

Article

**Syria, Cost-sharing, and the
Responsibility to Protect Refugees**

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INTRODUCTION¹

The Syrian refugee crisis is the largest refugee crisis since the Second World War.² By August 2014, the UN Refugee Agency's response to the Syrian displacement crisis had become the biggest operation it has undertaken in its 64-year history.³ The number of people who had fled Syria by August 2015 was staggering—over 4 million.⁴ At the time of writing nearly all Syrian refugees are concentrated in five countries in the region: Lebanon, Jordan, Turkey, Iraq, and Egypt.⁵ By November 2014, Lebanon alone was host to over a million refugees from

1. This article was completed in September 2015 and does not contain any analysis of events occurring after that time.

2. The Rwandan genocide, for example, resulted in approximately 2.3 million refugees, while the Syrian conflict has produced over four million refugees. See Ben Norton, *A Guide to the Worst Refugee Crises Since WWII*, MONDOWEISS (Sept. 9, 2015), <http://mondoweiss.net/2015/09/refugee-crisis-since>. The UN Refugee Agency describes the devastation caused by the conflict in Syria as the “largest forced displacement crisis in the world.” *Europe Must Give Syrian Refugees a Home*, GUARDIAN (July 22, 2014, 6:00 AM), <http://www.theguardian.com/commentisfree/2014/jul/22/europe-syrian-asylum-seekers-refugees-illegal-trafficking>. The European Commission Humanitarian Aid and Civil Protection arm stated in August 2015 that “[r]efugees from Syria are now the biggest refugee population from a single conflict in a generation.” EUROPEAN COMM. HUMANITARIAN AID & CIVIL PROT., ECHO FACTSHEET: SYRIA CRISIS 3 (Aug. 2015), http://ec.europa.eu/echo/files/aid/countries/factsheets/syria_en.pdf. Under international law, a refugee is a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” G.A. Res. 429 (V), art. 1, § A(2), Convention Relating to the Status of Refugees (June 28, 1951), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx> [hereinafter Convention Relating to the Status of Refugees]. Internally displaced populations (IDPs) are beyond the scope of my analysis.

3. See *Needs Soar as Number of Syrian Refugees Tops 3 Million*, U.N.H.C.R. (Aug. 29, 2014), <http://www.unhcr.org/53ff76c99.html>.

4. *Syria Regional Refugee Response*, U.N.H.C.R., <http://data.unhcr.org/syrianrefugees/regional.php> (last visited Oct. 15, 2015). The Rwandan genocide, by contrast, displaced approximately 2.3 million refugees. See Norton, *supra* note 2.

5. See U.N.H.C.R., COUNTRIES HOSTING SYRIAN REFUGEES: SOLIDARITY AND BURDEN SHIFTING 2 (2013), <http://www.unhcr.org/525fe3e59.pdf>.

Syria, comprising over a *quarter* of Lebanon's total population.⁶ By contrast, as of December 2014, the entire European Union had only extended protection to just over 217,000 Syrian refugees.⁷ In 2013 the United States committed to resettling a mere 2000 Syrian refugees.⁸

There is no principled basis for the current distribution of the cost and responsibility of protecting Syrian refugees. The five countries bearing an overwhelming share of this cost are not those most responsible for causing the conflict at the root of the refugee crisis. Neither are they the countries most capable of protecting Syrian refugees. Instead, geographic proximity to conflict and porousness of borders remain the primary determinants of which nations bear the heaviest cost, with disastrous effects.

Syrian refugees have needs far beyond what their host communities and states can meet. Most of the refugees are not in camps and struggle to find food and shelter. The sheer magnitude of the refugee population in host countries is dramatically depressing wages and inflating rental prices, while depleting what public services are available for health and education. What is at stake is not only lives of the refugees, but the stability and perhaps even the survival of the states that host them.⁹ And the consequences extend further. They include: a rise in threats to regional and international security as the sectarian conflict in Syria reproduces itself in neighboring countries; creation of fertile conditions for radicalization that fuels transnational terrorist organizations, as overall conditions in the Middle East worsen; and increased unauthorized desperation-driven migration to the West (especially Europe) as refugees risk their lives to escape starvation and conflict.¹⁰ In short, the Syrian refugee crisis is a problem of global proportions.

Despite the gravity of the refugee crisis, states can manage it *if* they cooperate to share the cost and responsibility of pro-

6. See *Needs Soar as Number of Syrian Refugees Tops 3 Million*, *supra* note 3.

7. See *id.* According to the United Nations High Commissioner for Refugees, in mid-2014: “[P]erson for person, the wealthy EU [was] offering refuge to 1,000 times fewer Syrians than cash-strapped Lebanon.” *Europe Must Give Syrian Refugees a Home*, *supra* note 2.

8. See John Hudson & Noah Shachtman, *Exclusive: U.S. Will Now Let in Thousands of Syrian Refugees*, FOREIGNPOLICY: THE CABLE (Aug. 8, 2013, 4:20 PM), http://thecable.foreignpolicy.com/posts/2013/08/08/exclusive_us_will_now LET_in_thousands_of_syrian_refugees.

9. See *infra* Part III.B.1.

10. See *infra* Part III.

protecting these refugees. Significantly, however, the international law regime that currently governs the refugee-specific obligations of states offers no basis for achieving this cooperation. This Article offers a novel response to addressing this gap in the regime.

In some fundamental respects, international refugee law was created to resolve the types of challenges the Syrian refugee crisis raises.¹¹ The UN Refugee Convention and its Protocol legally require states to extend protection to refugees within their jurisdiction. However, these treaties create no legal obligation on states to assist other states with mass refugee influxes with which the latter are unable to cope.¹² Eighty-six percent of the world's refugees reside in southern states.¹³ Thus in practice, the world's poorest countries are legally required to meet the needs of most refugees.¹⁴ Wealthy northern states,¹⁵ which are often instrumental in generating refugee crises, are under no legal obligation to assist southern states with shoul-

11. In the years after the Second World War, an estimated one million refugees remained unable to return to their homes. *Refugee Figures*, U.N.H.C.R., <http://www.unhcr.org/pages/49c3646c1d.html> (last visited Oct. 31, 2015). To define the international legal status of these refugees, and to establish the responsibilities owed to them by states, Western European and North American states created the 1951 United Nations Convention Relating to the Status of Refugees (UN Refugee Convention). See Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J.L. & POL'Y, 129, 131 (2001). The UN Refugee Convention limited its application to refugees from Europe fleeing events occurring prior to January 1951. In 1967, states adopted the United Nations Protocol Relating to the Status of Refugees to remove the geographic and temporal restrictions of the UN Refugee Convention. Protocol Relating to the Status of Refugees, *opened for accession* Jan. 31 1967, 606 U.N.T.S. 267 (entered into force Oct. 4 1967), <http://www.refworld.org/docid/3ae6b3ae4.html>. Today and for the foreseeable future, the UN Refugee Convention and its Protocol remain the only binding international legal instruments articulating the refugee-specific obligations of states.

12. See James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 143 (1997) ("The current system of unilateral, undifferentiated obligations is unfair and ultimately unsustainable.").

13. UNHCR GLOBAL TRENDS 2013: WAR'S HUMAN COST 2 (June 2014), <http://www.unhcr.org/5399a14f9.html>. I use the term southern states to refer to the global south or so-called developing countries. The World Bank defines developing economies as low- and middle-income economies with gross national incomes of below US\$1045 (low income) and between US\$1045 and US\$12,746 (middle income) respectively. *Updated Income Classifications*, WORLD BANK (July 3, 2014, 9:59 AM), <http://data.worldbank.org/news/2015-country-classifications>.

14. Hathaway & Neve, *supra* note 12, at 141.

15. I use the term northern states to refer to Western Europe and North America.

dering the responsibility of refugee protection.¹⁶ When southern states such as Syria's neighbors request international assistance with refugee protection, they do so in the absence of a framework for facilitating the requisite international cooperation. The result has been a per se unreliable mechanism for ensuring international cooperation.¹⁷

In 2005, world leaders unanimously adopted a United Nations General Assembly resolution that today serves as the official statement of the international doctrine of the responsibility to protect (RtoP).¹⁸ RtoP conceives of sovereignty as entailing a responsibility on each state to protect its territorial population from genocide, crimes against humanity, ethnic cleansing, and war crimes (RtoP crimes).¹⁹ RtoP also stipulates a complementary responsibility borne by the international community.²⁰ It

16. This is evident in the crisis in Syria, where many foreign states including European states, the United States, Russia, Turkey, Qatar, Saudi Arabia, Iran, and others are active participants in the armed conflict variously supplying weapons, training rebel and other fighters on the ground, and in some cases engaging in the armed conflict directly. For an overview of foreign involvement in the ongoing conflict, see CHRISTOPHER M. BLANCHARD ET AL., CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE (July 15, 2015), <https://www.fas.org/sgp/crs/mideast/RL33487.pdf>.

17. Hathaway & Neve, *supra* note 12, at 187 (“The present, loosely constructed system of international cooperation in refugee protection is characterized by vague promises of solidarity among governments, accompanied by often un dependable funding.”).

18. G.A. Res. 60/1, ¶¶ 138–39, 2005 World Summit Outcome (Sept. 16, 2005) [hereinafter 2005 World Summit Outcome]. See *infra* note 111 for the full text of this statement.

19. Unlike genocide, crimes against humanity, and war crimes, international law does not define “ethnic cleansing” and ethnic cleansing is not per se an international crime. See David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT’L L. 111, 128–29 (2007–2008) (“As a matter of law, the invocation of *ethnic cleansing* in the mandates of R2P is a non-technical expression for what in fact is a sub-category of the crime against humanity of *persecution*. . . . In its simplest terms, ethnic cleansing is the discriminatory assault on an identifiable group within the civilian population for the purpose of removing that group permanently from territory sought by the perpetrators of the assault.”). As the 2009 UN Secretary-General Report states “acts of ethnic cleansing may constitute one of the other [RtoP] crimes.” See U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, at 5, U.N. Doc. A/67/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*].

20. With respect to RtoP, the term “international community” refers at a minimum to nation states, their regional organizations, and the United Nations. See Julia Hoffman & André Nollkaemper, *Introduction to RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE 15* (Julia Hoffman & André Nollkaemper eds., 2012). My analysis in this Article focuses on the responsibilities that states bear under RtoP. Although I use the term “international

commits the international community to providing *international assistance* and *capacity building support* to help national authorities protect populations from RtoP crimes.²¹ Finally, RtoP commits the international community to taking *timely and decisive action* in response to the manifest failure of states to protect populations from RtoP crimes.²²

I have two primary objectives in this Article. The first is to offer an important, though qualified, solution to the problem of failed international cooperation to share the cost of protecting refugees such as those from Syria, fleeing mass atrocities. I argue that states and other international actors can and should use RtoP to facilitate international cooperation to protect Syrian refugees. My proposal can be generalized beyond the case of Syria and offers a much-needed means of mitigating the fallout from widespread, commonplace international displacement from conflict, which has been rising for decades.²³ My second objective is to propose a new approach to how international actors develop and apply RtoP even beyond the context of refugee protection.

There is a rich literature on possible solutions to the problem of international refugee cost-sharing.²⁴ Yet absent from the literature is any attempt to use RtoP to solve this problem. In fact, scholars have generally neglected analysis of the doctrine's application to refugees, with few exceptions.²⁵ Yet situations that trigger the international community's RtoP commitments often also give rise to vulnerable refugee populations in need of protection. Although RtoP is not legally binding on states, it can play an important role in facilitating international coopera-

community" to refer primarily to the world's states collectively, I recognize that it is a term that unfortunately obscures consequential differences among these states in terms of their influence on and participation in international affairs. Russell Buchan, for example, has argued for a distinction between international society, a concept describing "a legal framework based upon the legal principle of sovereign equality" of all states, and the international community, which he defines as "an association of liberal states that has become increasingly prepared to recognise only liberal states as legitimate." RUSSELL BUCHAN, *INTERNATIONAL LAW AND THE CONSTRUCTION OF LIBERAL PEACE* 42, 49 (2013). He further argues that the emergence of international community thus defined has paved the way for legitimized international intervention into states deemed to fall short of the conditions of membership within this community. *Id.* at 42.

21. *Implementing the Responsibility to Protect*, *supra* note 19, at 2.

22. *See id.*

23. *See* UNHCR GLOBAL TRENDS 2013, *supra* note 13.

24. *See infra* note 81.

25. For a discussion of the exceptions, *see infra* note 106.

tion on behalf of refugees.²⁶ I argue that RtoP offers a new frame for coordinating international refugee cost-sharing in cases like Syria.²⁷ As I will explain, RtoP is by no means a perfect frame for this task. Nonetheless, it is a readily available frame that offers a meaningful opportunity to reap important benefits, at very little cost or risk to international actors invested in a more sustainable and equitable international refugee protection regime.

I argue that when refugees flee RtoP crimes, the international community in principle bears a responsibility to protect these refugees regardless of their territorial location outside their country of nationality.²⁸ I argue that the extent and nature of the international community's responsibility are a function of these refugees' vulnerability. RtoP requires greater action from the international community when states hosting these refugees are less capable or less willing to provide protection to refugees. Specifically, international assistance and capacity building support, and timely and decisive action under RtoP include international cooperation to share the cost of refugee protection. I draw lessons from historical cases of interna-

26. RtoP is soft law: a set of principles that global actors agree should govern their behavior on the international stage, and that has in practice been used by these actors to justify a given course of action. For an overview of the range of definitions of soft law in the international relations approach to international law (IR/IL), see Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013). For more on RtoP as soft law, see Jennifer M. Welsh, *Norm Contestation and the Responsibility to Protect*, 5 GLOBAL RESPONSIBILITY TO PROTECT 365, 376–77 (2013). She helpfully states that although RtoP creates no additional legal obligations, “it helps to shape interpretation of existing rules by emphasizing particular normative understandings about domestic and international conduct.” *Id.* at 377.

27. Framing is “a way of selecting, organizing, interpreting, and making sense of a complex reality to provide guideposts for knowing, analyzing, persuading, and acting.” Volha Charnysh, Paulette Lloyd & Beth Simmons, *Frames and Consensus Formation in International Relations: The Case of Trafficking in Persons*, 21 EUR. J. INT'L REL. 323, 327 (2014) (citing Martin Rein & Donald Schön, *Reframing Policy Discourse*, in THE ARGUMENTATIVE TURN IN POLICY ANALYSIS AND PLANNING 145 (Frank Fischer & John Forester eds., 1993)).

28. Because RtoP is not legally binding I do not refer here to legal duties that international actors bear. For an account of how legal duties could be formulated under RtoP, see Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT'L L. 247 (2014). Instead my Article is an exploration of the commitments that international actors may work to institutionalize if they were to take RtoP seriously as a means of protecting at-risk populations.

tional refugee cost-sharing and use these to propose that, whenever it is necessary, this cooperation should be pursued via a Comprehensive Plan of Action (CPA)²⁹ based on RtoP. I outline an RtoP CPA for the Syrian refugee crisis that is illustrative of the policy implications of using RtoP for refugee cost-sharing.

My proposal will surprise RtoP and refugee scholars alike on account of the view among many that RtoP has shown itself to be an undesirable or unreliable facilitator of international cooperation. But I make the case that refugee protection offers a context for circumventing the central problems that commentators have identified as undermining RtoP's suitability for generating international cooperation. In other words, although there is good reason to question RtoP's value as a frame for international cooperation, this value varies by context. RtoP has as yet not been used as a frame for refugee cost-sharing, and there are good reasons to think it may be suitable for this purpose, even if it has been unsuitable for others.

To be clear, this is not a wholesale ideological defense of RtoP. It is instead an attempt to mine the doctrine for whatever potential it holds for protecting populations at risk of mass atrocities. At the same time, RtoP is by no means a cure-all for the perennial problem of refugee cost sharing, and I make explicit in this Article the limits even of successful implementation of my proposal. Were it to be realized, my proposal would increase the funding available to states hosting a disproportionate share *only* of refugees fleeing RtoP crimes, and not those fleeing any other forms of persecution. Despite its significance, increased funding for a fraction of the global refugee population is only a partial response to the gaps in the international refugee regime.

A comprehensive solution to the refugee cost sharing problem undoubtedly requires an overhaul of the international refugee protection regime, a prospect that presently appears distant. The human and other costs of the status quo, however, warrant experimentation with existing frameworks, including one as seemingly unlikely or controversial as RtoP.

In Part I of this Article I introduce the Syrian crisis and provide an overview of the international response to the refugee problem. I note the absence of RtoP from this response. In Part II I make the case that RtoP—as a matter of principle—

29. CPAs are platforms developed by key international refugee protection and humanitarian actors in collaboration with states, to provide a comprehensive response to a refugee crisis. *See infra* note 178.

entails international cooperation to share the cost and responsibility of refugee protection when certain conditions exist. I also outline how RtoP might be used in practice to achieve this cooperation. In Part III I show why RtoP may work in the refugee protection context despite its failure in others, again using the Syrian crisis.

I. THE CASE OF SYRIA

This Part provides an overview of the Syrian refugee crisis and the international response to it as of July 2015, and highlights shifts in the European response in August and September 2015. It highlights the failure of the international community to share the cost of protecting Syrian refugees, noting that although international actors turned to RtoP to mobilize international cooperation to intervene early on in the crisis in Syria, RtoP has been notably absent from any attempts to pursue international cooperation on behalf of Syrian refugees.

A. THE SYRIAN REFUGEE CRISIS

The conflict in Syria began in March 2011 when Syrian security forces responded violently to peaceful pro-democracy, anti-government protests in the town of Dar'a.³⁰ Demonstrations spread across Syria, as did the violent response from the regime of President Bashar al-Assad. President Assad spoke out against the protests, attributing them to imperialist forces, internal conspirators and "armed gangs and terrorists" determined to destroy his government.³¹ In April, however, he attempted to calm protesters by ending Syria's forty-eight year state of emergency and allowing controlled demonstrations.³² This attempt failed, protests escalated, and within a week government forces had killed over a hundred protestors.³³ The month of April marked an intensification of government repression and the United Nations Under-Secretary-General for Political Affairs reported reliable accounts of "artillery fire against unarmed civilians . . . shooting of medical personnel

30. See Spencer Zifcak, *The Responsibility to Protect After Libya and Syria*, 13 MELB. J. INT'L L. 59, 73 (2012).

31. *Id.*

32. See GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, TIMELINE OF INTERNATIONAL RESPONSE TO THE SITUATION IN SYRIA 2, <http://www.globalr2p.org/media/files/timeline-of-international-response-to-syria-26.pdf> (last visited Oct. 31, 2015).

