where the ILC states “one State of nationality [may bring] a claim against another State of nationality.” Draft Articles on Diplomatic Protection with Commentaries, *supra* note 98, at 46. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 399–400, 402 (7th ed. 2008) (citing *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 20–21 (Apr. 6)):

[D]iplomatic protection . . . rests primarily on the nationality of the claimant state attaching to the individual or corporation concerned both at the time of the alleged breach of duty and at the time when the claim is presented It is trite learning that, with some exceptions, states may only exercise diplomatic protection in respect of their nationals.

or requiring enforcement by the entire international community.

Although the reasons for focusing on human rights and international humanitarian law are therefore understandable, the consequence is that the State bystander approach leaves other types of substantive norms without any comparable attention to non-party obligations. Human rights and related norms generate obligations for bystanders but norms of other sorts (territorial rights, treaty rights, diplomatic rights, etc.) do not. The special provisions in the Genocide and Geneva Conventions are a case in point; they are limited to the specific contexts that they address. It is clear, as well, that the concepts of *jus cogens* and *erga omnes* are not elastic enough to accommodate all types of the non-party obligations—nor, probably, should they be. Neither of the other two categories—obligation to cooperate with prosecutions and the responsibility to protect—purports to address the possibility that there might be non-party obligations in other issue areas.

Less obvious, but perhaps even more important, is another distinctive feature of State bystander approaches. State bystander approaches are based mainly on so-called “affirmative duties,” meaning duties that require the performance of certain actions, as opposed to avoiding certain conduct. Most norms of international law, in contrast, *prohibit* doing certain things (breaching treaties, invading another State’s territory, violating human rights, and so forth) rather than requiring that something be done. The theory of third State obligations that we propose can likewise be satisfied through simple failure to act.¹⁰⁰

As many philosophers maintain—for good reason, we will see—it is much more problematic to impose affirmative duties than negative duties.¹⁰¹ The importance of having strong pro-

100. The proposed theory of third State obligations recognizes that in many or most cases, legal standards can be satisfied either through affirmative actions or failures to take action. The reason is that noninvolvement is satisfactory, but so is affirmatively coming to the assistance of the victim. See *infra* note 101 and accompanying text, and *supra* note 13. Thus the objection that affirmative obligations are too burdensome is not pertinent to third State responsibilities.

101. See generally Marcus G. Singer, *Negative and Positive Duties*, 15 (59) PHIL. Q. 97–103 (1965) (concluding that, “positive duties, when they have no corresponding or equivalent negative duties, are relatively less determi-

tection against particularly heinous violations (mass killing, slavery, and other exceptionally cruel and violent crimes) may call, despite these problems, for the unusual step of recognizing affirmative obligations to assist. But affirmative duties may be unsuitable for norms of lesser urgency, making them an inappropriate vehicle for dealing with other non-party obligations. Instead of extending to other substantive norms the treatment that is currently afforded to violations such as genocide, we propose a rather different strategy that avoids affirmative obligations altogether and focuses on prohibiting third States from assisting in, protecting, or encouraging the violation of other states.

III. THIRD STATE OBLIGATIONS: A PROPOSAL

Third State obligations, we propose, are a function of the type of involvement that the third State has with the dispute in question. These obligations consist of a duty not to contribute to the frustration or infringement of the victim's rights under international law.¹⁰² A third State's responsibilities are satisfied if either the State has no involvement at all in the dispute or if it is involved on the side of the victim.

This resolution of the problem of non-party obligations is fundamentally different from simply extending the approach already applied to human rights issues, namely, the State bystander approach. Although we might simply resolve that States have a universal affirmative obligation to come to the aid of the victim of any violation of international law, there are two potentially serious difficulties with following this path. The first concerns the practicability of imposing affirmative burdens on States other than the actual violator. The second concerns the legal grounding of non-party obligations: would a universal application of such an affirmative obligation really have the authority of law? We argue below that extending State bystander obligations to apply to all substantive norms is unworkable.

nate than negative duties"); Larry Alexander, *Affirmative Duties and the Limits of Self-Sacrifice*, 15(1) L. & PHIL. 65, 65-66 (1996) (demonstrating that imposing affirmative duties to aid others present heavier moral and practical burden than negative duties).