33. See *id.*

who attempted to aid the wounded,” and mass arbitrary arrests.³⁴

The conflict has steadily worsened over the last four years and credible sources report continuing war crimes, crimes against humanity, and other gross human rights violations.³⁵ The expansion of the hostilities across the country has resulted in unprecedented massacres and destruction,³⁶ including the use of chemical weapons on civilians.³⁷ It has also resulted in a massive internal displacement crisis.³⁸ Both the Assad regime and opposition forces are deeply implicated in the continuing violence, and the complexity of the numerous factions now involved further diminishes any prospect of the conflict’s swift resolution. Further complicating matters is the sustained participation of foreign states such as the United States, Russia, Iran, Saudi Arabia and other nations in the armed conflict.

As of April 2014 there were 191,369 documented conflict-related deaths in Syria.³⁹ At the beginning of the conflict, the number of conflict-related deaths outpaced the numbers of people fleeing the country.⁴⁰ But this trend eventually reversed. In

34. See *Syrian Army Carrying out “Major Military Operation” Against Key City*, UN NEWS CTR. (Apr. 27, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38201#.VhlSm-tQaKI>.

35. See, e.g., U.N. Human Rights Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, at 1, U.N. Doc. A/HRC/23/58, (July 18, 2013) (“Government forces and affiliated militia have committed murder, torture, rape, forcible displacement, enforced disappearance and inhumane acts.”).

36. *Id.* ¶ 18.

37. U.N. Mission To Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, Rep. on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013 (Sept. 13, 2013), http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf.

38. This Article does not address RtoP’s implications for Syria’s internally displaced populations but instead focuses on those externally displaced. Internal displacement is by no means a less urgent problem, but it raises considerations that are different from the refugee crisis, and beyond the scope of this Article. For a discussion of RtoP as it relates to internally displaced populations, see Howard Adelman, *Refugees, IDPs and the Responsibility to Protect (R2P): The Case of Darfur*, 2 GLOBAL RESPONSIBILITY TO PROTECT 127 (2010).

39. MEGAN PRICE, ANITA GOHDES & PATRICK BALL, UPDATED STATISTICAL ANALYSIS OF DOCUMENTATION OF KILLINGS IN THE SYRIAN ARAB REPUBLIC 1 (Aug. 2014), http://www.ohchr.org/Documents/Countries/SY/HRDAG_UpdatedReportAug2014.pdf. This number captures “documented killings that are fully identified by the name of the victim, as well as the date and location of death.” *Id.*

40. PHILIPPE FARGUES & CHRISTINE FANDRICH, MIGRATION POLICY CTR., MPC RESEARCH REPORT 2012/14: THE EUROPEAN RESPONSE TO THE SYRIAN REFUGEE CRISIS—WHAT NEXT? 3 (2012).

March 2013, the number of refugees fleeing Syria hit the one million mark⁴¹ and as of August 2015 this number had more than quadrupled.⁴² Among the refugees from Syria are nationals of other countries, who had been residing in Syria as refugees from other conflicts. For many years Syria hosted among the largest refugee populations globally.⁴³ Almost all of those who have fled Syria are now concentrated in that country's vicinity, specifically Lebanon, Turkey, Jordan, Iraq, and to a lesser extent Egypt.⁴⁴

Initially, host countries were able to accommodate refugees fleeing the conflict, and did so generously⁴⁵ despite—with the exception of Egypt and Turkey—not having acceded to the UN Refugee Convention and its Protocol.⁴⁶ However, as the numbers of refugees has escalated, the sheer volume of the influx has strained this generosity, severely impacting the livelihood of refugees and many of their hosts.⁴⁷ Women and children

41. Jeff Crisp et al., U.N.C.H.R. Policy & Evaluation Serv., *From Slow Boil to Breaking Point: A Real-Time Evaluation of UNHCR's Response to the Syrian Refugee Emergency*, ¶ 2, U.N. Doc. PDES/2013/13 (July 2013).

42. *Syria Regional Refugee Response*, *supra* note 4.

43. UNHCR notes that in 2012, "Syria was the third largest asylum country in the world." U.N.H.C.R., SYRIA REGIONAL RESPONSE PLAN 14 (2013) [hereinafter SRRP5]. These refugees have also had to flee the conflict. The United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA), for example, is providing assistance to Palestinian refugees formerly in camps in Syria who have fled to Lebanon, Jordan, and Gaza. Estimates are that this population of Palestinian refugees may total close to a hundred thousand refugees by the end of 2015. *Id.* at 6.

44. *Id.* at 6–7. Israel is an exception. At the time of writing it had not opened its borders to Syrian refugees. For a analysis of Israel's policy see Michael Kagan, *Must Israel Accept Syrian Refugees?*, 50 TEX. INT'L L.J. F. 1 (2014).

45. See Crisp et al., *supra* note 41, ¶ 10.

46. Protocol Relating to the Status of Refugees, *opened for accession* Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967). Turkey and Egypt have ratified both the UN Refugee Convention and its Protocol. However, Turkey maintains the restriction found in the UN Refugee Convention according to which only persons who have become refugees as a result of events occurring in Europe are formally entitled to refugee status in Turkey. Protocol Relating to the Status of Refugees, List of Participants, Declarations and Reservations, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en#EndDec (last visited Oct. 31, 2015). Syrian refugees in Turkey are currently considered "guests" by the Turkish government, which at the time of writing, is providing these refugees with protection that the UN Refugee Agency considers compatible with international standards. See SUSAN M. AKRAM ET AL., BOS. UNIV. INT'L HUMAN RIGHTS CLINIC, PROTECTING SYRIAN REFUGEES: LAWS, POLICIES, AND GLOBAL RESPONSIBILITY SHARING 104 (2015).

47. UNHCR reports that in host countries "infrastructure and services for

make up to 75% of the refugees,⁴⁸ revealing the vulnerability of the refugee population to sexual, labor and other forms of exploitation. Over 80% of the refugee population is outside camps, living among host community populations.⁴⁹ Because so many of the refugees are outside of camps, the heavy impact of their presence on host communities has fuelled tensions between the two groups.⁵⁰ According to the UN Refugee Agency, “[m]any refugees reside within the poorest regions of the host countries, and in some locations the number of refugees is equal to or even greater than that of the local population.”⁵¹ Most of these out-of-camp refugees are living in precarious socio-economic conditions.

The refugee crisis has created a need for emergency humanitarian assistance to meet the basic needs of the refugees. The most urgent needs include shelter, water, sanitation and hygiene provisions, health and education.⁵² Regional needs also extend beyond traditional emergency humanitarian assistance. The Syrian refugee crisis is now a protracted refugee situation, and not a short-term emergency.⁵³ Owing to the sheer scale and duration of the refugee crisis, and its impact on infrastructure

health, education, shelter, water and sanitation have faced increased pressure; competition for jobs has increased and wages have fallen; and the cost of basic goods has risen.” Crisp et al., *supra* note 41, ¶ 10.

48. U.N.H.C.R., *Stories From Syrian Refugees*, <http://data.unhcr.org/syrianrefugees/syria.php> (last visited Oct. 31, 2015). Given the high proportion of refugee children, their protection is of great concern. The UN Refugee Agency has documented troubling conditions facing child refugees including: “recruitment by armed groups, including of under-aged refugees; labour exploitation, including child labour; early marriage; as well as domestic, sexual and gender-based violence, particularly targeting women and children.” Crisp et al., *supra* note 41, ¶ 17.

49. *The Syrian Refugee Crisis, Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 113th Cong. (Jan. 7, 2014) (testimony of Anne C. Richard, Assistant Secretary, Bureau of Population, Refugees, and Migration).

50. For a report on the impact of refugees on host communities, see for example, TIM MIDGLEY ET AL., WORLD VISION, *ADVOCACY REPORT: UNDER PRESSURE—THE IMPACT OF THE SYRIAN REFUGEE CRISIS ON HOST COMMUNITIES IN LEBANON* (July 2013), [http://www.worldvision.org/resources.nsf/main/press-reports/\\$file/Syria-Under-Pressure-Report_20130715.pdf](http://www.worldvision.org/resources.nsf/main/press-reports/$file/Syria-Under-Pressure-Report_20130715.pdf).

51. Crisp et al., *supra* note 41, ¶ 32.

52. *Id.* ¶ 23.

53. “Protracted displacement situations are those which have moved beyond the initial emergency phase but for which solutions do not exist in the foreseeable future. . . . UNHCR identifies a major protracted refugee situation as one where more than 25,000 refugees have been in exile for more than five years.” Gil Loescher & James Milner, *Understanding the Challenge*, 33 *FORCED MIGRATION REV.* 9, 9 (2009), <http://www.fmreview.org/FMRpdfs/FMR33/FMR33.pdf>.

and local communities, regional hosts now also urgently require development assistance in order to sustain the swell of their populations.⁵⁴ Expansion of basic services such as education and healthcare within host communities is a top priority.⁵⁵

B. THE INTERNATIONAL RESPONSE TO THE REFUGEE CRISIS

As early as August 2012 the UN Secretary General warned the Security Council about the danger posed by refugee flows out of Syria.⁵⁶ The UN High Commissioner for Refugees has addressed the UN Security Council multiple times expressing grave concern for the well-being of Syrian refugees and warning of the threat the refugee crisis poses to regional and international stability.⁵⁷ The Security Council itself has also expressed “deep concern at the consequences of the refugee crisis” and its “destabilizing impact on the entire region.”⁵⁸

However, as already highlighted, the primary responsibility and cost of hosting refugees from Syria has fallen on regional neighbors (with the exception of Israel). These countries have maintained relative access for Syrian refugees into their territories, although not always on an unrestricted basis.⁵⁹

54. SRRP5, *supra* note 43, at 6.

55. *Id.* at 10 (“Scaling up of basic services is a priority for refugees and host communities, through both direct humanitarian relief to the beneficiaries and assistance to strengthening local Government services and infrastructure.”).

56. U.N. SCOR, 67th Sess., 6826th mtg. at 3, U.N. Doc. S/PV.6826 (Aug. 30, 2012) (remarks of the Deputy Secretary-General on behalf of the Secretary-General).

57. “While Syria continues to drain itself of its people, the prospects for a political solution and an end to the fighting remain poor, and the warning signs of destabilization in some neighbouring countries are troubling. The continuing influx could send them over the edge if the international community does not act more resolutely to help.” *UNHCR Chief Urges States To Maintain Open Access for Fleeing Syrians*, U.N.H.C.R. (July 16, 2013), <http://www.unhcr.org/51e55cf96.html>. Previously he had warned the Security Council of “the real risk of the conflict spilling over across the region, and of the situation escalating into a political, security and humanitarian disaster that would completely overwhelm the international response capacity.” U.N. SCOR, 68th Sess., 6949th mtg. at 5, U.N. Doc. S/PV.6949 (Apr. 18, 2013) (remarks of António Guterres, United Nations High Commissioner for Human Rights).

58. S.C. Pres. Statement 2013/15 (Oct. 2, 2013); *see also* S.C. Res. 2139, at 1 (Feb. 22, 2014) (“Expressing grave concern at the increasing number of refugees and internally displaced persons caused by the conflict in Syria, which has a destabilizing impact on the entire region . . .” (italics omitted)).

59. Lebanon had maintained open borders permitting largely unrestricted access. However, it too announced visa restrictions for Syrians in January 2015 as it struggled to cope with the steady stream of refugees into the country. *See* Dana Ballout, *Lebanon To Require Visas for Syrians as Refugees Strain*

Working alongside regional states, the United Nations has played the lead role in coordinating the response to the refugee crisis at the national, regional, and international levels.⁶⁰ The current platform for refugee protection coordination is the Syria Regional Refugee Response Plan, or RRP, which is periodically updated to reflect changes in the refugee crisis. The RRP was developed by “over 155 actors—including host governments, UN agencies, NGOs, [the International Organization for Migration], foundations and donors.”⁶¹ The UN Refugee Agency has oversight of the RRP’s implementation.⁶²

As of May 2015, international agencies and non-governmental organizations implementing the relief effort required just over US\$4.5 billion to finance the RRP.⁶³ For 2014, the governments of Egypt, Jordan, and Lebanon together required an additional US\$583.1 million to fund their protection of Syrian refugees.⁶⁴ To raise these funds, as well as those needed by Iraq, Turkey, and Egypt, the United Nations

Country, WALL ST. J., Jan. 4, 2015. Iraq, Jordan, Egypt, and Turkey have at different times imposed some restrictions on access, citing security concerns. Tom A. Peter, *Egypt, Jordan, Iraq To Stem Syrian Refugee Food*, U.N.H.C.R. (July 14, 2013), <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=52fc6fbd5&id=51e4d7b05>.

60. The UN Refugee Agency’s concrete role varies among host countries. The Turkish government, for example, manages and administers refugee protection and assistance in Turkey, with technical assistance from the UN Refugee Agency. See *2015 UNHCR Country Operations Profile: Turkey*, U.N.H.C.R., <http://www.unhcr.org/pages/49e48e0fa7f.html> (last visited Oct. 31, 2015) (“In 2015, U.N.H.C.R. will support the Turkish authorities in building the capacity of the country’s new asylum institution and establishing a rights-based reception system.”). In Lebanon, by contrast, the UN Refugee Agency plays the lead role in administering assistance to refugees. See *2015 UNHCR Country Operations Profile: Lebanon*, U.N.H.C.R., <http://www.unhcr.org/pages/49e486676.html> (last visited Oct. 31, 2015) (describing U.N.H.C.R.’s strategy in Lebanon).

61. U.N.H.C.R., SYRIAN REFUGEES: INTER-AGENCY REGIONAL UPDATE, (Apr. 6, 2015), <http://www.data.unhcr.org/syrianrefugees/download.php?id=8622>.

62. See SRRP5, *supra* note 43, at 13 (describing the coordination framework led by UNHCR).

63. *Syria Regional Refugee Response*, *supra* note 4. This is the money required to finance the humanitarian and development assistance Syrian refugees and their hosts need.

64. U.N.H.C.R., 2014 SYRIA REGIONAL RESPONSE PLAN 1 (2014), <http://www.unhcr.org/syriarrp6/docs/Syria-rrp6-full-report.pdf>. As the crisis continues these figures have and will continue to increase. For example, in December 2014, Lebanon announced that it required US\$2.1 billion to fund assistance to refugees. See Rashid Derbas, Minister of Social Affairs, Lebanon, Remark at the Launch of the Lebanon Crisis Plan (Dec. 15, 2014), <http://www.un.org.lb/library/assets/LCRP-Speeches-063024.pdf>.

launched a massive humanitarian appeal.⁶⁵ By May 2015, the Regional Response Plan was only 20% funded.⁶⁶

In addition to raising money for the relief effort, the UN Refugee Agency has called on countries beyond the five regional hosts to commit to resettling Syrian refugees in their territories to relieve the demographic pressure on the regional hosts. As of January 2015, states outside the region had committed to resettling just under 80,000 persons⁶⁷—a mere fraction of the then 3.9 million refugee population. Perhaps even more troubling have been the sustained efforts, particularly by the European countries closest to the regional crisis, to keep Syrians from seeking refuge on their territories.⁶⁸

65. The total funding required to address the humanitarian fallout within Syria and the surrounding region has spurred the largest humanitarian appeal of all time. *UN Announces Largest Ever Humanitarian Appeal for Syria*, UN NEWS CENTRE (June 13, 2013), <http://www.un.org/apps/news/story.asp?NewsID=45112>.

66. *Syria Regional Refugee Response*, *supra* note 4.

67. U.N.H.C.R., RESETTLEMENT AND OTHER FORMS OF ADMISSION FOR SYRIAN REFUGEES (Oct. 2, 2015), <http://www.unhcr.org/52b2febafc5.pdf>.

68. Refugees fleeing Syria access the EU via three routes: by land through Greece or Bulgaria via Turkey (and some will then proceed to other countries in the EU); by air to any EU member state; and by sea across the Mediterranean to Greece, Cyprus, Malta, Italy, and possibly France and Spain. FARGUES & FANDRICH, *supra* note 40, at 5. As the refugee crisis has continued, more and more are making the journey inland to wealthier, western European states such as Sweden and Germany. See Natalia Banulescu-Bogdan & Susan Fratzke, *Europe's Migration Crisis in Context: Why Now and What Next?*, MIGRATION POL'Y INST. (Sept. 24, 2015), <http://www.migrationpolicy.org/article/europe-migration-crisis-context-why-now-and-what-next>. From fairly early on in the conflict, countries at Europe's frontier with the Syrian crisis such as Greece adopted effective measures to prevent Syrian refugees fleeing into their territories. These include deploying large numbers of additional border security officials at the Greece/Turkey border and placing floating barriers in the river that divides the two countries. *Id.* at 12. Bulgaria took a similar approach. See HUMAN RIGHTS WATCH, CONTAINMENT PLAN: BULGARIA'S PUSHBACK AND DETENTION OF SYRIAN AND OTHER ASYLUM SEEKERS AND MIGRANTS 2 (2014). The reasons these countries have for keeping Syrian refugees out are myriad, and include the fact that under the European Union's asylum policy frontier states shoulder a disproportionate share of the responsibility for refugee protection in Europe. See EUROPEAN COUNCIL ON REFUGEES AND EXILES, SHARING RESPONSIBILITY FOR REFUGEE PROTECTION IN EUROPE: DUBLIN RECONSIDERED 12–13 (2008), http://www.asyl.at/fakten_1/ECRE_Dublin_Reconsidered_Mar2008.pdf. The European system regulating the distribution of refugees across EU countries requires urgent reform. Nonetheless, attempts by states in Europe governed by international refugee law to keep Syrian refugees out of Europe violate international law. See U.N.H.C.R., SYRIAN REFUGEES IN EUROPE: WHAT EUROPE CAN DO TO ENSURE PROTECTION AND SOLIDARITY 9 (2014). For an overview of shifts in the flows of refugees to Europe, and the EU's response in September 2015 see

The summer of 2015 saw a dramatic rise in the number of Syrians seeking refuge in Europe—by August 28 over 300,000 refugees and migrants had risked their lives in the Mediterranean to reach Europe, compared to 219,000 for the entire 2014.⁶⁹ By August 2015 over 2500 had lost their lives attempting this journey.⁷⁰ At the time of writing, a few European nations had announced changes in their asylum policy towards Syrian refugees, most notably Germany, which in August 2015 announced it would suspend deportation of all Syrian refugees, permitting them to seek asylum in that country.⁷¹ Still, the need far outstrips the international response,⁷² and the overwhelming majority of Syrian refugees remain in the region.⁷³

Finally, in addition to states and other public international actors, individuals⁷⁴ and other private donors such as corporations⁷⁵ have increasingly extended support to Syrian refugees. Although it is beyond the scope of this paper to explore private support for refugees, much work remains to be done to understand the proper role of private actors in responding to mass displacement.