102. Such a State would still be entitled to take voluntary action in support of the victim.

Third State obligations, as we define them, avoid these problems. Third State responsibilities are limited to situations where the third State contributed to the violation and do not apply where the third State is a stranger to the dispute. Their grounding in positive law lies in the substantive law at issue in the dispute, together with the law of “secondary actors.” The provenance of third State obligations is therefore relatively secure.

A. *Practicability and Affirmative Duties*

The first difficulty in extending State bystander logic universally relates to the burden that such affirmative responsibilities would impose on most nations around the globe. Few States, particularly small States that maintain a relatively low international profile, have the capacity to monitor compliance with international law all across the globe. And taking action against violators (as opposed to merely monitoring) would be even more costly—economically, militarily, and in terms of expenditure of diplomatic capital. The cost of universal affirmative duties makes such an approach almost certainly unworkable.

1. *The Cost of Universal Affirmative Duties*

Consider a hypothetical territorial dispute between two States in West Africa. What is the responsibility of a small island nation in the Pacific Ocean that has no knowledge about or interest in this African boundary conflict? Extending the State bystander approach to legal responsibility would seem to require that this island nation (along with every other nation in the world) form an opinion on the merits of the territorial dispute and take some kind of action against the State that, according to its view of the merits, was in the wrong. From start to finish, the demands of this project exceed a small State’s capabilities.

The island nation might begin by identifying all of the world’s existing violations of international law; as a third State it would be responsible for supporting the victim on every one of them. This task is not as straightforward as might first appear; not all conflicts are front-page news, and it might be necessary for this small country to do considerable research to

identify all of the disputes that it might be called to take action on.

Next would come the task of gathering information about the merits of the dispute. The island nation would have to gather historical documents about West African boundaries in many languages, hiring historical and other experts to assess them. Disagreements, also, would have to be resolved about contested issues of international law—altogether a costly and imperfect enterprise. But assume that, despite these difficulties, our island nation pushes ahead.

It would then be obliged to take a position in support of the rights of the victim State. Probably the most common method that States use to pressure other countries is withholding access to advantageous economic or social relationships.¹⁰³ Such sanctions are among the least aggressive ways of influencing other States; certainly they are less destructive than, for example, military action. Even sanctions of this modest sort, however, would be prohibitively demanding. Organizing and monitoring a sanctions regime is burdensome and costly, and boycotts and embargoes can also prompt costly retaliation from the target.

This is the case even if a State faces only a single international law dispute at a time. Of course, however, at any given time there will be many more than one and they will be of all different kinds: territorial disputes, maritime disputes, diplomatic rows, disagreements over extradition, violations of the laws of war, and disputes over interpretation of miscellaneous treaties and conventions. Small States could easily find themselves cut off by their own sanctions from advantageous relationships with a substantial number of their preferred trading partners.

103. The advantages withheld are typically not entitlements but rather opportunities that other states want but have no right to. Among the inducements are promises of such things as support for membership in international organizations (e.g. NATO, the European Union or the WTO); trade privileges (e.g. tariff reductions on the State's exports); support for miscellaneous diplomatic goals in international arenas (e.g. to be voted one of the nonpermanent members of the Security Council or to have one's candidate selected as Secretary General); military assistance; and in case of developing countries, foreign aid or support for economic assistance from international organizations such as the World Bank.

Then there is the likelihood that the small island nation might erroneously conclude that there was no violation of international law (or erroneously conclude that there *was* a violation). In either case—whether it erroneously applies a sanction or erroneously does not—its coming to the wrong conclusion means trouble. For example, an erroneous decision not to undertake measures to pressure the current occupier of the territory could bring down on its head sanctions from all of the States that had concluded that sanctions were necessary. If followed to its logical conclusion, this reasoning would call for sanctions for failure to impose sanctions, and sanctions for failure to impose sanctions for failure to impose sanctions . . . and so on, *ad infinitum*. The project would then collapse under its own weight—assuming that it had not already done so.

2. *Exclusion of States with No Involvement*

The burden of universalizing affirmative duties to protect victims speaks strongly against using a State bystander approach to assess non-party responsibilities as a general matter. The “practicability” objection loses force, however, once third State obligations are limited to situations in which the third State has willingly become involved. Our proposed definition of third State obligations avoids the practicability objection because States are only liable where they have contributed to the violation, and this requirement automatically eliminates States that have no involvement in the dispute.

As a matter of principle, first, it does not seem unreasonable to expect that, before embarking on a new foreign policy initiative, a State should be prepared to make a judgment about the legal merits of what it is doing. States are expected to conform their own behavior to international law’s requirements; it is not any more difficult to make judgments on the merits about other States’ conduct, and to base one’s position on their disputes on those judgments. In a world where third States have obligations to respect the legal rights of the parties to a dispute, mistakes are possible, just as they are possible in a world where third States do not. But surely fewer would be made in the former than the latter. Moreover, a State that willingly involves itself in a conflict outside its borders cannot reasonably complain about having to make a determination about the conflict’s underlying legal rights and wrongs. If a

State has the capacity to get involved, it has the capacity to get involved on the right side.

As a practical matter, moreover, the fact that third State obligations apply only where a State has somehow contributed to the violation successfully blunts the objection that the burden of monitoring and acting is unreasonable. This is so for several related reasons. Universalized State bystander obligations are unworkable, in part, because of the sheer volume of disputes that exist around the globe. Limiting obligations to disputes in which the State was involved would reduce the volume substantially. This is true whether involvement comes in the form of military assistance, diplomatic pressure, provision of expertise, proposals to act as a mediator, economic aid, or something else. States generally know which disputes they are involved with, eliminating the need to periodically search the globe looking for conflicts on which they might need to take a position.

States also are likely to know a fair amount about the conflicts in which they are involved. In such cases, third State obligations do not require collection of an entire new body of evidence. It seems reasonable to hope that information about the merits of the legal claim would already be in the hands of the third State; evidence about the merits of the claim ought to be part of the decision to get involved in the first place.

Little is lost, in any event, by excusing States with no involvement. A State that is not involved with the parties or the substance of the dispute is likely not to have much influence over the violator. The hypothetical example of a Pacific island nation taking a position on a territorial dispute in West Africa illustrates this point. It cannot reasonably be thought that such States would have the capacity to contribute substantially. It is far more reasonable to expect a contribution from, for example, a West African power with a history of regional hegemony.

The test that we propose for third State obligations excludes States that are truly strangers to the dispute. Third State obligations, we propose, arise only in situations where the third State has had some involvement in the dispute on behalf of the violator. Third State obligations are not so much an affirmative duty to take action as they are a negative duty not to contribute to the violation. They do not require action

by States that are truly strangers to the dispute and for this reason impose no unreasonable burden.

B. *Legal Grounding*

The second basic difficulty is the status of the obligations that non-parties have; are they legal or are they moral, ethical, philosophical, or something else (simple common sense, perhaps)? Third State obligations are defined in such a way as to have solid legal foundations; State bystander approaches are not.

1. *The Need for Legal Status*

Earlier we argued that non-party obligations can be explained in terms similar to first party legal duties, in particular the logic of collective action.¹⁰⁴ While this argument is true as far as it goes, it does not really go far enough.

The status of first party obligations is not merely a product of collective goods reasoning. Not all collective or public goods arguments result in legalization, even when it is true that legal enforcement would make them more reliably advantageous. The familiar rules of international law (e.g., prohibition of aggression, compliance with treaty obligations) are not only advantageous as a substantive matter; they have also been agreed to by States either formally in written instruments or through State practice. This acceptance is essential to their status as law.¹⁰⁵ Without some grounding in State acceptance, non-party obligations are simply recommendations about what the law ought to be.

The analogy between non-party and first party norms therefore does not really hold. In addition to their value in producing collective goods, first party norms have an advantage not shared by third State obligations: a history of community acceptance as law. The two methods of creating international legal norms—through adoption of agreements (treaties and conventions) and through State practice (customary law)—provide a positive law basis for first party norms.¹⁰⁶ The

104. See *supra* notes 27–29 and accompanying text.

105. See generally BROWNIE, *supra* note 99, at 3–16.

106. *Id.*

element of State agreement or acceptance seems to be lacking with the duties of nonparties.