So why has international cooperation to protect Syrian refugees fallen so far short of the necessary response? One thing that is certain is that this is not simply a case of Syrian refugee protection being beyond the absolute financial means of the

Banulescu-Bogdan & Fratzke, *supra*.

69. Melissa Fleming, *Crossings of Mediterranean Sea Exceed 300,000, Including 200,000 to Greece*, U.N.H.C.R. NEWS STORIES, (Aug. 28, 2015), <http://www.unhcr.org/55e06a5b6.html>.

70. *Id.*

71. See Aditya Agrawal, *Germany Will Allow Syrian Refugees To Stay and Apply for Asylum*, TIME (Aug. 29, 2015), <http://time.com/4015934/germany-syrian-refugees-asylum>.

72. See, e.g., *Statement by the UN High Commissioner for Refugees, Antonio Guterres on Refugee Crisis in Europe*, U.N.H.C.R. (Sept. 4, 2015), <http://www.unhcr.org/55e9459f6.html> (“[T]here has been exemplary political and moral leadership from a number of countries. But overall, Europe has failed to find an effective common response.”).

73. By July 2015 fewer than 10% of all Syrian refugees had sought refuge in Europe. *Europe: Syrian Asylum Applications from April 2011 to August 2015*, U.N.C.H.R., <http://data.unhcr.org/syrianrefugees/asylum.php> (last visited Oct. 31, 2015) [hereinafter *Europe: Syrian Asylum Applications*].

74. See, e.g., Laura Smith-Spark, *Making Refugees Welcome: Citizens of Germany, Iceland Show the Way*, CNN (Sept. 2, 2015), <http://edition.cnn.com/2015/09/02/europe/europe-migrants-welcome>.

75. Ryan Scott, *Do Companies Have an Obligation To Help Syrian Refugees?*, FORBES (Oct. 2, 2015), <http://www.forbes.com/sites/causeintegration/2015/10/02/do-companies-have-an-obligation-to-help-syrian-refugees> (noting that UNHCR received US\$17 million in donations from companies and individuals in just six days).

world's states.⁷⁶ Instead, the failure of international cooperation for Syrian refugee protection must be understood as emblematic of a systemic global failure to distribute the cost of refugee protection equitably and sustainably among states.⁷⁷ One important reason for this failure is rooted in the nature of refugee protection itself. Scholars have characterized refugee protection as a global public good in the sense that international actors seemingly benefit even when only one or a handful of states provide refugee protection, which creates a "free rider" problem.⁷⁸ For example if states in a region experiencing a refugee crisis were able and willing to shoulder the entire cost of protecting these refugees, states in geographically remote regions would stand to benefit from the resulting regional stability even if they themselves did not share in the cost.

76. See *infra* Conclusion.

77. James C. Hathaway and R. Alexander Neve argue that refugee cost-sharing has become increasingly elusive because of the shift in the demographics of the global refugee population. In the post-Second World War period, northern states showed more willingness to cooperate for the protection of European refugees for whom the UN Refugee Convention was established. Most refugees today, however are from poorer southern states, and are predominantly non-white, which has diminished the earlier generosity of northern states to refugee protection. Hathaway & Neve, *supra* note 12, at 119–20. See also B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 351 (1998), which also attributes the decline in northern states' commitments to refugee cost-sharing to a post-Second World War "myth of difference" that constructs southern refugees as undesirable additions to northern societies. With respect to Syrian refugees an Islamophobic and anti-Arab rhetoric frequently equates Muslims or Arabs with terrorists, and at least in the United States this has been a barrier to further assistance of these refugees. See, e.g., *Why Is the U.S. Not Doing More To Help Syrian Refugees?*, NEWSWEEK (Sept. 7, 2015), <http://www.newsweek.com/why-us-not-doing-more-help-syrian-refugees-369539> (describing how conflation of Iraqis and Syrians with terrorists by some Congress members helps explain why the U.S. is not accepting more refugees). Notably, the head of the World Bank has labeled Europe's reluctance to accept refugees on its soil as xenophobic, given that "Europe need[s] migrants to help offset its demographic time bomb." Phil Thornton, *Bank Slams European Xenophobia as It Sets out New Refugee Strategy*, EMERGING MARKETS (Nov. 10, 2015), <http://www.emergingmarkets.org/Article/3496412/Bank-slams-European-xenophobia-as-it-sets-out-new-refugee-strategy.html>.

78. See Alexander Betts, *International Cooperation in the Refugee Regime*, in REFUGEES IN INTERNATIONAL RELATIONS 58 (Alexander Betts & Gil Loescher eds., 2010). Empirical analysis supports the characterization of refugee protection as a public good. See, e.g., *id.* at 20; Steven D. Roper & Lilian A. Barria, *Burden-Sharing in the Funding of the UNHCR: Refugee Protection as an Impure Public Good*, 54 J. CONFLICT RESOL. 616, 631 (2010) ("Our findings suggest that states regard refugee protection by the UNHCR as an impure public good.").

Because refugee-producing conflicts are concentrated in southern states, these states host the majority of the global refugee population, while contributions of northern states to assist southern states are discretionary.⁷⁹ Furthermore, southern states have diminished bargaining power, closer proximity to conflict, and diminished ability to control their borders,⁸⁰ creating an inherent power asymmetry in the international refugee protection regime.

There are at least two distinct approaches to solving the problem of cost-sharing: a cost-benefit approach and a norm-based approach.⁸¹ A cost-benefit approach treats “action as being driven by a logic of rational and strategic behavior that anticipates consequences and is based on given preferences.”⁸² This approach assumes that “actors’ preference formation is external to the institutional context in which actors find themselves. Institutions affect only the strategic opportunities for achieving certain objectives.”⁸³ Under this approach, solving the problem of cost-sharing hinges primarily on whether it is in the strategic interest of states to cooperate.

A norm-based approach, on the other hand, treats action as guided by “notions of identity and roles shaped by the institutional context in which actors operate.”⁸⁴ Under this approach, institutions are the “political environment or cultural context” that shapes an actor’s interests.⁸⁵ Institutional norms condition actions over time, as actors make decisions based on what’s appropriate in light of these norms.⁸⁶ There is a rich literature on precisely how norms condition or shape state action, and different theories posit different mechanisms or processes.⁸⁷

79. Betts, *supra* note 78, at 54.

80. *Id.* at 58.

81. See Eiko R. Thielmann, *Between Interests and Norms: Explaining Burden-Sharing in the European Union*, 16 J. REFUGEE STUD. 254, 255 (2003). These two approaches essentially track the distinction between rational actor models for explaining international action on the one hand, and constructivist or normative models on the other. For an overview of both, see Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1944–62 (2002).

82. Thielmann, *supra* note 81, at 254.

83. *Id.* (citation omitted). A cost-benefit logic is at the heart of the realist position I discuss in more detail in Part III.

84. *Id.*

85. *Id.* at 255.

86. See *id.*

87. There is a range of different theories regarding how norms and institutions actually shape state behavior. For an overview of most of these theories, see Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 635–55 (2004) (can-

These two approaches are not mutually exclusive,⁸⁸ and I take the view that overcoming the international failure to share the cost of refugee protection requires a frame that utilizes norms and cost-benefit analyses to motivate state cooperation.⁸⁹ Framing is “a way of selecting, organizing, interpreting, and making sense of a complex reality to provide guideposts for knowing, analyzing, persuading, and acting.”⁹⁰ There is a significant, interdisciplinary literature supporting the claim that frames play an important role in influencing the attitudes and behaviors of individuals, and relations among states.⁹¹ In theory an international treaty could play this framing role to achieve refugee cost-sharing. As mentioned in the Introduction, however, the two agreements that comprise the traditional international refugee law do not provide a frame for the equitable or sustainable distribution of the cost and responsibility of refugee protection.⁹²

There is a sizeable scholarship analyzing the nature and implications of this gap, and advancing a variety of proposals

vassing the various ways persuasion and acculturation influence state behavior). Margaret Keck and Kathryn Sikkink, for example, have argued the role of transnational advocacy networks in promoting “causes, principled ideas, and norms . . . [and] advocating policy changes that cannot be easily linked to a rationalist understanding of their ‘interests.’” MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 8–9 (1998). These networks do so primarily through persuasion and socialization. *Id.* at 16. For my purposes it is unnecessary to commit to any one constructivist theory, and sufficient instead to distinguish a generally constructivist approach notwithstanding differences among theories within this approach.

88. Thielmann, *supra* note 81, at 270 (“Political actors are constituted both by their interests, through which they evaluate anticipated consequences, and by the norms embedded in political institutions and their own identities.”). Eiko Thielmann’s empirical study of burden-sharing in the European Union provides a good example of how cost-benefit and norm-based approaches work in the same institutional regime.

89. See Goodman & Jinks, *supra* note 87, at 627 (noting that “through a dynamic relationship” rational actor- and norm-based mechanisms reinforce each other, such that regime design should incorporate elements of both).

90. Charnysh, Lloyd & Simmons, *supra* note 27, at 327 (citing Rein & Schön, *supra* note 27, at 145–46).

91. For a review of psychology, sociology, and political science literature on framing, see *id.* at 327–28. For a review of literature on framing in international legal scholarship, see Goodman & Jinks, *supra* note 87, at 636 & n.41.

92. See Hathaway & Neve, *supra* note 12, at 141 (“[The] chaotic distribution of the responsibility to provide refugee protection is not offset by any mechanism to ensure adequate compensation to those governments that take on a disproportionate share of protective responsibilities. To the contrary, any fiscal assistance received from other countries or the UNHCR is a matter of charity, not of obligation, and is not distributed solely on the basis of relative need.”).

for a new refugee regime.⁹³ But the path to establishing a comprehensive international framework for achieving refugee cost and responsibility sharing is long and uncertain, notwithstanding the urgency that attends it.⁹⁴ Even as scholars and policy makers work toward this goal, the untenable conditions facing Syrian refugees and their hosts, and the instability threatened by the status quo, call for innovation in the short term.

The predominant frame that the United Nations actors spearheading international cost-sharing for Syrian refugees have used has been a general discourse of international solidarity with those suffering and those now unable to alleviate this suffering due to resource constraints.⁹⁵ As a frame, “interna-

93. See generally Deborah Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295 (1998) (concluding that the implementation of a collective action regime is unrealistic); James L. Carlin, *Significant Refugee Crises Since World War II and the Response of the International Community*, 3 MICH. Y.B. INT'L LEGAL STUD. 3, 12–21 (1982) (reflecting on the need to strengthen collective response from international entities); Hathaway & Neve, *supra* note 12 (advocating region-based refugee burden-sharing based on regional interest convergence groups); Tally Kritzman-Amir, *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, 34 BROOK. J. INT'L L. 355 (2009) (reviewing various proposals for international refugee responsibility sharing); Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L L. 532, 532 (1986) (focusing on “the responsibilities of . . . source countries under international law to compensate refugees and countries of asylum”); Gregor Noll, *Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field*, 16 J. REFUGEE STUD. 236 (2003) (focusing on zero-sum game theory within the context of EU patterns of migration and asylum); Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243 (1997) [hereinafter Schuck, *Refugee Burden-Sharing*] (identifying the failure of refugee burden-sharing among states as a significant problem with the refugee regime and proposing a consensual regional or sub-regional scheme permitting states to assume the protection responsibilities of other states, for a price); Peter H. Schuck, *A Response to the Critics*, 12 HARV. HUM. RTS. J. 385, 386 (1999) (clarifying that, under his earlier proposal, states could induce other states to “provide refugee protection with anything that the transferee state values”); Astri Suhrke, *Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action*, 11 J. REFUGEE STUD. 396 (1998) (articulating the challenges to collective state action for refugee protection).

94. See Hathaway & Neve, *supra* note 12, at 155 (“Governments . . . exhibit little enthusiasm for engaging in the kind of major negotiations needed to establish a new international refugee convention.”).

95. With no sustained talk of responsibility, the UN-led effort has appealed primarily to this international solidarity sensibility, calling for charitable donations. An important example is the Regional Response Plan, which highlights the crucial need for “more substantial international solidarity.” SRRP5, *supra* note 43. Another is the urgent plea made by the head of UNHCR to the UN Security Council: “Massive international solidarity with [Syria’s] neighbouring countries is central to making this appeal successful. Resettlement and humanitarian admission opportunities can complement this as

tional solidarity” and its appeal to charity have proven insufficient, as evinced by the dramatic funding shortfall in the international response to the refugee crisis.⁹⁶

RtoP offers an alternative frame—one whose normative content and institutional features can be used to facilitate both norm-based and cost/benefit-based international cooperation. An especially attractive feature of RtoP is that it already exists, unlike a new treaty, which would require states to convene and commit to a whole new regime. In other words, RtoP is low-hanging fruit, whose potential in the refugee protection context remains unexplored.

Recent empirical research makes a case for soft law—specifically General Assembly resolutions—as a successful mechanism for framing the problem of and solutions to human trafficking.⁹⁷ This research finds that how the problem of human trafficking is framed affects international consensus on the required solution, and collective action to achieve that solution. In the human trafficking case, the frame that highlighted state sovereignty and state authority increased international consensus and was most successful at bringing about collective action.⁹⁸ I return, in Part III, to the viability of RtoP as a frame in light of this research and other considerations. In the remainder of this Part, I note RtoP’s absence from (1) the international response to the Syrian refugee crisis; and (2) from scholarship on refugee cost-sharing.

useful, even if limited, measures of burden-sharing.” *UNHCR Chief Urges States To Maintain Open Access for Fleeing Syrians*, *supra* note 57. Similarly, an evaluation of UNHCR’s response to the crisis concluded:

Without a visible and tangible demonstration of international solidarity and responsibility sharing, the protection environment for refugees can be expected to deteriorate rapidly. One strategic priority must thus be to swiftly and substantially increase the level of support available to host states and communities throughout the region, thereby mitigating the socio-economic and political pressures generated by the refugee influx

Crisp et al., *supra* note 41, ¶ 12.

96. A heartening development to the contrary at the time of writing of this Article was the dramatic outpouring of support by private citizens in European countries for Syrian and other refugees reaching European shores. *See, e.g.*, Smith-Spark, *supra* note 74.

97. *See, e.g.*, Charnysh, Lloyd, & Simmons, *supra* note 27, at 324.

98. Volha Charnysh, Paulette Lloyd, and Beth Simmons argue that state consensus on human trafficking regulation was driven by framing the problem as one of transnational crime and not of human rights. *Id.* at 332. The crime frame grew the coalition of states against human trafficking, and then “made possible an integrative approach that *accommodates both rights and crime fighting.*” *Id.*

C. THE NOTABLE ABSENCE OF RTO P

Addressing the Executive Committee of the UN Refugee Agency in 2005, a high-ranking UN Refugee Agency official described RtoP as a useful framework for addressing many of the existing weaknesses in the international refugee regime.⁹⁹ To date, however, refugees have received limited attention in the application of RtoP to the most high profile cases of mass atrocities since the doctrine's adoption in 2005. Although they are explicitly recognized as subjects of protection under RtoP, they remain marginal in RtoP analyses.¹⁰⁰

In the context of the Syrian refugee crisis, actors at the center of coordinating the response have not invoked RtoP to guide international involvement.¹⁰¹ Neither states nor multilateral actors within the UN have advocated application of RtoP to the refugee crisis.¹⁰² This omission is striking given that international actors have otherwise invoked RtoP in attempts to coordinate international action to address the conflict *within* Syria.¹⁰³ Significantly, these actors have invoked RtoP

99. See Erika Feller, Dir. of Int'l Prot., U.N. High Comm'r for Refugees, Presentation at the Moving on: Forced Migration and Human Rights Conference (Nov. 22, 2005), <http://www.refworld.org/docid/43a692122.html>.

100. See SUSAN HARRIS RIMMER, U.N. HIGH COMM'R FOR REFUGEES POLICY DEV. AND EVALUATION SERV., REFUGEES, INTERNALLY DISPLACED PERSONS AND THE RESPONSIBILITY TO PROTECT 2 (2010).

101. To my knowledge, the closest any international actor has come may be the following comment made by the French representative to the Security Council, addressing the Council in January 2012: "Thousands of refugees are fleeing the violence; the sovereignty of neighbouring States is being violated; inter-community tensions are on the rise—all of which has a direct impact on the stability of an already fragile region. Even without reference to the responsibility to protect, those regional consequences are enough to establish the Council's responsibility." U.N. SCOR, 67th Sess., 6710th mtg. at 15, U.N. Doc. S/PV.6710 (Jan. 31, 2012).

102. Two plausible reasons for this are that actors pursuing international cooperation for refugee protection view RtoP as either an undesirable or ineffectual frame. In Part III, I address these views.

103. As of June 29, 2015, the UN Human Rights Council had adopted fifteen resolutions condemning the violence in Syria. *Populations at Risk: Syria*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, <http://www.globalr2p.org/regions/syria> (last visited Oct. 31, 2015). Other UN actors have also condemned the violence in Syria, including the UN Secretary-General, the UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect, and the UN High Commissioner for Human Rights. See, e.g., United Nations Press Release: Office of the Special Adviser on the Prevention of Genocide, Special Advisers of the U.N. Sec'y-Gen. on the Prevention of Genocide, Francis Deng, and the Responsibility to Protect, Edward Luck, on the Situation in Syria (July 21, 2011); Navi Pillay, Briefing to the Security Council by Navi Pillay on the Situation in the Middle East (Dec. 12, 2011), <http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/>

as relevant for determining the appropriate international response to the crisis in Syria. They have called on the Syrian government and the international community to fulfill their respective responsibilities under the doctrine to protect Syria's territorial population.¹⁰⁴

Scholars of RtoP have generally paid little attention to refugees, as have scholars considering the Syrian crisis.¹⁰⁵ Refugee law scholars have similarly paid little attention to RtoP, with limited exception.¹⁰⁶ Absent from the literature is a

arabspring/syria/Syria_47_SC_Breafing_by_Pillay.pdf; David Kaye, Human Rights Prosecutors? The UN High Commissioner for Human Rights, International Justice, and the Example of Syria 7–8 (Jan. 4, 2013) (unpublished draft) (on file with University of California Irvine School of Law) (describing the UN High Commissioner for Human Rights's repeated condemnation of the violence).