This objection stands squarely opposed to the simple extension of State bystander approaches to non-party obligations generally. There is no problem with non-party obligations in the context of the Genocide or Geneva Conventions: The Genocide and Geneva Conventions obviously have legal status, as do accepted customary international law doctrines such as *jus cogens* and *erga omnes*. But these doctrines are not universally applicable. They would not explain non-party responsibilities concerning disputes over treaty interpretation or territorial rights and there is no other apparent legal source to justify applying them in a broader context.

Third State obligations, however, are defined in such a way as to meet this challenge. The proposed definition specifies that a third State violates its obligations only if its involvement has the effect of somehow contributing to the violation of the victim's legal rights. The legal basis for imposing third State liability is that the third State is involved in the violation of the same substantive law as the primary violator.

2. *Negative Involvement and Positive Involvement*

Not all involvement is good; and not all involvement is bad. Involvement in a dispute can either increase the likelihood of compliance with international law—a positive involvement—or increase the likelihood of noncompliance with international law—a negative involvement. Third State obligations, as we define them, are violated only by negative involvement; weighing in on the side of the innocent victim is not unlawful. Restricting third State obligations to States that were somehow encouraging, protecting, or facilitating the underlying violation effectively resolves the problem of identifying a legal foundation. Examples might include taking the side of the loser in an ICJ case, thereby encouraging it to persist in its noncompliance, or entering into a military alliance with a State that is planning to invade one of its neighbors. The legal source on which the third State obligation rests is the underlying substantive norm which the first party is violating and which the third State is now engaged in frustrating.

State bystander obligations do not differentiate between States that contributed to the violation and States that are

wholly innocent. The obligation to provide assistance is not defined by reference to whether the third State supported the victim or encouraged the violator or, indeed, whether the third State had any involvement at all. Thus, while third State obligations effectively prohibit third States from contributing in some way to the violation and thus support international legal norms, State bystander obligations (which are not dependent on whether the non-party contributed) do not.

Our proposed definition of third State obligations is simple and intuitively attractive: A State has a legal obligation not to contribute to another State's violation of the victim's legal rights. This definition does not impose an affirmative obligation on States to become involved in disputes all around the world, let alone to engage in extensive research to ascertain such disputes' existence. We believe that third State liability is appropriate only when the State has already somehow involved itself in the dispute in support of the violator. Limiting liability to those third States whose involvement frustrates substantive international law has the consequence of placing legal responsibility on exactly those third States whose conduct should be changed. A State can avoid legal responsibility if it simply does not become involved in a dispute; but if it does become involved, then it has a duty to take the right side, the one that respects international law.

We can test this generalization against our earlier hypothetical example of a West African territorial dispute.¹⁰⁷ The Pacific Island nation with no involvement in the dispute has no third State responsibility under this theory, but what about a regional West African power with a history of involvement? Here, it is necessary to determine whether the involvement contributed to the legal rights of the victim or to the interests of the violator of international law.

If the existing involvement is in favor of the victim (a positive involvement) then it does not count as a violation of third State obligation. The third State might, for example, have tried to induce the violator to move out of the disputed territory or to submit the dispute to adjudication before a fair and competent tribunal. It might be giving the victim military or financial assistance, technical expertise, or diplomatic support.

107. See *supra* note 103 and accompanying text.

Where, in contrast, the involvement runs counter to international law (a negative involvement) the regional power has violated its third State obligation. Assume for example that the regional power (the third State) is a long-standing ally of the State that is violating international law. Using its influence in the region, it might have been lobbying behind the scenes for designation of mediators sympathetic to its ally's position, or formulating proposals for resolving the controversy that were sympathetic to its ally's view of the facts. It could have been supplying military assistance to its ally to support its illegal military occupation of the victim's territory, or using the local media to disseminate propaganda favoring its ally's position.

The strategies for assisting an ally at the expense of legal rights of its opponents are as varied as the States that use them. A wealthy country may try to use its influence in global or regional financial institutions to buy support from other States, and a State that is skilled diplomatically might be able to obtain diplomatic concessions helpful to the side of the dispute it favors. A permanent member of the Security Council can protect an ally from censure or sanction by systematic use of its veto power. The more powerful the third State, the longer the list of possible tactics.