104. UN High Commissioner for Human Rights, Navi Pillay, reiterated the failure of the international community to meet its RtoP obligations to Syria as recently as May 2013. See Nick Cumming-Bruce, *U.N. Rights Chief Says Governments Fail To Protect Victims of Syria Conflict*, N.Y. TIMES (May 27, 2013), <http://www.nytimes.com/2013/05/28/world/middleeast/syria-united-nations-human-rights-council.html>; see also Kaye, *supra* note 103, at 9 (describing how the UN High Commissioner for Human Rights has situated the Syrian conflict in the RtoP framework). The UN Human Rights Council has similarly invoked RtoP as the framework governing the obligations of Syria and the international community. See, e.g., *UN Human Rights Council Calls for End to Syria Fighting, Condemns Foreign Fighters*, UN NEWS CTR. (May 29, 2013), <http://www.un.org/apps/news/story.asp?NewsID=45033>.

105. Scholarship on the crisis in Syria is plentiful, but articles focused specifically on refugees are almost entirely absent from legal scholarship. See generally Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANS-NAT'L L. 693 (2013) (offering a new approach to the law of armed conflict in order to further humanitarian protection); Andrew Garwood-Gowers, *The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?*, 36 U. NEW S. WALES L.J. 594 (2013) (examining the implications of RtoP that may ultimately lead to a deadlock in Syria); Joseph Klingler, *Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law*, 55 HARV. INT'L L.J. 483 (2014) (exploring the legality of arming Syrian opposition groups); Tom Ruys, *The Syrian Civil War and the Achilles' Heel of the Law of Non-International Armed Conflict*, 50 STAN. J. INT'L L. 247 (2014) (arguing that rebel groups should be granted combatant-like status); Dan E. Stigall, *The Civil Codes of Libya and Syria: Hybridity, Durability, and Post-Revolution Viability in the Aftermath of the Arab Spring*, 28 EMORY INT'L L. REV. 283 (2014) (discussing post-conflict development in Libya and Syria); Paul R. Williams et al., *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE W. RES. J. INT'L L. 473 (2012) (arguing that limited use of force should be included within RtoP doctrine); Zifeak, *supra* note 30 (tracing differences within UN Security Council deliberations on RtoP in Libya and Syria).

106. Susan Martin has written on RtoP's potential as a framework for protecting a broader group of displaced migrants than those meeting the defini-

comprehensive analysis of what RtoP means for the international protection of refugees. Similarly absent from the literature is an analysis of what role RtoP can play in improving international cooperation for refugee cost-sharing generally, and for the Syrian crisis specifically.

Refugee crises “lie at the intersection of multiple regimes,”¹⁰⁷ and in addition to international refugee law, these crises may simultaneously be governed by international human rights and international humanitarian legal and normative regimes, respectively. This creates the opportunity to seek solutions within this “regime complex”¹⁰⁸ as opposed to focusing narrowly on the solutions available in international refugee law. RtoP is part of this regime complex, and in this Article I explore the doctrine’s potential for promoting refugee cost-sharing.

It is difficult to say with certainty why international actors, especially those whose mandate is refugee protection, have not used RtoP to frame international responses to refugee crises, even when faced with one as large as the Syrian crisis. In the Parts that follow I engage two important possibilities,

tion of refugees under international refugee law. Susan Martin, *Forced Migration, the Refugee Regime and the Responsibility to Protect*, 2 GLOBAL RESP. TO PROTECT 38 (2010). Brian Barbour and Brian Gorlick have argued that refugees should be considered in the “analysis, scope and meaning of [RtoP].” Brian Barbour & Brian Gorlick, *Embracing the “Responsibility to Protect”: A Repertoire of Measures Including Asylum for Potential Victims*, 20 INT’L J. REFUGEE L. 533, 564 (2008). Susan Harris Rimmer has underscored the marginal analysis of RtoP’s application to refugees in the various international reports that have shaped RtoP’s development. RIMMER, *supra* note 100, at 7. She argues RtoP “needs more work to become something conceptually sound and useful” for refugee protection. *Id.* at 15. I take that challenge on in this Article.

Alexander Aleinikoff and Stephen Poellot recently proposed what they term “the responsibility to solve,” a duty based on the principles underlying the international refugee regime and specific commitments states have as members of the UN General Assembly and signatories of the UN Refugee Convention. T. Alexander Aleinikoff & Stephen Poellot, *The Responsibility to Solve: The International Community and Protracted Refugee Situations*, 54 VA. J. INT’L L. 195, 195 (2014). They distinguish the responsibility to solve from RtoP because “the former does not override national sovereignty or propose coercive action . . .” *Id.* at 206 n.50. I argue that although RtoP permits coercive action under certain conditions, refugee protection would never warrant this action. *See infra* Part II.

107. Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. REV. 1147, 1171 (2011).

108. A regime complex is “an array of partially overlapping and nonhierarchical institutions governing a particular issue-area.” Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 279 (2004).

which must be addressed in order to evaluate RtoP's potential for refugee protection.

The first is conceptual: actors within and outside the UN concerned with the refugee crisis and its implications may have conceptual misgivings about whether the existing doctrine of RtoP entails international cooperation for refugee protection generally or in the Syrian case.¹⁰⁹ In other words, is RtoP a frame applicable to refugee cost-sharing? In Part II, I address any such misgivings by making explicit why RtoP entails international cooperation for refugee cost and responsibility sharing.¹¹⁰ The second possibility is that refugee protection actors have not invoked RtoP because although it applies to the cost-sharing problem it may lead to bad outcomes or be altogether ineffectual. I engage this possibility in Part III.

II. REFUGEES AND THE RESPONSIBILITY TO PROTECT

What are the implications of the existing doctrine of RtoP for international cooperation to protect refugees such as those fleeing the Syrian conflict? In this Part, I argue that RtoP, at least in principle, entails a more equitable distribution of costs and responsibility among the world's states for protecting refugees fleeing mass human rights violations when certain conditions are met. I also outline what an RtoP-based international refugee cost-sharing framework might look like using the Syrian refugee crisis. But first, I provide an overview of RtoP.

A. THE RESPONSIBILITY TO PROTECT

Two paragraphs of the World Summit Outcome Document articulate the content of RtoP currently endorsed by UN Member states¹¹¹ and the UN Security Council.¹¹² These two para-

109. Here I refer to the various UN organs whose mandates bring the protection of refugees within the purview both directly, as is the case with the UN Refugee Agency, but also indirectly as is the case with the OHCHR and the Human Rights Council, for example. Outside of the UN these actors may be individual states, international non-governmental organizations and so on.

110. Although the UN Refugee Agency, for example, has expressed openness to RtoP's potential, *see* RIMMER, *supra* note 100, it has not publicly engaged in a process of exploring or making explicit the nature of this potential.

111. This document states:

138. Each individual State has the responsibility to protect its population 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.

graphs serve as an “authoritative framework within which Member States, regional arrangements and the United Nations system and its partners can seek to give a doctrinal, policy and institutional life to the responsibility to protect.”¹¹³ As previously noted, RtoP is not legally binding on the states that unanimously committed to it in 2005. There is, however, an expansive literature on how RtoP’s tenets otherwise relate to international law.¹¹⁴

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . 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 decisive manner, through the Security Council, and in accordance with the [UN] 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 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.

2005 World Summit Outcome, *supra* note 18.

112. The United Nations Security Council has affirmed the principles captured in paragraphs 138 and 139 in at least two of its own resolutions. *Implementing the Responsibility to Protect*, *supra* note 19, ¶ 2.

113. *Id.*

114. A 2012 edited volume provides a good sample of representative views. See RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, *supra* note 20. For a discussion of RtoP origins in the international law on the obligations of states and organizations, see Nina H.B. Jørgensen, *The Responsibility to Protect and the Obligations of States and Organisations Under the Law of International Responsibility*, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, *supra* note 20, at 125. Some proponents of RtoP describe it as a continuation of human rights protection developments that originate in the UN Charter and the Universal Declaration of Human Rights and have found expression in international treaties such as the Genocide Convention, International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and the Rome Statute of the International Criminal Court. Hoffman & Nollkaemper, *supra* note 20, at 13; see also Edward C. Luck, *The Responsibility to Protect: The Journey*, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, *supra* note 20, at 39 (“The RtoP is an important innovation, not a radical departure. It is based on the existing body of law, not novel theories. . . . By combining established elements in fresh combinations, the whole has the potential to be much more than the sum of its parts.”). They argue that it embodies pre-existing responsibilities but breaks the mold by articulating the complementary responsibility of *all* states to protect civilians from international crimes when the territorial state fails. *But see* Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, 34 REV. INT’L STUD. 445, 450 (2008) (“To date, however, outside of the Genocide Convention, no firmly established doctrine

In 2009, UN Secretary General Ban Ki-moon published a report intended as a first step toward operationalizing the RtoP mandate spelled out in the 2005 World Summit Outcome Document. The report advances a three-pillar approach to understanding RtoP and the actions to which it commits states and other international actors. This three-pillar approach is a pivotal reference point both for policy makers and scholars, who treat it as an important contribution to understanding the commitments RtoP entails.

Pillar one prescribes the protection responsibilities of individual states with respect to their territorial populations,¹¹⁵ and this includes citizens and non-citizens alike.¹¹⁶ Based on

has been formulated regarding the responsibility of third-party States in failing to prevent war crimes and crimes against humanity, let alone ethnic cleansing—which it should be remembered, is not as such a legal term of art.”); Jørgensen, *supra*, at 126 (“[T]he notion of a ‘serious breach of an obligation arising under a peremptory norm of general international law’ entailing special consequences in the form of obligations on third States, may ultimately be said to reflect a twenty first century idea . . . even if rooted in established principle.”).

Those more skeptical of RtoP consider it as “at best, a candidate norm” Mark Swatek-Evenstein, *Reconstituting Humanity As Responsibility? The “Turn to History” in International Law and the Responsibility to Protect*, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE *supra* note 20, at 47. *But see* Hanne Cuyckens & Philip de Man, *The Responsibility to Prevent: On the Assumed Legal Nature of the Responsibility to Protect and its Relationship with Conflict Prevention*, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, *supra* note 20, at 111 (arguing that RtoP embodied a new norm prior to the 2005 World Summit Outcome Document articulation, which he argues stripped the concept of RtoP of any legal innovation). Firmly in the camp of RtoP skeptics, Neomi Roa has called for a rethinking of RtoP by arguing: “[T]he novelty of a third-party duty to help people in other states and the insufficiency of justifications offered for this new responsibility.” Neomi Roa, *The Choice To Protect: Rethinking Responsibility for Humanitarian Intervention*, 44 COLUM. HUM. RTS. L. REV. 697, 699 (2013). Put bluntly, “a general obligation requiring the international community to ensure protection of individuals whenever the state concerned fails to play its part is neither contained in a treaty, nor does it have the status of customary law.” Ludovica Poli, *The Responsibility to Protect Within the Security Council’s Open Debates on the Protection of Civilians: The Growing Culture of Protection*, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, *supra* note 20, at 76. There are some UN member states that embrace RtoP as “an obligation and not just as a political or moral responsibility,” *id.* at 75, but it is not legally binding as a matter of international law. For an argument that RtoP is soft law which is antagonistic to hard law on the use of force for humanitarian intervention, see Shaffer & Pollack, *supra* note 107, at 1208–39.

115. *Implementing the Responsibility to Protect*, *supra* note 19, ¶ 11(a).

116. See Jennifer D. Halbert, *A Responsibility to Protect or Preclude? Examining the Beneficiaries of the Responsibility to Protect*, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, *supra* note 20, at 275; Luck, *supra* note 114, at 41.

paragraph 138 of the 2005 World Summit Outcome Document: “[t]his responsibility entails the prevention of [genocide, war crimes, ethnic cleansing, and crimes against humanity], including their incitement, through appropriate and necessary means.”¹¹⁷

Pillar two of RtoP lays out the commitment of the international community to assist states with meeting their pillar one responsibilities toward their respective territorial populations.¹¹⁸ The 2009 UN Secretary-General Report has dubbed pillar two the “International assistance and capacity-building” pillar.¹¹⁹ International assistance and capacity building under pillar two include measures such as knowledge exchange to improve the prevention of mass atrocities;¹²⁰ international military assistance to combat instability driven by non-state actors;¹²¹ development assistance;¹²² and rule of law assistance.¹²³ Under pillar two, the territorial state must be willing to accept assistance from the international community,¹²⁴ as this pillar relies on the “mutual commitment and an active partnership between the international community and the State.”¹²⁵

Finally, pillar three prescribes the international community’s commitment to “respond collectively in a timely and decisive manner” when a territorial state is “manifestly failing” to fulfill its responsibility to protect under pillar one.¹²⁶ Pillar three applies when a state’s failure to protect is more extreme than under circumstances that might warrant action under pillar two. Measures under pillar three include “peaceful measures under Chapter VI of the UN Charter, coercive ones under Chapter VII and/or collaboration with regional and subregional arrangements under Chapter VIII.”¹²⁷ Peaceful measures under Chapter VI include, for example, Security Council recommendations calling on the parties engaged in a dispute that poten-

117. 2005 World Summit Outcome, *supra* note 18, ¶ 138.

118. *Implementing the Responsibility to Protect*, *supra* note 19, ¶ 11(b).

119. *Id.*

120. *Id.* ¶ 37–38.

121. *Id.* ¶ 40.

122. *Id.* ¶ 43–44.

123. *Id.* ¶ 47.

124. *Id.* ¶ 29.

125. *Id.* ¶ 28.

126. *Id.* ¶ 11(c). The threshold for pillar three responsibilities is expressly that “national authorities are manifestly failing to protect their population” *Id.* ¶ 50 (citing 2005 World Summit Outcome, *supra* note 18, ¶ 139). The 2009 UN Secretary-General Report terms this pillar the “timely and decisive response” pillar.

127. *Id.* ¶ 11(c).

tially threatens international peace and security to engage in diplomacy, mediation, and inclusive dialogue.¹²⁸ Coercive measures under Chapter VII include targeted sanctions on travel, financial transfers, and arms;¹²⁹ pursuit of accountability through the International Criminal Court (ICC);¹³⁰ and most controversially, foreign military intervention. Importantly, only when peaceful measures (diplomatic, humanitarian or otherwise) are inadequate, can coercive measures be used under Chapter VII.

These three pillars of RtoP do not represent a rigid progression of steps or responsibilities to be pursued by the international community sequentially.¹³¹ Instead the three pillars are intended to complement one another such that any given potential or actual conflict may trigger multiple pillars simultaneously.¹³²

B. SITUATING INTERNATIONAL COOPERATION TO PROTECT REFUGEES WITHIN RTO P AS ARTICULATED UNDER THE 2005 WORLD SUMMIT OUTCOME DOCUMENT

Although the two paragraphs of the 2005 World Summit Outcome Document anchor RtoP, they do not fully elaborate the action that international actors must take to give meaning to the doctrine. In the text of the 2005 World Summit Outcome Document itself, states noted the need for further consideration of RtoP (and implicitly its implications) by the UN General Assembly.¹³³ Accordingly, the UN General Assembly has commit-

128. See U.N. S. C., Repertoire of Security Council Practice: Consideration of the Provisions of Chapter VI of the Charter, Supplement 17, at 25, (2010–2011), http://www.un.org/en/sc/repertoire/2010-2011/Part%20VI/2010-2011_Part%20VI.pdf#page=25.

129. *Implementing the Responsibility to Protect*, *supra* note 19, ¶ 57.

130. *Id.* ¶ 53–54.

131. Arbour, *supra* note 114, at 457 (“Since [RtoP] groups different tools along discrete phases, one may be tempted to believe that the available tools for protection come in rigid progression—ranging from the softest to the most muscular options. . . . Although escalating sequences may make sense in certain cases, it may also leave dangerous protection gaps in others. . . . In situations at risk or in the midst of conflict, experience teaches that there may be, for example, a need to build capacity to protect human rights, including early warning, among local communities while enforcing coercive measures against perpetrators.”).

132. *Implementing the Responsibility to Protect*, *supra* note 19, ¶¶ 29, 50.

133. “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.” 2005 World Summit

ted to further development of the doctrine through discussions within that body and by tasking the UN Secretary General with implementing it through the UN system.¹³⁴ A necessary, though by no means sufficient, step towards the use of RtoP as one of the many frames UN and other international actors employ to pursue refugee protection generally, and cost-sharing specifically, is an account of why the frame is applicable in the first place.

1. Refugees as Beneficiaries of the International Community's Responsibility to Protect

The 2005 World Summit Outcome Document circumscribes RtoP to populations at risk from genocide, crimes against humanity, war crimes, and ethnic cleansing. As currently articulated, RtoP offers a basis only for pursuing international cooperation to protect refugee populations facing risk from these four RtoP crimes.¹³⁵ All refugees who have fled the Syrian civil war meet this condition, but refugees fleeing persecution that does not involve RtoP crimes would not.¹³⁶ For example, members of a religious minority prohibited from freely practicing their religion and who faced religious persecution in their country of nationality qualify for refugee status under international refugee law but would not, without more, fall within the ambit of RtoP. RtoP is thus relevant only for a subset of the global refugee population.

Some have criticized RtoP's privileging of the threat to life posed by the four international crimes over that posed by other man-made or even purely environmental conditions. I share this unease, but I nonetheless restrict my analysis here to the terms of RtoP adopted by international consensus and found in

Outcome, *supra* note 18, ¶ 139.

134. See ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT 19–20 (2011).

135. For a critique of international crimes as the threshold for international involvement under RtoP, see Margaret M. deGuzman, *When Are International Crimes Just Cause for War?*, 55 VA. J. INT'L L. 73 (2015).

136. Recall that under the UN Refugee Convention and its Protocol, a refugee is a person who:

owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Convention Relating to the Status of Refugees, *supra* note 2.

the 2005 World Summit Outcome Document, in order to focus on the potential of RtoP as the doctrine exists today.

Recall that although international actors have not used RtoP to frame what limited international response there has been to the Syrian refugee crisis, they have used it to frame the international response to the plight of Syria's territorial population.¹³⁷ This practice artificially limits the beneficiaries of the international community's responsibility to protect to the population within Syria. Another feature of RtoP's invocation in relation to Syria is that international actors have predominantly deployed the doctrine to mobilize the international community's coercive commitments under pillar three.¹³⁸ This limitation is similarly artificial in that it does not originate in RtoP's tenets, nor does it advance the doctrine's purpose.