Basic principles of shared responsibility support extending liability to the third State whose involvement in the dispute includes support for the party that is violating international law. In both domestic and international law, the individual or State that contributes to an unlawful act by another actor may be secondarily liable. The third State's legal responsibility is comparable to the responsibility of an accessory, an accomplice, or a co-conspirator.

3. *Primary and Secondary Violators of International Law*

Third State obligations are, in certain respects, analogous to laws against accessories or accomplices. The third State is not the primary violator, but is a contributor to another State's unlawful acts. Thus framed, these obligations are practical and reasonable, as well as a close corollary of basic principles of international responsibility.

A third State that supports the violator, contributing to the defeat of the victim's international legal rights, shares in

the substantive responsibility for the violation. This is particularly clear when the violation would not have been possible without the support of the third State because without the third State's involvement, the wrong would not have occurred. But the point remains even in cases where the third State was a contributing cause to an injury that would have happened anyway. In supporting the violation, the third State effectively contravenes the same substantive norm as the primary violator. The third State's posture is analogous to the position of an accomplice or an accessory to a crime in ordinary criminal law.¹⁰⁸ In both the domestic and the international context, a State or individual (as the case may be) can be liable even though what it did would not be unlawful when examined independently, without the actions of the primarily responsible party.¹⁰⁹

Domestic criminal law characterizes accomplices, accessories and co-conspirators as "secondary offenders" or "secondary participants."¹¹⁰ Domestic civil law likewise attaches legal

108. Article 16 of the International Law Commission's Articles on State Responsibility ("Aid or assistance in the commission of an internationally wrongful act") states:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Articles on Responsibility of States (2001), *supra* note 21.

109. An interesting question is whether the third State should be liable if it contributes to the first State violating a legal obligation that applies to the first party but not the third State. For example, assume that the first party has signed a treaty that the third State has not. If the third State assists the first party in violating the treaty, should the third State be liable to the victim? We are inclined to answer in the affirmative, but understand the merits of the opposing view. Article 16(b) of the ILC Articles on State Responsibility states that "the act [must] be internationally wrongful if committed by that State." *Id.* We owe this interesting example to Carlos Vazquez.

110. In the United States, for example, courts have distinguished between principals and accessories, the latter category consisting of accomplices, accessories after the fact, and those that provide aid and assistance. RONALD N. BOYCE ET AL., 466–68 (11th ed. 2010). The terms "secondary offenders" and "secondary participants" are frequently used. *See, e.g.*, NOEL CROSS, CRIMINAL LAW AND CRIMINAL JUSTICE: AN INTRODUCTION 75–78, 90–91 (2010) (referring to secondary offenders and principal offenders). Both the ICTY and

responsibility to defendants that assisted a primary defendant in the commission of a tort.¹¹¹ International criminal law, as well, imposes individual criminal responsibility for secondary participants in the commission of a crime.¹¹² International case law supports the extension of secondary liability to third States that, while not committing a violation themselves, do effectively contribute to the occurrence of a violation.

In the *Genocide* case, the International Court of Justice recognized the existence of a spectrum of State behavior falling short of the actual commission of genocide.¹¹³ A third State's contribution to a violation, the Court indicated, may fall anywhere between simple failure to prevent genocide to actual complicity.¹¹⁴ The Court did not require that the contribution be the same type of conduct as the unlawful behavior of the

ICTR have used the term "secondary perpetrator" or "secondary liability" in their judgments. *See, e.g.*, Prosecutor v. Radislav Krstic, Case No. IT-98-33-A, Appeals Judgment, ¶ 141 n.242 (Int'l Crim. Trib. for the Former Yugoslavia Apr.19, 2004) (referring to "secondary liability"); *id.* ¶ 248 n.408 (citing cases that use terms such as "secondary or indirect forms of participation").

111. Courts in the United States have adopted varying approaches to multiple tortfeasors under "joint and several liability" but they recognize the concept as valid. *See* HARRY SHULMAN ET. AL., *LAW OF TORTS: CASES AND MATERIALS* 428–35 (5th ed. 2010).