The geographic territory of the sovereign state that is "manifestly failing" to protect a population¹³⁹—in this case Syria—is a good indicator of who is at risk of RtoP crimes, because it is the failure of this state that triggers pillar three of RtoP.¹⁴⁰ But ending the analysis here ignores the persisting vulnerability of the members of this population who are forced to flee Syria's territory to protect themselves. When international actors invoke RtoP exclusively to focus on Syria's territorial population, they erroneously cast the border between Syria and its neighbors as an on/off switch for RtoP beneficiary status with respect to the international community.¹⁴¹

137. For example, the UN High Commissioner for Human Rights has called for a referral of Syria to the International Criminal Court and urged the Security Council to assume its responsibility to protect the population of Syria. High Comm'r for Human Rights, Statement to the Security Council at the Council's Thematic Debate on the Protection of Civilians, (Feb. 12, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12990&LangID=E>.

138. The following serve as examples: The Special Advisors of the UN Secretary General on the Prevention of Genocide and on the Responsibility to Protect have called on the international community "to take immediate, decisive action to meet its responsibility to protect populations at risk of further atrocity crimes in Syria, taking into consideration the full range of tools available under the United Nations Charter." *Statement of the Special Advisors of the Sec'y-Gen. on the Prevention of Genocide and on the Responsibility to Protect on the Situation in Syria*, UN NEWS CENTRE (June 14, 2012), <http://www.un.org/apps/news/infocus/Syria/press.asp?sID=44>. They have also recommended that the Security Council refer the Syrian situation to the International Criminal Court. *Id.*

139. *Implementing the Responsibility to Protect*, *supra* note 19, ¶ 11(c).

140. *Id.*

141. Arbour, *supra* note 114, at 454–55 ("[W]hile proximity may matter most in terms of promptness and effectiveness of responses, it should not be

Under pillar two, the international community's responsibility to protect extends to any territory where a state requires assistance with protecting its population from RtoP crimes.¹⁴² Under pillar three, the international community's responsibility to take non-coercive action also includes no territorial qualifiers.¹⁴³ Instead, whether or not members of the international community bear a responsibility to protect Syrians who have fled the country, and are by definition refugees, depends on whether they remain at risk of RtoP crimes.

The nature and extent of the international community's RtoP commitments to refugees will correspond to the nature and extent of their vulnerability, regardless of territorial bor-

used as a pretext for non-neighbours to avoid responsibility. Indeed, the concept of responsibility to protect holds that all States are concurrently burdened with a responsibility to protect which they share irrespective of their location. . . . I would further argue that being better positioned to avert and respond to atrocities may have as much to do with the capacity to project power and mobilise resources beyond national and regional borders as with physical proximity. In this respect, too, powerful States may be reasonably expected to play a leading role in bolstering appropriate measures of prevention, dissuasion and remedy across geographic spectrum commensurate with their weight, wealth, reach, and advanced capabilities.”).

142. The following sections of the 2005 World Summit Outcome supply the content of pillar two of RtoP:

The international community should, as appropriate, encourage and help States to exercise [their responsibility to protect]. . . . 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.

Implementing the Responsibility to Protect, *supra* note 19, ¶ 1 (citing 2005 World Summit Outcome, *supra* note 18).

143. The following text of the 2005 World Summit Outcome provides the content of the international community's responsibility to protect under pillar three:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help to 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 decisive manner, through the Security Council, in accordance with the [UN] 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.

2005 World Summit Outcome, *supra* note 18, ¶ 139. For a discussion of this text as the basis of pillar three of RtoP, see *Implementing the Responsibility to Protect*, *supra* note 19, ¶¶ 49–50. Notably, the wording of the 2005 World Summit Outcome refers to “populations”—with no territorial qualifiers—as the beneficiaries of the international community's responsibility to use diplomatic, humanitarian, and other peaceful means of protection.

ders. It is only when vulnerability ceases that the international community's responsibility to protect ceases.

In principle, the international community bears a responsibility towards all at-risk Syrians regardless of their territorial location outside of Syria. Admittedly, by seeking refuge in the territory of other states, Syrian refugees also fall under the protection of those host states. This is because the very first pillar of RtoP commits all states to protect their territorial populations regardless of immigration status.¹⁴⁴ However, territorial displacement cannot, on its own, sever the complementary responsibility the international community owes to refugees fleeing Syria, even after they arrive in Lebanon or elsewhere.

Without citizenship in the host country, Syrian refugees remain at risk of RtoP crimes in Syria. In fact, their legal right to remain in the countries currently hosting the vast majority of Syrian refugees remains sufficiently tenuous that risk of return to Syria is a genuine concern. Turkey, for example, which as of July 2015 hosted the highest number of Syrian refugees globally,¹⁴⁵ did not at that time even recognize these refugees as refugees under international or its domestic law and showed no signs of changing its policy. Syrian refugees are instead "guests" and the terms of their stay in Turkey are governed by a temporary protection regulation that could be revoked or terminated at any time. Many Syrian refugees are not even formerly registered for this or any other temporary protected status in regional host countries, and for those that are, this status offers little guarantee that they will not be pushed back into Syria by regional hosts.

Put differently, Syrian refugees living in regional host countries remain vulnerable to RtoP crimes in Syria because, as non-citizens of these countries, they remain at risk of return to Syria by deportation or refoulement. Risk of return stems also from more structural but equally dangerous factors. One example arising from the current failure of international cooperation is becoming an increasing concern among Syrian refugees. As socio-economic conditions facing refugees worsen in the re-

144. See 2005 World Summit Outcome, *supra* note 18, ¶ 138. The UN Refugee Convention and its Protocol also require states party to these treaties to provide protections for *refugees* present in their territory. See Convention Relating to the Status of Refugees, *supra* note 2, art. 1–25.

145. See Nick Cumming-Bruce, *Number of Syrian Refugees Climbs to More than 4 Million*, N.Y. TIMES (July 9, 2015), <http://www.nytimes.com/2015/07/09/world/middleeast/number-of-syrian-refugees-climbs-to-more-than-4-million.html>.

gion due to insufficient resources, the International Rescue Committee reported that refugees (particularly women) in Lebanon and Jordan feared they would have to return to Syria and face the threat of fatal violence, rather than die of starvation in host countries.¹⁴⁶

The extent of the international community's responsibility to protect Syrians outside of Syria is a function of their host states' capacity and willingness to extend protection. As capacity and/or willingness diminish, the urgency and extent of the requisite international involvement increase. Under pillar two, the international community's commitments come into play when a territorial state, "because of capacity deficits or lack of territorial control," fails to meet its RtoP commitments.¹⁴⁷ The nature and extent of the international community's commitments under RtoP become more intensive as host states are less capable (or willing) to protect refugees within their borders. For example, at the time of writing, Sweden arguably faces no capacity deficit or lack of territorial control that would trigger the international community's RtoP commitments to Syrians seeking refuge in that country. Jordan, on the other hand, has made explicit its inability to sustain protection of the Syrian refugees in its territory.

By early 2015, Jordan had maintained a largely open border policy for Syrian refugees and was host to over 600,000.¹⁴⁸ About 20% of these refugees resided in camps, and the largest of these was Zaatari camp, which by August of 2014 had over 80,000 registered Syrian residents.¹⁴⁹ The remaining 80% of the Syrian refugee population resided in non-camp urban and rural areas.¹⁵⁰ To Jordan's population of more than 6 million,¹⁵¹ Syrian refugees were about a 10% addition. Unsurprisingly, the scale of the refugee population "stretched the ability of local au-

146. *Syrian Refugees Warn They Have No Choice but To Return to Syria After Aid Cuts to Food, Health*, INT'L RESCUE COMM. (Dec. 3, 2014), <http://www.rescue.org/press-releases/syrian-refugees-warn-they-have-no-choice-return-syria-after-aid-cuts-food-health-2262>.

147. *Implementing the Responsibility to Protect*, *supra* note 19, ¶ 13.

148. *See Syrian Refugees: A Snapshot of the Crisis—in the Middle East and Europe: Jordan*, EUR. UNIV. INST., http://syrianrefugees.eu/?page_id=87 (last visited Oct. 31, 2015).

149. *Id.* Zaatari is administered by a body appointed by the Jordanian government, with support from the UN Refugee Agency. *See* U.N.C.H.R., SYRIA REGIONAL RESPONSE PLAN: JORDAN 4 (2014), <http://www.unhcr.org/syriarrp6/docs/syria-rrp6-jordan-response-plan.pdf>.

150. SYRIA REGIONAL RESPONSE PLAN: JORDAN, *supra* note 149.

151. *Data: Jordan*, WORLD BANK, <http://data.worldbank.org/country/jordan> (last visited Sept. 19, 2015).

thorities to maintain service delivery [and] resulted in overcrowded labour markets.”¹⁵² Schools and hospitals operated over capacity and competition for jobs depressed wages, even as prices for fuel and rental accommodation increased for refugees and Jordanians alike.¹⁵³ At the end of 2013, the Jordanian government calculated the gross cost of hosting 600,000 non-camp refugees to be US\$1.68 *billion*.¹⁵⁴ These circumstances warrant international assistance under pillar two of RtoP, assistance that would more sustainably and equitably distribute the cost of protecting Syrian refugees.

The case for international cooperation under RtoP is even stronger when refugees from RtoP crimes face a risk of these crimes in their host countries. The source of the threat may be external or internal to the refugee population. External threats for refugees in Turkey seeking refuge close to the border with Syria, would include shelling across Syria’s borders that puts refugees and host communities at direct risk.¹⁵⁵ Another example is attacks by Islamic State militants that began in October 2014 targeting the Syrian town of Kobani, which sits at the border with Turkey.¹⁵⁶ These attacks posed a legitimate threat of spillover violence, putting Syrian refugees and their Turkish hosts close to the border at direct risk of RtoP crimes.¹⁵⁷

It would be a mistake to understand the international community’s responsibility to protect as engaged only when the facts of a conflict meet the *full* legal threshold of the RtoP

152. SYRIA REGIONAL RESPONSE PLAN: JORDAN, *supra* note 149, at 6. According to the UN Refugee Agency, Syrians in urban areas “purchase water, electricity and shelter through the Jordanian market, and are granted access to public services, including health and education.” *Id.*

153. *Id.*

154. *Id.* at 11.

155. Shelling from Syria during the conflict has struck Turkish territory resulting in human casualties and property damage close to the border with Syria. *Turkey Retaliates After Second Syrian Shell Hits Village*, TELEGRAPH (Oct. 7, 2012), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9592461/Turkey-retaliates-after-second-Syrian-shell-hits-village.html>. The same has been true in Lebanon. *Military: Shelling from Syria Hits Lebanon*, CNN (July 7, 2012, 9:31 AM), <http://www.cnn.com/2012/07/07/world/meast/lebanon-syria-attack/index.html>.

156. See Karam Shoumali & Anne Barnard, *Slaughter Is Feared as ISIS Nears Turkish Border*, N.Y. TIMES, (Oct. 6, 2014), <http://www.nytimes.com/2014/10/07/world/middleeast/isis-moves-into-syrian-kurdish-enclave-on-turkish-border.html>.

157. See, e.g., *id.* (describing Islamic State militants’ attack of the Syrian town of Kobani).

crimes.¹⁵⁸ This is because RtoP is fundamentally forward looking—it aims as far as possible to prevent RtoP crimes, and where that fails, it aims to halt the commission of these crimes.¹⁵⁹ Where there is strong reason to believe that the patterns of a violent conflict or instability foreshadow an escalation to full blown RtoP crimes, RtoP requires that the international community take action. This action would include sharing the cost of protecting the refugee population and its hosts, where the host state lacked the capacity to do so.

Refugees and their host communities may also face the risk of RtoP crimes in the host state for reasons internal to the refugee population. Where the volume or composition of a refugee population places itself and its hosts at risk of RtoP crimes, the international community has a responsibility to protect refugees and their hosts. Lebanon offers a good example. It has experienced a significant spike in sectarian violence as a result of the scale and composition of refugee flows.¹⁶⁰ On some accounts

158. David Scheffer has made this point elsewhere, Scheffer, *supra* note 19, at 115 (“R2P is as much a principle of prevention as it is of response.”), although he may ultimately favor what I view to be an overly restrictive substantiality test. He nonetheless makes the following point:

R2P cannot possibly be a viable concept if it is defined as a means of reacting to the most speculative suggestion of some relatively minor and isolated threat of genocide, crimes against humanity, ethnic cleansing, or war crimes. The threat has to have some meaningful content, and the speculation about it must be centered on the plausible possibility of a crime of some magnitude. . . . Principles of substantiality that apply to ongoing atrocity crimes are thus relevant to examining what is required to trigger R2P as a preventative measure.

Id. at 120. While I agree that speculative suggestions ought not trigger RtoP, any substantiality test must be both flexible and not so overly restrictive as to essentially require fulfillment of all the legal elements of the four crimes. To this extent, I share the following view:

The most effective enforcement of R2P will normally precede an accurate legal description of the crime at issue, a task that may take years and several criminal trials, or a judgment of the International Court of Justice to establish. Policymakers must make the political decision about whether and how to take action, while gambling on the nature of the crime threatening a civilian population and how, if left unchallenged, that crime may unfold.

Id. at 134.

159. Louise Arbour has described RtoP as encompassing “a continuum of prevention, reaction, and commitment to rebuild, spanning from early warning, to diplomatic pressure, to coercive measures, to accountability for perpetrators and international aid. Thus, through a calibrated process, the norm is engaged from the earliest stages of a situation of concern.” Arbour, *supra* note 114, at 448.

160. See Fernande van Tets, *Syria Spillover into Lebanon Intensifies with Clashes in Sidon*, INDEPENDENT (June 18, 2013), <http://www.independent.co.uk/news/world/middle-east/syria-spillover-into-lebanon-intensifies-with-clashes-in-sidon-8664117.html> (“The southern Lebanese city of Sidon erupted

this is the worst sectarian violence the country has experienced since the end of its own civil war.¹⁶¹ This violence may foreshadow an escalation that could well lead to the commission of RtoP crimes in Lebanon.¹⁶² In January 2015, the Lebanese government imposed visa requirements restricting the access of Syrian refugees to Lebanon. It linked this decision directly to the staggering socio-economic, political and security ramifications of hosting a refugee population that in early 2015 constituted about a quarter of its total population.¹⁶³ The situation confronting Lebanon warrants international assistance under pillar two, *and* timely and decisive action under pillar three.

According to the 2005 World Summit Outcome, timely and decisive action must first take the form of “appropriate diplomatic, humanitarian and other peaceful means,” through the UN.¹⁶⁴ Below, I discuss what form this non-coercive timely and

in heavy clashes as followers of a radical Sunni cleric battled gunmen believed to be sympathisers of the Shia-backed Hezbollah, in the latest outbreak of violence between factions supporting opposing sides in the Syrian conflict.”); Erin A. Weir, *Deluge of Syrian Refugees in Lebanon Awakens Old Sectarian Divisions*, GLOBAL OBSERVATORY (June 18, 2013), <http://theglobalobservatory.org/2013/06/deluge-of-syrian-refugees-in-lebanon-awakens-old-sectarian-divisions> (“In Lebanon, the sectarian identities and political allegiances of half a million refugees from Syria are aggravating long-standing tensions among Lebanese communities.”). Reports in 2013 suggested a similar dynamic was developing in Iraq. See Tim Arango, *Sectarian Violence Reignites in an Iraqi Town*, N.Y. TIMES (Sept. 18, 2013), <http://www.nytimes.com/2013/09/19/world/middleeast/sectarian-violence-reignites-in-an-iraqi-town.html> (“Iraqi leaders worry that the violence here may be a sign of what awaits the rest of the country if the government cannot quell the growing mayhem that many trace to the civil war in Syria, which has inflamed sectarian divisions, with Sunnis supporting the rebels and Shiites backing the Assad government.”).

161. *In Tripoli, Deadly Sectarian Violence Fanned by Syrian Conflict*, PBS (June 5, 2013), http://www.pbs.org/newshour/bb/middle_east-jan-june13-syria2_06-05.

162. For an account of how the ethnic and sectarian dynamics of the refugee population and host communities are reproducing the conflict in Lebanon, see Chris Zambelis, *Syrian Unrest Raises Sectarian Tensions in Lebanon*, 9 TERRORISM MONITOR, Aug. 4, 2011, http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=38285. A report produced for the United States Secretary of Defense warns that refugee influxes into Turkey, Lebanon, Iraq, and Jordan are a key factor likely to contribute to the spread of civil war across the region. See WILLIAM YOUNG ET AL., RAND NAT’L DEF. RESEARCH INST., *SPILLOVER FROM THE CONFLICT IN SYRIA: AN ASSESSMENT OF THE FACTORS THAT AID AND IMPEDE THE SPREAD OF VIOLENCE* vii (2014), http://www.jamestown.org/uploads/media/TM_009_Issue31_03.pdf.

163. *Lebanon Restricts Free Entry of Syrian Refugees To Limit Sunni Inflow*, GUARDIAN (Jan. 5, 2015), <http://www.theguardian.com/world/2015/jan/05/lebanon-syrian-refugees-sunni-visa-rules>.

164. 2005 World Summit Outcome, *supra* note 18, ¶ 139.

decisive action might take. However, pillar three of RtoP allows for coercive measures, too, when a territorial state is manifestly failing to protect its population and a state refuses international assistance to ensure protection.

Although I endorse peaceful measures under pillar three that operate on the basis of voluntary cooperation with the refugee-hosting state, I see no place for coercive measures against refugee-hosting states when these states themselves are not engaged in perpetrating RtoP crimes.¹⁶⁵ Countries requiring assistance under RtoP are unlikely to reject international assistance with protection when they are incapable of providing this protection. In fact the opposite is typically true. For example, Lebanon, Turkey, Iraq, Jordan and Egypt have made their need for international support abundantly clear.¹⁶⁶ It is difficult to imagine circumstances where the goal of cost-sharing to ensure refugee protection in host countries would require or be achieved by coercive action against the host state. The question of whether coercive measures under RtoP, such as ICC referrals and humanitarian intervention,¹⁶⁷ are *ever* appropriate responses to mass atrocities is too vast to take on in this Article. I do, however, view these measures with deep skepticism, largely on account of the harm they have historically imposed on at-risk populations, even when international actors have deployed these measures ostensibly to benefit at-risk populations.¹⁶⁸ As I

165. This is a separate concern from the use of coercive measures against refugee-producing states to prevent refugee flows. For Syria this would mean the use of the regional refugee crisis as justification for humanitarian intervention in Syria. See *infra* Part III.B.

166. Turkey is an example of a country that at first refused international assistance with protecting Syrian refugees, but that ultimately requested this assistance as the magnitude of the crisis escalated. See *Syrian Refugees: A Snapshot of the Crisis—in the Middle East and Europe: Turkey*, EUR. UNIV. INST., http://syrianrefugees.eu/?page_id=80 (last visited Oct. 31, 2015) (“The rising price tag has now forced the Turkish government to seek international support for an operation that, at the beginning, was guarded as a government responsibility.”).

167. Although there is no single authoritative definition of humanitarian intervention, the following is instructive:

Humanitarian intervention is the use of force across state borders by an international governmental organisation, a group of states or a single state aimed at preventing or ending gross violations of human rights and humanitarian law committed against individuals other than its own citizens, without the full and valid consent of the state within whose territory force is applied.

Diana Amnéus, *Has Humanitarian Intervention Become Part of International Law Under the Responsibility to Protect Doctrine?*, in *RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE*, *supra* note 20, at 157.

168. See *infra* Part III. It is arguable that to invoke RtoP, even solely to

discuss further in Part III, I propose attempting to realize the non-coercive commitments of RtoP even while marginalizing coercive action under the doctrine.

In sum, pillars two and three of RtoP entail international cooperation for refugee cost-sharing when states hosting RtoP refugees are unable to protect these refugees. The nature and extent of the international community's responsibility will be a function of the host nation's incapacity. With respect to determining whether a refugee crisis warrants international involvement under pillar two or pillar three, such a determination will be highly contingent on the circumstances of a given crisis. As the UN Secretary General has noted on the general question of whether a given crisis triggers pillars two or three:

In dealing with the diverse circumstances in which crimes and violations relating to the responsibility to protect are planned, incited and/or committed, there is no room for a rigidly sequenced strategy or for tightly defined "triggers" for action.¹⁶⁹

By September 2015, I would argue that all of the regional Syrian refugee hosting countries met the threshold for international assistance under pillar two, and for timely and decisive action under pillar three. Regional hosts are manifestly failing to protect Syrian refugees, whose very livelihoods remain insecure in these countries, to say nothing of the hardships that host communities now face themselves as a result of the refugee crisis.

The international community also bears a responsibility when states are unwilling to protect refugees, capacity notwithstanding. However, host unwillingness to protect raises serious challenges to realizing the international community's responsibility to protect refugees in such contexts.

Where a state is unwilling to extend protection to refugees there may be little the international community can do to change such a state's position, and what little it can do is un-

mobilize its non-coercive commitments, is inevitably to raise the specter of foreign military intervention. For one thing, this specter already exists even outside the RtoP frame: Article 42 of the UN Charter, which is legally binding on all UN member states, remains a vehicle for this whether or not RtoP is invoked. See U.N. Charter art. 42, <http://www.un.org/en/documents/charter/chapter7.shtml>. Article 42 permits the UN Security Council to authorize use of force to maintain or restore international peace and security. See *id.* Under RtoP, coercive intervention is only available if it is authorized by the UN Security Council. Furthermore, as I discuss further in Part III, it is worth attempting to realize the non-coercive commitments of RtoP even while marginalizing its coercive commitments.

169. *Implementing the Responsibility to Protect*, *supra* note 19, ¶ 50.

likely to include coercive action. Take the example of Israel, which has by and large closed its borders to Syrian refugees.¹⁷⁰ It is difficult to imagine what form of coercive action the international community could pursue to force Israel to accept Syrian refugees on its territory, and also guarantee their genuine protection once admitted. Military intervention and sanctions are not only unlikely, but would arguably fail even if they were realized. The (only marginally) more promising route would be to seek to convince unwilling states through non-coercive means such as diplomatic negotiations.

Ultimately, the international community bears a responsibility to protect refugees seeking protection in states unwilling to extend this protection. However, it is unlikely that the international community could successfully realize this responsibility via cooperation with an unwilling state. What this means for my analysis is that international cost-sharing to protect refugees under RtoP is more likely to benefit refugees in territories where the host state has some willingness to extend protection to these refugees, even if this state lacks the capacity to do so.

C. IMPLEMENTING RTO-P-BASED REFUGEE COST-SHARING

At least one way to develop RtoP-based refugee protection would be for the UN Secretary General to issue a report per his UN General Assembly RtoP-development mandate. This report would detail RtoP's implications for refugee protection generally and would serve as a first step in institutionalizing refugee cost-sharing under RtoP in the same way that the 2009 Secretary General report institutionalized the three-pillar approach to RtoP. This report could make explicit the relationship between refugees and RtoP as a conceptual matter, along the lines that I have done above. Additionally, this report could include an institutional road map for pursuing refugee cost-sharing under RtoP.

For any refugee crisis, protection efforts can be divided into at least two levels of activity. There are activities at the coordination level, devoted to designing the protection plan, assigning responsibility for its implementation, and securing funding and other commitments necessary to deliver refugee protection. There are also activities at the operational level devoted to implementation of the blueprint developed at the coordination

170. See Kagan, *supra* note 44 (examining Israel's policy on Syrian refugees).

level. A key feature of the UN Secretary General report would be an institutional blueprint for how RtoP could frame coordination for a more equitable distribution of refugee protection costs.

I propose the following key features for an RtoP-based cost-sharing framework. First, initiation of this framework would occur at the joint request of the UN Refugee Agency and the government(s) hosting RtoP refugees whom they lacked the capacity to protect.¹⁷¹ As the leading international actor in the area of refugee protection, the UN Refugee Agency's technical expertise makes it a natural choice for this role. The UN Refugee Agency's suitability is evident in the centrality of this body to coordination of the ongoing Syrian regional refugee response. Also, although the UN Refugee Agency is not immune to varying degrees of political influence primarily as a result of its financial dependency on a select group of states, it nonetheless combines the best mix of expertise and independent commitment to refugee protection of any international entity.¹⁷²

Recent empirical research on international cooperation for refugee protection further underscores the value of the UN Refugee Agency in this role. Looking at four of the largest international cooperation efforts for refugee protection, Alexander Betts finds that northern states contributed to refugee protection in southern states only when they appreciated the substantive linkages between "in-region protection and their interests."¹⁷³ He also finds that "[the UN Refugee Agency] has played a crucial role in creating, changing, or simply communicating these substantive linkages."¹⁷⁴ He acknowledges that the

171. There is precedent for this, not under RtoP, but in initiatives in the past to secure international burden-sharing for refugee protection. For example, the International Conference on Refugees in Central American (CIREFCA) was convened by the UN Refugee Agency and regional refugee hosting countries to secure international assistance with addressing the refugee crisis in Central America in the late eighties. See Alexander Betts, *Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA* 9–11 (UNHCR New Issues in Refugee Research, Working Paper No. 120, 2006).

172. See Gil Loescher, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, 35 INT'L MIGRATION REV. 33, 33–56 (2001).

173. Betts, *supra* note 78, at 64 ("Northern states have voluntarily contributed to burden-sharing insofar as they have believed that there has been a material, ideational, or institutional relationship between refugee protection in the South and their interests in security, trade, and immigration, for example.")

174. *Id.* at 65 ("[UNHCR] has played a role in providing information in order to address uncertainty and imperfect information on linkages. In an idea-

UN Refugee Agency has had limited ability to change “the material relationship between issue-areas, [but] it has nevertheless played a significant role in shaping states’ beliefs about the causal relationship between issue-areas.”¹⁷⁵

This research suggests that successfully promoting international cooperation for refugee cost-sharing under RtoP requires a central issue-linking actor, to make explicit how cost-sharing advances the normative and strategic interests of contributing states. Doing so involves managing these states’ perceptions of the refugee crisis, and a natural choice for this role is the UN Refugee Agency.¹⁷⁶

For crises that host governments and the UN Refugee Agency deem to warrant international cost-sharing, an attractive vehicle for pursuing this cooperation is a Comprehensive Plan of Action (CPA).¹⁷⁷ CPAs are platforms developed by key international refugee protection and humanitarian actors in collaboration with states, to provide a comprehensive response to a refugee crisis.¹⁷⁸ CPAs have been used at various points in history to coordinate international cooperation for refugee protection, in two instances with significant though not unmediated success.¹⁷⁹ The CPA would be a vehicle for convening UN member states to determine the levels and nature of interna-

tional context, it has played an important epistemic role in developing a common understanding of the ‘nexus’ between refugee protection and other issue-areas. . . . It has often reinforced a certain set of beliefs about linkages through argumentation. Given the absence of a clearly defined normative and legal framework on burden-sharing, UNHCR has been able to play an important role in the institutional design of its ad hoc conferences and so shape the contractual relationship between issue-areas.”).

175. *Id.*

176. *Id.* at 44–48 (analyzing the UN Refugee Agency’s role as an issue linker successfully facilitating international cooperation to address large scale refugee crises).

177. To date, there has been at least one call for a Syrian refugee CPA by refugee advocates, but not under the RtoP frame. *See* AKRAM ET AL., *supra* note 46, at 2.

178. *See* Betts, *supra* note 171, at 5–6 (identifying the key characteristics of a CPA as an approach that “[draws] on a range of durable solutions simultaneously,” facilitates “additional burden- or responsibility-sharing between countries of origin and asylum, and third countries acting as donors or resettlement countries” and involves work across UN agencies and with NGOs to implement the plan).

179. *See id.* (describing the two CPAs referred to above as CIREFCA, which between 1987 and 1994 was the platform used to achieve international cooperation to assist Central American refugees, and CPAIR, which was used to achieve international cooperation to assist Indochinese refugees between 1988 and 1996 and detailing accounts of the functioning of these two important CPAs).

tional cooperation required to assist regional actors either under pillars two and three of RtoP according to the severity of the refugee crisis.

A fundamental goal of the CPA would be the equitable and sustainable distribution of the cost of refugees from the respective crisis. There is a range of distinct possible approaches to conceptualizing such a distribution.¹⁸⁰

A sustainable distribution is one that would permit host nations and international contributors to a given refugee protection effort to maintain a minimum level of assistance to refugees and their host communities such that the fundamental human rights of these populations would be ensured for the duration of the crisis. An equitable distribution, in light of RtoP's tenets, should be one governed by a theory of "common but differentiated responsibility," which other scholars have recommended for international refugee cost-sharing.¹⁸¹ Although states have a shared responsibility to protect refugees under RtoP, differentiated responsibility ties each states' contribution to the cost of refugee protection to its relative capacity to shoulder this cost.¹⁸²

Factoring a state's available resources into a cost-sharing regime under RtoP is consistent with a core tenet of the doctrine, which is that international assistance is supposed, in part, to remedy capacity failures of UN member states in the face of RtoP crimes.¹⁸³ It would be perverse for the doctrine to commit states to contributing more than they could afford. Furthermore, factoring in a state's available resources contributes to ensuring the sustainability of a given cost-distribution.

180. For a good discussion of the possible range of conceptions of and mechanisms for refugee cost-sharing, see Kritzman-Amir, *supra* note 93, at 378–89.

181. I adopt the term "common but differentiated responsibility" from Hathaway & Neve, who propose a regime of collectivized responsibility for refugee protection that is, however, quite different from the one I propose in this Article. See Hathaway & Neve, *supra* note 12, at 144 (proposing that states form interest convergence groups where clusters of northern states enter binding agreements with southern states under which the former agree to fund refugee protection in the latter).

182. See *id.* at 145; see also Schuck, *Refugee Burden-Sharing*, *supra* note 93, at 277 (proposing a similar approach, which he calls proportional burden-sharing, which "demands that a state's share of the burden be limited to its burden-bearing capacity relative to that of all other states in the international community").

183. See 2005 World Summit Outcome, *supra* note 18, ¶ 139.

One approach to determining the differentiated contributions of states would be to use the United Nations assessed contribution calculus to determine what fraction of the total funding requirement each UN member state would be expected to contribute.¹⁸⁴ The Secretary-General report on the responsibility to protect refugees could therefore recommend that cost-sharing for a given crisis would entail assessed contributions from UN member states using the UN assessed contributions formula. An important modification to this would then be to reduce the contributions of countries already hosting refugees by an amount proportionate to the cost borne by these countries. For the Syrian refugee crisis, this approach would mean the fraction of the requisite total funding for a CPA that each UN member state would be responsible for contributing, would be determined by the UN assessed contribution calculus. Regional hosts would be exempt from this assessed contribution, and other states hosting refugees from other crises, whom they, too, lacked the capacity to protect would also be exempt.

Depending on the scale and nature of the crisis, the host government(s) and the UN Refugee Agency could seek to convene the CPA through the UN Security Council acting under its Chapter VII mandate. Chapter VII of the UN Charter empowers the UN Security Council to determine the existence of threats to international peace and security.¹⁸⁵ Chapter VII also authorizes the Security Council to take action to maintain or restore international peace and security.¹⁸⁶ The Security Council does so through Chapter VII resolutions, which are binding on *all* 193 UN member states. A Security Council resolution establishing a CPA could make the terms of the CPA binding under international law. Enforcement of or compliance with Chapter VII resolutions is by no means perfect. Although these resolutions are legally binding on all United Nations members states, violations are a fact of international practice. All the same, Chapter VII resolutions have and continue to play an

184. See G.A. Res. 67/238 (Dec. 24, 2012), http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/238 (providing the formula the United Nations uses to assess the funding contributions of each of its member states to the organization that intends to capture each member state's capacity to pay, in which the United Nations reviews the formula every three years and bases assessed contributions on a number of factors including gross national income and debt-burden). I agree with Peter Schuck that "[p]rotective capacity is largely, though not exclusively, a function of national wealth." Schuck, *Refugee Burden-Sharing*, *supra* note 93, at 279.

185. U.N. Charter art. 39, <http://www.un.org/en/documents/charter/chapter7.shtml>.

186. *Id.*

important role in coordinating international action and would be an improvement on the existing vacuum in the international refugee regime.

Even in the absence of a Chapter VII mandate, a CPA is possible. Neither the CPA pursued for achieving international cooperation to protect refugees in Central America between 1987 and 1994 (CIREFCA), nor that for Indochinese refugees between 1988 and 1996 (CPAIR) involved a UN Security Council Chapter VII mandate.¹⁸⁷ Although both CPAs have been justly criticized, they achieved significant gains in international cost-sharing for protection of their respective refugee populations.¹⁸⁸ CIREFCA, for example, achieved an estimated 86% of the total funding required from members of the international community to provide protection and assistance to refugees in the region.¹⁸⁹ These gains could arguably be replicated for RtoP-based CPAs, including one to address the Syrian refugee crisis.¹⁹⁰ Admittedly more work is required to flesh out the terms of an operationalizable CPA for Syria and for other refugee crises. This Article, as the first to explain the conceptual basis for and key features of such a CPA, is an important first step.

Even in the absence of RtoP there has been at least one attempt to lobby the UN to pursue a CPA for the Syrian refugee crisis.¹⁹¹ What, then, is gained by situating a CPA within the RtoP framework?

Situating CPAs in the RtoP frame along the lines I have proposed begins the process of institutionalizing refugee cost-sharing within a frame with potential to facilitate this cost-sharing. Every time international actors framed a conflict as

187. For a discussion of the formation of these CPAs, see Betts, *supra* note 171.

188. *Id.* at 5.

189. *Id.* at 11.

190. In his study of these two CPAs, Betts argues that their success was not historically contingent but can be replicated where certain preconditions are met. *See id.* at 5; Betts *supra* note 78, at 54 (listing factors and explanations); *see also* U.N.H.C.R., EXPERT MEETING ON INTERNATIONAL COOPERATION TO SHARE BURDENS AND RESPONSIBILITIES 8 (June 27–28, 2001), <http://www.refworld.org/docid/4e9fed232.html> (“Successful historical examples [of international cooperation to solve protracted refugee situations] demonstrate the importance of context-specific sustained engagement, usually multi-year; clear ownership of the process; differentiated support and participation; a clearly defined role for civil society; a special facilitator role for UNHCR; and good partnerships.”).

191. AKRAM ET AL., *supra* note 46.

triggering RtoP, any attendant refugee crisis would as a matter of course generate debate on whether a CPA was necessary. The UN and host nations could avail themselves of an established procedure, and if circumstances so warranted, they could fight the battle for funding on pre-existing terms. RtoP provides a frame within which the UN and host countries could influence state behavior through a variety of means, to share the cost of protecting refugees. In sum, situating cost-sharing within RtoP confers the benefits of institutional framing that I discuss in Part I on attempts to secure international cost-sharing. I discuss RtoP's viability in this regard in Part III.

As to the substance of the CPA, the Secretary-General report could not detail its content because the specific needs of RtoP refugees, and the costs of meeting these needs would vary by conflict. That said, a report could identify categories of assistance that would be central to an RtoP CPA. I propose using the three categories of assistance that the Syrian RRP adopts: protection assistance, humanitarian assistance, and development assistance.¹⁹² UN member states would thus be sharing the costs of these different forms of assistance, as opposed to the status quo, under which regional host governments with limited capacity are left to shoulder a disproportionate cost of the responsibility of protecting refugees.

RtoP refugees are likely to remain concentrated in the region where the conflict they are fleeing is located.¹⁹³ As a result, the fundamental means by which states outside the region will fulfill their commitments under RtoP will be through humanitarian and development assistance. Humanitarian assistance (not to be confused with humanitarian intervention) is measures for emergency relief to refugees including their nutritional, sanitation, and emergency medical needs. This assistance might take the form of goods and services delivered to the countries hosting the refugee populations. It will also take the form of funding assistance to host states and international organizations implementing the RtoP CPA.

Development assistance is measures that go beyond emergency assistance to address the long-term needs of refugees and their hosts. These measures also address the infrastructural impact that large numbers of refugees can have on their host

192. See, e.g., U.N.H.C.R., OVERVIEW: 2015 SYRIA RESPONSE PLAN AND 2015–2016 REGIONAL REFUGEE RESILIENCE PLAN 8 (2014), <https://data.unhcr.org/syrianrefugees/download.php?id=7908> (summarizing the protection, humanitarian and development assistance goals of the RRRP).

193. See *Europe: Syrian Asylum Applications*, *supra* note 73.

communities. Measures in this category would be financial and other contributions from international actors to host states. These measures would enable host governments to ensure that refugees and their host communities have access to clinics, hospitals, schools and other essential services notwithstanding the significant, and often long-term increases in population that result from refugee influxes in the wake of conflict.