112. GIDEON BOAS, JAMES L. BISCHOFF & NATALIE L. REID, *1 INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY: FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW* 188–91 (2007).

113. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, ¶ 430 (Feb. 26, 2007), *available at* <http://www.icj-cij.org/docket/files/91/13685.pdf>.

114. *Id.* ¶ 428. Another situation in which third States might be responsible for conduct that would not be unlawful without the violation caused by the primary party is extraordinary rendition. In these cases, various States provided the United States with facilities where individuals suspected of links with terrorist organizations could be tortured and detained; the torture and detention were in violation of United States and international law. In one recent case, for example, the European Court of Human Rights called on Macedonia to account for its role in extraordinary rendition of Khaled el-Masri, a German national. Macedonia seized Khaled el-Masri and kept him incommunicado for 23 days at the request of the CIA in 2003 before he was handed over to the CIA and later transferred to Afghanistan where he was abused. Richard Norton-Taylor, *Macedonia Called to Account Over Extraordinary Rendition Case*, *GUARDIAN*, Oct. 14, 2010, <http://www.guardian.co.uk/world/2010/oct/14/macedonia-khaled-el-masri>. The lawyers and organization representing el-Masri claim that Macedonia was "complicit" in the extraordinary rendition. *See* OPEN SOCIETY JUSTICE INITIATIVE, *El-Masri v. Macedonia*, <http://>

primary violator; legal responsibility was not limited to those who participated in the primary crime.

For example, the Court alluded to Serbia's culpable failure to arrest General Mladic while he was on Serbia's territory. This failure was obviously not of the same order of magnitude as the actual killing but it did suffice as evidence of culpable contribution to the first party's crime:

[T]he Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladic, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him. . . . the intelligence services of that State knew where Mladic was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive.¹¹⁵

Doctrines of secondary liability confirm that liability can be predicated upon conduct that does not involve acts precisely comparable to the conduct of the primary defendant.¹¹⁶

www.soros.org/initiatives/justice/litigation/macedonia (describing Macedonia's knowledge that the CIA would mistreat El-Masri).

115. *Genocide case*, ¶ 448.

116. *Id.* ¶ 449.

449. It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as a party to the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the Convention. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the "international penal tribunal", the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have "accepted [the] jurisdiction" of that "interna-

To bear legal responsibility, it is enough that a third State supports, facilitates or protects the commission of the actual violation.

The International Law Commission's Articles on State Responsibility likewise lend some support to treating third States as analogous to accessories, accomplices, or co-conspirators. The Commentary confirms that legal responsibility is appropriate, for example, where a State provides the violator with protection from remedies imposed by the international community. The example given in the Commentary is assisting another State to circumvent sanctions imposed by the Security Council.¹¹⁷

This modicum of support does not establish that the concept of third State obligations (or something similar) has achieved conventional acceptance in international law. The ICJ's small measure of support for secondary liability, inferred from the *Genocide* case, and the support for secondary liability suggested by the ILC articles dealing with accessories and accomplices, are not outright endorsements of a general theory of third State responsibility. In the *Genocide* case, the standard for establishing shared responsibility is set quite high.¹¹⁸ The

tional penal tribunal"; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty. On this point, the Applicant's submissions relating to the violation by the Respondent of Articles I and VI of the Convention must therefore be upheld.

450. It follows from the foregoing considerations that the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged.

Id. ¶¶ 449–50.

117. ILC Report (2001), *supra* note 20, at 158–59. Paragraph 9 of the comment to Article 16 reads:

The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the United Nations Security Council or provides material aid to a State that uses the aid to commit human rights violations.

Id.

118. One authority, similarly, adopts the following definition for "conspiracy to commit genocide": "An agreement between two or more persons that

Court opined that complicity is proven only if both the third State continues its assistance after it has become actually aware of the facts, and the assistance contributes to the commission of the crimes.¹¹⁹

[T]here cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts.¹²⁰

The Articles on State Responsibility likewise takes the position that actual knowledge and intent are prerequisites for liability.¹²¹ Article 16 provides that,

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

genocide or any of its underlying offences shall be committed concluded with the intent to partially or completely destroy a national, ethnic, racial, or religious group." GIDEON BOAS, JAMES L. BISCHOFF & NATALIE L. REID, 2 INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY: ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW 188 (2008).