The Syrian refugee crisis demonstrates the importance of development assistance to regional hosts of RtoP refugees. Refugee crises that trigger RtoP will in all likelihood become protracted refugee crises meaning that emergency humanitarian assistance alone cannot meet the needs of refugees and their hosts. Analysts predict that the Syrian refugee crisis is unlikely to be resolved any time soon,¹⁹⁴ thus the international response must be appropriately tailored for the long-term nature of the displacement. The short-term nature of the humanitarian assistance frame cannot equip regional host states to address the systemic challenges they now face. UN bodies, regional hosts, and even researchers have increasingly called for more development assistance for Syrian refugee hosts,¹⁹⁵ which the 2009 Secretary-General Report identifies as falling squarely under pillar two of RtoP.¹⁹⁶

Protection assistance consists of measures to anchor externally displaced populations within a legal or policy framework that lays out the rights or benefits that attach to their status, and identifies the entity responsible for delivering these rights or benefits. For states bound by international refugee law and faced with Syrian refugees arriving on their territories, protection assistance would mean giving effect to the international refugee law prohibition on returning individuals in their territory to countries where they will be subjected to persecution.¹⁹⁷

194. See, e.g., Banulescu-Bogdan & Fratzke, *supra* note 68.

195. See, e.g., *Funding Shortage Leaves Syrian Refugees in Danger of Missing Vital Support*, U.N.H.C.R. (June 25, 2015), <http://www.unhcr.org/558acbbc6.html>; *UNHCR and Host Countries Seek More Help To Cope with Syria Refugee Crisis*, U.N.H.C.R. (May 5, 2014), <http://www.unhcr.org/5367a97f9.html>. For a discussion of the need for economic and development spending in Lebanon and Jordan, see Omar Dahi, *The Refugee Crisis in Lebanon and Jordan: The Need for Economic Development Spending*, 47 FORCED MIGRATION REV. 11 (2014).

196. See *Implementing the Responsibility to Protect*, *supra* note 19.

197. Convention Relating to the Status of Refugees, *supra* note 2, ¶ 1 (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a par-

A best-case scenario is a policy Sweden announced in 2013, under which it would grant asylum to all Syrian refugees who apply for protection in Sweden.¹⁹⁸ This policy granted Syrians permanent residence status until such a time as the Swedish government determined otherwise. Brazil offers another example. It announced in 2013 that it would provide humanitarian visas to refugees from Syria.¹⁹⁹ As mentioned, most recently Germany announced a shift in policy towards granting asylum to all Syrians applying in that country.²⁰⁰ To be clear, asylum grants do not on their own resolve vulnerabilities of refugees, and even in Sweden, for example, Syrian refugees have been subject to xenophobic discrimination by those opposing the presence of refugees in that country.²⁰¹ Recognizing the limits of formal legal status for refugees, however, does not diminish refugees' need for this status.

As for countries that are not bound by international refugee law, pillars two and three of RtoP would nonetheless be bases for calling on them to extend legal protection to refugees physically present in their territories. Such protection would not be unprecedented. Lebanon, Jordan, and Iraq—key providers of protection assistance in the Syrian regional refugee crisis—are providing this protection despite not being bound by international refugee law. Their generosity is in stark contrast with European and other countries such as Australia that are bound by this legal regime, but have actively sought to keep refugees from Syria out of their territories.²⁰²

For those countries that do not have refugees physically present on their soil, protection assistance could take the form of refugee resettlement. Resettlement entails relocating refugees from the country where they have sought and been grant-

ticular social group or political opinion.”).

198. *Sweden Grants Blanket Asylum to Syrian Refugees*, TRIBUNE (Sept. 3, 2013), <http://tribune.com.pk/story/599235/sweden-grants-blanket-asylum-to-syrian-refugees>.

199. See *UN Refugee Agency Welcomes Brazil Announcement of Humanitarian Visas for Syrians*, U.N.H.C.R. (Sept. 27, 2013), <http://www.unhcr.org/524555689.html> (detailing how under this arrangement Brazilian embassies in Syria's neighboring countries will grant travel visas to those fleeing the conflict and their families).

200. See Agrawal, *supra* note 71.

201. See, e.g., Johan Carlstrom & Niklas Magnusson, *Swedish Nationalists Rise as Influx of Syrian Refugees Grows*, BLOOMBERG BUS. (Aug. 21, 2014), <http://www.bloomberg.com/news/articles/2014-08-20/swedish-nationalists-rise-as-record-immigration-stirs-backlash> (describing Swedish backlash against refugees).

202. See Ballout, *supra* note 59.

ed protection (e.g., Lebanon) to a third country (e.g., Canada). The UN Refugee Agency typically uses resettlement as a way to ensure the protection of refugees from host countries where those refugees remain vulnerable.²⁰³ With displacement on the magnitude of the Syrian refugee crisis, the fraction of refugees likely to be resettled will be small. Resettlement may not put a significant dent in regional concentration of refugees, but it remains an important means of international support for refugees.

III. RTO P'S VIABILITY

Even if one accepts my claim that conceptually RtoP entails RtoP refugee cost-sharing, an important question remains: Is RtoP a viable frame for pursuing this cost-sharing?

A. LANDSCAPE OF THE DEBATE

As mentioned in the Introduction, my proposal must reckon with the debate in RtoP scholarship over the doctrine's desirability and viability. Commentary on the benefits and viability of RtoP is divided: there are proponents and there are skeptics. Proponents believe that RtoP offers great benefits to vulnerable populations globally. They find no serious fault in the doctrine's trajectory, and have few concerns about the use of coercive measures under RtoP. Others argue that RtoP is—even in principle—dangerous for the world's vulnerable, and its detrimental impact is already evident. I call these the critical skeptics. And then there are those who believe that RtoP is irrelevant, with no significant capacity to shape the behaviour of international actors. I call these the realist skeptics. In the subsections that follow I provide examples of commentators whose views I believe reflect these three positions in some important respect, even though these positions may not encompass the full nuance of these commentators' views on RtoP. Although, for example I may attribute realist skepticism to a given commentator's analysis, I do not mean this label as all-encompassing of that commentator's perspective on the doctrine. I also grant that it is possible for a single commentator to adopt all three positions with respect to different facets of RtoP.

203. See, e.g., Betts, *supra* note 171, at 40.

1. The Proponents

RtoP proponents celebrated the international response to the 2011 conflict in Libya as exemplary of the doctrine functioning successfully.²⁰⁴ Following initial unrest in January 2011, Libyans took to the streets in earnest in February 2011. They protested the Gaddafi regime's arrest of a human rights advocate.²⁰⁵ The Gaddafi regime responded with brutal violence that included the execution of unarmed civilians, and drove government officials, ambassadors, and even some members of the armed forces to resign their posts.²⁰⁶

In response to the conflict, the UN Security Council initiated its first ever coercive action under the RtoP framework.²⁰⁷ After vitriolic threats by Colonel Gaddafi to exterminate the population of Benghazi, a city at the heart of the rebellion,²⁰⁸ the UN Security Council exercised its Chapter VII powers to

204. See, e.g., Alex J. Bellamy, *From Tripoli to Damascus? Lesson Learning and the Implementation of the Responsibility to Protect*, 51 INT'L POL. 23, 23 (2014); Ramesh Thakur, *R2P, Libya and International Politics as the Struggle for Competing Normative Architectures*, in THE RESPONSIBILITY TO PROTECT: CHALLENGES & OPPORTUNITIES IN LIGHT OF THE LIBYAN INTERVENTION 13 (2011) ("The outcome is a triumph first and foremost for the citizen soldiers who refused to let fear of Gaddafi determine their destiny any longer. It is a triumph secondly for R2P. NATO military muscle deployed on behalf of UN political will helped to level the killing field between citizens and a tyrant."); Zifcak, *supra* note 30, at 68 ("The fact of military victory on the ground is in itself sufficient to justify the conclusion that the Libyan R2P operation succeeded. This is despite the strong protests against its methods, lodged not without reason, by those members of the Security Council who abstained from the vote on Resolution 1973. However, it was not just the military win that served to secure R2P as an international political doctrine of very considerable importance. The Libyan success had a number of novel aspects each of which consolidated the doctrine's gains.").

205. *Libyan Uprising One-Year Anniversary: Timeline*, TELEGRAPH, (Feb. 17, 2012), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9087969/Libyan-uprising-one-year-anniversary-timeline.html>.

206. Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT'L L. 355, 372 (2012) (detailing the start of the uprising in Libya).

207. See Zifcak, *supra* note 30, at 3. The Security Council explicitly stated that its actions were rooted in the Libyan government's responsibility to protect its population, a responsibility the Libyan government was manifestly failing to uphold. Security Council members "expressed hope that the resolution was a strong step in affirming the responsibility of States to protect their people as well as the legitimate role of the Council to step in when they failed to meet that responsibility." Press Release, Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, U.N. Press Release SC/10187/Rev.1 (Feb. 26, 2011), <http://www.un.org/press/en/2011/sc10187.doc.htm>.

208. See Zifcak, *supra* note 30, at 60.

issue Resolution 1970.²⁰⁹ This Security Council resolution called on Libya to abide by its obligations under international human rights and humanitarian law;²¹⁰ referred the situation in Libya to the ICC;²¹¹ and imposed an arms embargo, asset freezes and travel bans on key figures within the Gaddafi regime.²¹² Nonetheless, the situation in Libya continued to deteriorate. As it did so, RtoP proponents among states sought authorization for even more coercive measures.²¹³

On March 17, 2011, the UN Security Council adopted Resolution 1973. This resolution authorized UN member states acting nationally or through regional organizations “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in [Libya] . . . while excluding a foreign occupation force of any form on any part of Libyan territory[.]”²¹⁴ It also established a no-fly zone that prohibited flights in Libyan airspace, and authorized the use of “all means necessary to ensure compliance.”²¹⁵ Again, the Security Council explicitly invoked RtoP.²¹⁶ Two days later, a coalition of West-

209. S.C. Res. 1970, ¶ 2 (Feb. 26, 2011).

210. *Id.* ¶¶ 1–2.

211. *Id.* ¶¶ 4–8.

212. *Id.* ¶¶ 9–25.

213. By March, opposition forces had managed to gain control of strategic sites, numerous cities, and even oil infrastructure, and the Colonel Gaddafi regime responded with counter-attacks to recapture these gains. *See* Payandeh, *supra* note 206, at 376. Its alleged use of military planes to engage in indiscriminate air strikes against civilians fueled calls for a no-fly zone over Libya. France and the United Kingdom were early movers in support of this no-fly zone, and the U.S. Senate would follow by adopting a resolution calling on the UN Security Council to pursue this option. *Id.* Regional Organizations similarly expressed support for this no-fly zone, including the Organization of the Islamic Conference and the League of Arab States, which at the same time rejected any form of foreign military intervention. *Id.* at 376–77. The African Union continued to condemn the violence, but it too expressed opposition to foreign military intervention. *Id.* at 377. The European Parliament came out in support of a no-fly zone, explicitly invoking RtoP to stress the importance of protecting Libya’s civilian population. *Id.* Human rights organizations similarly came out in strong support. *See Libya: Benghazi Civilians Face Grave Risk*, HUMAN RIGHTS WATCH, (Mar. 17, 2011), <https://www.hrw.org/news/2011/03/17/Libya-benghazi-civilians-face-grave-risk> [hereinafter *No Fly Zone*]. Finally, the anti-Gaddafi forces requested the imposition of a no-fly zone from the international community. *Id.* at 1.

214. S.C. Res. 1973, ¶ 4 (Mar. 11, 2011).

215. *Id.* ¶¶ 6, 8.

216. *See* S.C. Res. 1973, *supra* note 214, ¶ 4; Press Release, Security Council, Security Council Approves ‘No Fly Zone’ over Libya, Authorizing All Necessary Measures to Protect Civilians by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011). Speaking before the

ern states intervened militarily in Libya.²¹⁷ NATO eventually took over, and between March and October 2011 it carried out military attacks as Libyan opposition forces continued their fight.²¹⁸ Rebel forces subsequently captured Colonel Gaddafi's hometown of Sirte, and he was killed during the fighting. On October 23, opposition forces announced Libya's liberation.²¹⁹ Four days later the UN Security Council terminated its use of force authorization and the no-fly zone.²²⁰ For RtoP proponents, intervention in Libya demonstrated the role the doctrine could play in facilitating international cooperation to protect populations at risk of mass atrocities.

2. The Skeptics

a. *Critical Skeptics*

Critical skepticism challenges RtoP both in principle and in practice.²²¹ In important respects, critical skeptics are suspicious of RtoP as a frame on normative grounds. A salient criticism among these skeptics is that RtoP is a Trojan horse of sorts. Despite RtoP's ostensible justification (protecting vulnerable populations from mass atrocities), these skeptics view the doctrine as a vehicle by which powerful states will undermine the sovereignty of weaker states²²² in order to advance their

Security Council vote, the French Foreign Affairs minister stated that:

France had been working assiduously with the United Kingdom, the United States and other members of the international community calling for means to protect the civilian population. Those efforts had led to the elaboration of the current resolution, which authorized the Arab League and those Member States wishing to do so to take all measures to protect areas that were being threatened by the Qadhafi regime.

Id. For further analysis, see Zifcak, *supra* note 30, at 6.

217. See Payandeh, *supra* note 206, at 379.

218. *Id.*

219. *Id.*

220. S.C. Res. 2016, ¶¶ 5–6 (Oct. 27, 2011).

221. For wide-ranging examples of scholars adopting this critical perspective, see CRITICAL PERSPECTIVES ON THE RESPONSIBILITY TO PROTECT 3 (Philip Cunliffe ed., 2011) [hereinafter CRITICAL PERSPECTIVES] (“The contributors to this volume break with the prevailing consensus on the responsibility to protect by taking direct aim at the idea itself.”).

222. See, e.g., David Chandler, *Understanding the Gap Between the Promise and the Reality of the Responsibility to Protect*, in CRITICAL PERSPECTIVES, *supra* note 221, at 21 (“What the [ICISS Report] *did* do was set up a moral case for more engaged regulation and consensual intervention in the domestic policy processes of non-Western states.”). In its strongest form, the critical skeptic critique of RtoP casts the doctrine as a neo-imperial wolf in sheep's clothing. Those holding this view understand RtoP as a new manifestation of an old rationale that historically served as at least one influential moral justi-

own national interests.²²³ At the core of this critique is a concern for the “differential meaning for, and impact on, third world States and peoples,”²²⁴ of international legal norms.²²⁵

fication for Europe’s colonial enterprises. Mahmood Mamdani is one such scholar who has located RtoP in what he terms “the era of international humanitarian order[, which] draws on the entire history of modern Western colonialism.” Mahmood Mamdani, *Responsibility to Protect or Right to Punish?*, in CRITICAL PERSPECTIVES, *supra* note 221, at 127. Mamdani is critical of RtoP’s emphasis of the vulnerability of populations in the global south, and its reduction of these populations to recipients of charity as opposed to rights-bearing citizens. *Id.* at 126–27. On this account this conceptual move mirrors one central to the colonial period: “At the very outset of Western colonial expansion in the nineteenth and twentieth centuries, leading Western powers—the UK, France, Russia—claimed to protect ‘vulnerable groups.’” *Id.* at 127. This “vulnerable groups” framing was then used “to legitimate colonial intervention as a rescue mission.” *Id.*; see also B.S. Chimni, *Forum Replies: A New Humanitarian Council for Humanitarian Interventions?*, 6 INT’L J. HUM. RTS. 103, 104 (2002) (citing in agreement the position that “[t]he ‘sovereignty as responsibility’ thesis simply ‘raises the specter of a return to colonial habits and practices’”); Noam Chomsky, *The Skeleton in the Closet: The Responsibility to Protect in History*, in CRITICAL PERSPECTIVES, *supra* note 221, at 14 (identifying a risk that RtoP may be used as a “weapon of imperial intervention at will”). Speaking more generally about continuity of a discourse of vulnerability from the colonial period to the contemporary focus on humanitarianism, B.S. Chimni writes, “It is . . . worth reminding ourselves that colonialism was justified on the basis of humanitarian arguments (the civilizing mission). It is no different today.” B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, in THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION 61 (Antony Anghie et al. eds., 2003) [hereinafter *TWAIL Manifesto*]. For more on the “civilizing mission” as justification for repeated western intervention in the third world, see Anthony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77, 84–86 (2003) [hereinafter *TWAIL and Individual Responsibility*]. This critique is one expression of a more general critique of international law and norms some scholars of third world approaches to international law (TWAIL) have advanced, which views “colonialism [as] central to the formation of international law,” or as having deeply influenced the formation of international law. *Id.* at 84.

223. See, e.g., Philip Cunliffe, *A Dangerous Duty: Power, Paternalism and the Global “Duty of Care,”* in CRITICAL PERSPECTIVES, *supra* note 221, at 51 (“[RtoP] is neither sound nor just and . . . its vitality, such as it is, stems not from its capacity to protect the wretched of the Earth but from the opportunity it offers states to extend the writ of their power both over their own peoples and over other (weaker) states.”); Mamdani, *supra* note 222, at 126 (“The result [of the new international humanitarian order of which RtoP is a part] is a bifurcated system whereby state sovereignty obtains in large parts of the world but is suspended in more and more countries in Africa and the Middle East.”). Commenting on this shift in international order more generally, B.S. Chimni notes “an ongoing process of redefinition of State sovereignty [that is] being justified through the ideological apparatuses of Northern States and international institutions it controls.” *TWAIL Manifesto*, *supra* note 222, at 60. A related criticism is that RtoP subverts popular sovereignty by embodying

Critical skeptics argue that RtoP is a doctrine whose very tenets facilitate selective application,²²⁶ especially of coercive measures that they argue serve to harm rather than protect vulnerable populations. They fear capricious, unprincipled use of military intervention and other coercive measures to advance the interests of powerful interveners.²²⁷ Although RtoP requires Security Council authorization for military intervention and other coercive measures under RtoP, critical skeptics view this requirement as insufficient to ensure the sovereign interests of weaker states.²²⁸

paternalism: states are responsible *for* their people rather than accountable *to* them, and the international community, rather than these people are the arbiters of when this responsibility is breached. Cunliffe, *supra*, at 52–53, 60–63; see also Adam Branch, *The Irresponsibility of the Responsibility to Protect*, in CRITICAL PERSPECTIVES, *supra* note 221, at 103 (arguing that RtoP “makes the legitimacy of the African state subject to determination by the ‘international community,’ according to vague moral standards”).

224. *TWAIL Manifesto*, *supra* note 222, at 57.