119. *Genocide case*, ¶ 431; *see also*, Reisman, *supra* note 46, at 83 (noting that a state bears a duty to use all means to prevent or stop a genocide under the circumstances once the state either learns of or should normally have learned of a serious risk of genocide).

120. *Genocide case*, ¶ 432.

121. ILC Report (2001), *supra* note 20, at 156. Paragraph 3 of the comment to Article 16 reads:

First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

Id.

- (b) The act would be internationally wrongful if committed by that State.¹²²

Moreover, the ILC Articles on State Responsibility makes clear its general position on third State obligations: "It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred."¹²³

Despite this disclaimer that "there is no general obligation," the authorities cited above go a long way towards establishing the sort of general obligation that we propose. The drafters apparently preferred to stop somewhat short of the acceptance of third State obligations that we propose in this article. The ambivalence of both the Court and the International Law Commission may in part be attributable to the long shadow cast by the universal extension of affirmative responsibilities, with its extreme impracticability. But this caution is unnecessary if one does not approach the matter from the point of view of State bystanders, but instead from the point of view of third State obligations.

IV. CONCLUSION

Proponents of the view that international law is "really law" should be quick to recognize the significance of the question of third State obligations. International law is more powerful—more "law-like"—to the extent that it has suitable remedies for noncompliance, and it is less "law-like" to the extent that States (including third States) are free to ignore it.¹²⁴

122. Articles on Responsibility of States (2001), *supra* note 21, art. 16.

123. ILC Report (2001), *supra* note 20, at 154. Paragraph 9 of the introductory comment to Chapter IV (Responsibility of a State in Connection with the Act of Another State) reads:

Another concerns the issue which is described in some systems of internal law as being an accessory after the fact. It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event.

Id.

124. Lea Brilmayer, *International Remedies*, 14 *YALE J. INT'L L.* 579, 579 (1989) (noting that the "narrow legalistic view" adopted by the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES "would un-

The standard argument that international law is not really law proceeds mainly by pointing out gaps and flaws in the existing international enforcement structure. Third State obligations could help to fill some of those gaps and fix some of those flaws, if only they could be recognized in principle, realistically defined, and successfully defended.

It is possible that the reason that third State obligations have gone so long without recognition is a mistaken idea of what they would have to look like. What first comes to mind is a global obligation, on the part of every State, to undertake heroic measures to pressure, prevent or punish every violation of international law. What we are arguing for is less ambitious, although still quite ambitious enough.

Third State obligations consist of a prohibition on taking sides with a State that is infringing on other States' legal rights. Their central objective is simply to support outcomes consistent with the parties' legal rights and to avoid undermining international law. Third States are not entitled to treat the legal merits of the dispute as irrelevant and it is *prima facie* not acceptable to choose sides based on self-interest or the interests of one's allies.

Louis Henkin was probably correct that it is "unusual" for third States "to respond to a violation even of a widely accepted norm."¹²⁵ But should we be satisfied with the world he describes, in which "[f]or most international norms or obligations there is no judgment or reaction by the community to deter violation" ?¹²⁶ Facilitating, encouraging, or protecting the violation of international law by other States effectively undercuts the substantive norm that is violated, a norm that is binding on the third State. Why shouldn't the international community react?

It is no surprise that existing law does not quite bridge the gap between current international law regarding third State responsibilities and our proposal for third State obligations. We recognized at the outset that existing international law and theory did not yet accommodate a general obligation to assist

dercut the claim that substantive norms of international conduct are adequately supported by legal enforcement mechanisms").

125. Henkin, *supra* note 2, at 58.

126. *Id.*

with enforcement of international legal norms.¹²⁷ But the remaining gap is not large. The most convincing existing foundations for third State obligations are the substantive basis for the victim's legal rights, together with the fact that the third State assisted, in a secondary manner, in causing the victim's injury. These two ingredients carry us most of the way to establishing a legal obligation not to assist the violator. To fill the gap that these two leave requires, at most, a small measure of a third ingredient: enthusiasm for the progressive development of international law.

127. *See supra* note 20 and accompanying text.