225. The concerns of the critical skeptics resonate generally with those of TWAIL. TWAIL critiques of international law have as their starting point an acute sensitivity to historically contextual analysis of international laws and norms, and their impact on the non-Western world. A central concern for TWAIL scholars has been “power relations among states and . . . the ways in which any proposed rule or institution will actually affect the distribution of power between states and peoples.” *TWAIL and Individual Responsibility*, *supra* note 222, at 78. Additionally, TWAIL scholars have also stressed the importance of “the principles of sovereign equality of states and non-intervention,” to the extent that these principles prevent the exploitation of populations residing in weaker states. *Id.* at 81–83 (describing a shift in TWAIL towards critique of the post-colonial state as itself oppressive of third world peoples).

226. Cunliffe, *supra* note 223, at 56 (“For in the end, all [RtoP] can really offer is the vague assurance that remote foreign powers may involve themselves in a conflict if it happens to be convenient for them to do so.”); see also Chomsky, *supra* note 222, at 14–15 (providing examples of international action that highlight the selective use of RtoP).

227. For a brief discussion of the controversy between powerful and weaker states over a right to intervene following NATO’s intervention in Kosovo in the 1990s, see CRITICAL PERSPECTIVES, *supra* note 221. For a detailed discussion of whether RtoP has modified the legal status of humanitarian intervention, see Diana Améus, *Has Humanitarian Intervention Become Part of International Law Under the Responsibility to Protect Doctrine?*, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, *supra* note 20, at 165 (concluding that “[a]s most states have already come to acknowledge, RtoP is neither to be equated with nor is it developing into a right to unauthorised humanitarian intervention in international law”).

228. This concern, which I view as valid, is because determinations regarding whether or not to intervene coercively are determined by the five veto holding members of the UN Security Council, who arguably may wield this veto power only to advance their own national interests and those of their allies.

Analysis of the Libya intervention by critical skeptics foregrounded what intervening parties stood to gain from intervention on the one hand, and on the other the overwhelming price the Libyan population would have to pay for the intervention framed as ostensibly in their interest.²²⁹ Alan Kuperman compellingly argues that a review of the intervention reveals that “NATO’s primary aim . . . evolved to overthrowing Qaddafi’s regime, even at the expense of increasing harm to Libya’s civilians.”²³⁰ He also makes a strong case that “NATO intervention significantly exacerbated humanitarian suffering in Libya and Mali, as well as security threats throughout the region.”²³¹ There is no question that the power vacuum created by NATO intervention has considerably worsened human rights conditions in post-intervention Libya relative to the decade prior to the war.²³² Ultimately, Libya’s steady post-intervention implosion—for which Libyan civilians have paid the highest price long after proponents of intervention have turned to other concerns—has only vindicated the concerns of the critical skeptics.²³³

b. Realist Skeptics

A different category of skepticism can be loosely described as falling within the realist tradition.²³⁴ The realist critique of

229. For a detailed and compelling account of the flaws of the intervention in Libya, see Alan J. Kuperman, *A Model Humanitarian Intervention?: Reassessing NATO’s Libya Campaign*, 38 INT’L SEC. 105 (2013).

230. *Id.* at 113.

231. *Id.* at 132.

232. *Id.* at 133 (citing Human Rights Watch and Amnesty International).

233. Asli U. Bali & Ziad Abu-Rish, *The Drawbacks of Intervention in Libya*, AL JAZEERA (Mar. 20, 2011), <http://www.aljazeera.com/indepth/opinion/2011/03/201132093458329910.html> (“The historical record clearly established that an external regime change intervention based on mixed motives - even when accompanied with claims of humanitarianism - usually privileges the strategic and economic interests of interveners and results in disastrous consequences for the people on the ground.”); *see id.* (detailing how the ICC referral of the Libyan situation was counterproductive to protecting civilians); *see also* Asli U. Bali & Aziz Rana, *Why There Is No Military Solution to the Syrian Conflict*, JADALIYYA (May 13, 2013), <http://www.jadaliyya.com/pages/index/11680/why-there-is-no-military-solution-to-the-syrian-co> (making a compelling case for why military intervention in Syria would be disastrous).

234. Richard Steinberg states the three core assumptions of realism as: “the state [is] the central actor in international law”; “each state is endowed with interests”; and “each state is endowed with material power capabilities that are brought to bear in the international battle to shape the substance and structure of international law.” Richard Steinberg, *Wanted—Dead or Alive: Realism in International Law*, in INTERDISCIPLINARY PERSPECTIVES ON IN-

RtoP is that it is ineffectual as a mechanism for constraining or shaping state behavior. Under this view, RtoP has no meaningful, independent influence on state behavior. Instead, states act to advance their own self-interest. As RtoP proponents failed to mobilize support for humanitarian intervention or even a Security Council referral of the Syrian situation to the ICC, a realist critique of the doctrine gained momentum. At its core was the view that some expressed even following RtoP's deployment in Libya. Eric Posner, for example, issued a blistering critique of RtoP, arguing that it had been applied selectively—governed not by principle but fundamentally by national interest.²³⁵

Although there is important overlap with the critical skeptics, who see RtoP as facilitating the self-interest of powerful states, the realist critique is distinct in the following way. Whereas critical skeptics are concerned with RtoP as an ideological vehicle that advances normative and material interests of the global north, the realist critique is that RtoP has proven useless for anything more than perhaps advancing the haphazard interests of powerful states. In very basic terms, the critical skeptics fear that RtoP will influence state behavior but with detrimental or disastrous outcomes for vulnerable populations, whereas the realist skeptic position (stated in its strongest var-

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART, *supra* note 26, at 146, 148–50. On the basis of these assumptions, “realists tend to make three types of causal claims about the role of international law”: “international law reflects the interests of powerful states”; “international law makes states better off than otherwise”; and “if international law contradicts the long-term interests of a powerful state, then it will not comply with it.” *Id.* at 150.

235. Eric A. Posner, *Outside the Law*, FOREIGN POLICY (Oct. 25, 2011), <http://foreignpolicy.com/2011/10/25/outside-the-law> (“As a principle or norm, [RtoP] has been applied selectively, to say the least. No one seems interested in protecting Syrian or North Korean civilians from their governments. The truth is that the Responsibility to Protect is too capacious a norm to regulate states: It can be cited to justify virtually any intervention in the type of country that the West might want to invade, while it can also be evaded on grounds that it is not formal law, so countries can avoid intervening in a crisis when intervention does not serve their interests.”); see also Aidan Hehir, *Syria and the Dawn of a New Era*, in INTO THE ELEVENTH HOUR: R2P, SYRIA AND HUMANITARIANISM IN CRISIS (Robert W. Murray & Alasdair McKay eds., 2014); Julian Junk, *The Two-Level Politics of Support—US Foreign Policy and the Responsibility to Protect*, 14 CONFLICT SEC. DEV. 535 (2014); Robert W. Murray, *Rationality and R2P: Unfriendly Bedfellows*, in INTO THE ELEVENTH HOUR: R2P, SYRIA AND HUMANITARIANISM IN CRISIS, *supra*; Nassim Yaziji, *The Sad Fate of R2P: From Libya to the Lost Chance of Syria*, OPEN DEMOCRACY (July 2, 2014), <https://www.opendemocracy.net/openglobalrights/nassim-yaziji/sad-fate-of-r2p-from-libya-to-lost-chance-of-syria>.

iant) is that RtoP has been epiphenomenal in terms of shaping the behavior of states.²³⁶

Without overstating the difference in views between critical and realist skeptics, this distinction is important for my analysis because it captures important nuance for assessing RtoP's suitability as a frame for my purposes. The critical skeptics capture a normative opposition to RtoP as a frame—on their view the doctrine as currently invoked advances norms and standards favoring powerful western states. The realist skeptics capture a related concern with a different nuance: interest convergence.²³⁷ Unless the use of RtoP simultaneously advances the national interest of powerful nations, there will be no RtoP action on behalf of vulnerable populations.

B. HYBRID APPROACH

The enthusiasm of RtoP proponents (as I have described this view above) ignores the very important concerns raised by RtoP skeptics. It is necessary to take seriously critical and realist skepticism of RtoP, though at the same time I would argue it is premature to dismiss the entire doctrine on these grounds at this stage in the doctrine's development. To be clear, as I state in the Introduction, I am not invested in a wholesale ideological defense of RtoP. Rather, I am interested in how best to realize any potential the doctrine may have as a frame for pursuing protection of populations (particularly refugees) from mass atrocities. In my approach to exploring this potential, I share many of the normative concerns that critical skeptics have with RtoP (and with international law more generally).²³⁸

236. I do not mean to evoke here “the misunderstood and mischaracterized structural realist straw-man claim that ‘international law does not matter’ . . .” Steinberg, *supra* note 234, at 146. I mean instead to capture deep-seated skepticism expressed by some that RtoP has operated on the basis of nothing other than national interest, rather than concern for vulnerable populations.

237. I adopt the concept of “interest convergence” from Derrick Bell. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). In the context of racial inequality in the United States, Derrick Bell famously posited that “the interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” *Id.* at 523. Other refugee law scholars have imported this concept into the refugee protection context. See Hathaway & Neve, *supra* note 12 (applying Bell's concept of interest convergence to the context of refugee burden sharing).

238. The concerns I share with critical skeptics are those underlying TWAIL. *TWAIL and Individual Responsibility*, *supra* note 222, at 79 (“TWAIL scholars seek to transform international law [into] . . . a body of rules and

I share their commitment to developing international norms that reflect the goals and vision of peripheral states in the international legal order, in addition to those of powerful states.²³⁹ I also share their commitment to interrogating the impact of international norms and laws on populations of peripheral states, to ensure that global standards do not unduly adversely affect these populations. I do not, however, share the view that RtoP as a whole, *necessarily* functions to disadvantage vulnerable populations in peripheral states in a way that warrants completely abandoning the doctrine *at this stage*.²⁴⁰

In my view, the true potential benefit that RtoP brings to international relations, and to the refugee protection landscape in particular, is a frame for shared responsibility among international actors to provide international assistance to help states unable to protect populations in their territory from the four RtoP crimes. Here I refer to *material* assistance that the latter states voluntarily accept, making them willing partners with the international community, sharing the aim of protecting at-risk populations.

Many critical skeptics likely view any benefit that may come from RtoP's non-coercive commitments as outweighed by the doctrine's endorsement of coercive measures. I disagree with this accounting of the costs of RtoP, because international law already permits the coercive action critical skeptics decry most with respect to RtoP. Coercive measures under RtoP require Security Council approval under Chapter VII of the UN Charter. Significantly, even in the absence of RtoP the Security Council can authorize coercive action under Chapter VII. What

practices that reflect and embody the struggles and aspirations of Third World peoples and which, thereby, promotes truly global justice.”).

239. As B.S. Chimni notes: “[I]ndividual legal regimes have to offer some concessions to poor and marginal groups in order to limit resistance to them both in the third world and, in the face of an evolving global consciousness, in the first world.” *TWAIL Manifesto*, *supra* note 222, at 73. This normative commitment to international norms that reflect consensus shared not only by powerful Western countries but also by states on the periphery deeply informed the early work of TWAIL scholars. *TWAIL and Individual Responsibility*, *supra* note 222, at 80–81.

240. I consider myself engaged in a similar project as Jennifer Welsh, who has explored how “reframing of RtoP might address, and potentially overcome” compelling concerns about RtoP. Welsh, *supra* note 26, at 368. Whether or not reframing can be a success is an empirical question, and I would argue RtoP is too young a doctrine for us to have sufficient data to resolve this question at this stage.

this means is that the risk of coercive interventions (pretextual or otherwise) already exists.

It is conceivable that using RtoP in the way I propose in Part II, lends further legitimacy even to the coercive tenets that I acknowledge can be dangerous for vulnerable populations. However, it is not evident how using the doctrine to provide assistance to refugee host nations requesting this assistance makes it easier for Security Council veto-holding states to abuse their Chapter VII powers to authorize coercive action using RtoP. Even if there is some risk that using RtoP for refugee cost-sharing marginally increases the possibility of pretextual coercive intervention by the Security Council, this risk is arguably outweighed by the possible benefits of non-coercive international cooperation such as cost-sharing. Admittedly, any development that increases the risk of pretextual coercive intervention is far from ideal. However, the current structure of the international legal order itself is far from ideal, and my goal here is to consider an imperfect solution that is an improvement on the status quo.

If RtoP's non-coercive tenets can be strengthened, the at-risk populations in southern states that critical skeptics are concerned about stand to gain in material ways.²⁴¹ The Syrian refugee crisis illustrates my position. If RtoP were used successfully to convene a CPA for the Syrian refugee crisis, it is difficult to see how this would make coercive international action under RtoP more likely against Syria or any of the other states in the region. On the other hand, the benefits of RtoP-based cost-sharing would be monumental for Syrian refugees and their hosts.

Critical skeptics would be hard-pressed to oppose refugee cost-sharing under RtoP as anti-sovereignty or as anti-vulnerable populations, at least as I have conceptualized this protection in the previous Part.²⁴² International cooperation to protect refugees typically follows requests from host nations geographically proximate to conflict. Conflicts serious enough to trigger RtoP are concentrated largely in the global south. It is southern states that shoulder most of the cost that resulting mass refugee influxes impose. Providing assistance requested by regional hosts of Syrian refugees is not a threat to sover-

241. *See supra* Part II.

242. What I mean here is that even from a critical skeptic perspective, using RtoP to increase material support for RtoP refugee hosting countries such as Lebanon, does not per se undermine Lebanese sovereignty.

eignty in the way that humanitarian intervention unquestionably is. Furthermore, the international assistance that would be required for refugee protection would materially benefit states geographically proximate to conflict. These are precisely the sort of states critical skeptics fear stand to lose under RtoP's current interventionist thrust. To be clear, this is not to say RtoP-based refugee cost-sharing is the most sovereignty-promoting approach one could conceive of. But again, the "perfect" ought not, *per se*, to be the enemy of the "available." RtoP is available, and the benefits of experimenting with applications that possibly mitigate the seemingly intractable problem of refugee cost-sharing outweigh the risks.

Below I explore in more detail how applying RtoP to refugee protection addresses critical concerns. I also explore how this application in some circumstances closes the gap between genuine protection of at-risk populations and the interests of influential state actors.

With respect to the realist critique, it understates the role that international normative commitments can play in shaping state behavior, even when the action these commitments recommend does not maximize fulfillment of naked national interest. In this respect I view the constructivist approach to understanding how international norms shape state behavior as relevant for making sense of RtoP's possible influence on international cooperation in the future.

As mentioned above, RtoP's basis is a UN General Assembly Resolution. And also as referenced above, at least one recent study gives empirical support for the claim that General Assembly Resolutions can shape international consensus and facilitate collective action. That research noted that international consensus and collective action were enhanced by foregrounding the transnational crime facets of human trafficking and not its human rights implications in General Assembly Resolutions. Admittedly what I have argued for in Part II reveals RtoP as currently articulated to be more of a human rights frame than one that is fundamentally about enhancing the national security of states. What I will argue below, however, is that even under the RtoP frame, it is possible to foreground why pursuing international cooperation to share the cost of protecting refugees is firmly in the national interest of UN member states, including those in a position to

make the most meaningful contribution to assisting Syrian refugees, for example.²⁴³

Although I reject the realist critique's reduction of RtoP's independent influence on state action to zero, I nonetheless posit that foregrounding the overlap of international normative commitments with the national interests of powerful states increases the likelihood of international cooperation to fulfil these commitments.

I thus combine critical and realist sensibilities,²⁴⁴ and use them to inform further experimentation with RtoP, with a focus on the challenges facing the international refugee regime. Below I show that critical skepticism is useful for developing a constructive normative critique of RtoP, and realism is useful for developing the institutional mechanisms necessary for realizing RtoP's normative goals. Although in this Article I focus on how this hybrid approach has benefits for refugee protection, it is relevant for developing RtoP's application to other areas of international concern.

1. Refugee Protection as a Means of Shoring up RtoP's Normative Appeal

The critical skeptic critique captures justifications that states opposing international action under RtoP have offered to explain their opposition. Addressing critical concerns, among other things, simultaneously makes the doctrine more

243. Some might wonder then, why a better approach would not be a different frame from RtoP, one that more closely tracked the national security framing of the human trafficking resolutions. First, unlike RtoP, such a frame is not readily available. Secondly, even if it were, a frame that explicitly prioritized national security above all in responding to refugee crises would result in even worse treatment of refugees than is the case within the existing international regime.

244. There are methodological synergies between critical TWAIL scholarship and international relations approaches to international law (IR/IL) but there are also differences: "IR/IL approaches have much to contribute to understanding international legal structures and processes, but [TWAIL] places great emphasis on international economic relations even as it does not negate the role of power (realism), subjective factors (constructivists), the role of institutions (institutionalists) and the role of domestic politics (liberal)." *TWAIL and Individual Responsibility*, *supra* note 222, at 97; *see id.* at 77–87 (providing an overview of the history and content of TWAIL as a distinct method of international law). I use the term "realist sensibility" as Jack Snyder has. Snyder notes that the realist sensibility with its attention to power, strategy, and consequences is of great potential value in analyzing the problem of assisting refugees and other victims of political strife. Jack Snyder, *Realism, Refugees, and Strategies of Humanitarianism*, in *REFUGEES IN INTERNATIONAL RELATIONS*, *supra* note 78, at 29–32.

appealing (at least in principle) to broader spectrum of states than is currently the case. RtoP's normative appeal can be enhanced by focusing on its non-coercive tenets, around which there is broader international consensus relative to its coercive tenets. My assumption here is that expanding the normative appeal of RtoP makes the doctrine a more truly international norm, which is a good in itself, and that increasing normative appeal increases the likelihood of international action under RtoP.

In the case of Libya, although Russia and China did not use their veto to block Resolution 1973, these two countries remained critical of efforts to enforce a no fly zone authorized under this resolution.²⁴⁵ NATO's mission eventually grew to include targeting government infrastructure and even deliberate targeting of Colonel Gaddafi and other regime leaders.²⁴⁶ The United States and its allies ultimately agreed that protecting Libya's population required regime change. But for countries such as Russia, China, Brazil, India and South Africa, regime change presented an unjustifiable violation of the principle of state sovereignty and far exceeded the mandate authorized by Resolution 1973.²⁴⁷ These states have cited Libya as a basis for blocking intervention in Syria under RtoP, notwithstanding the immense devastation the civil war has wrought on Syria's population.²⁴⁸

245. Payandeh, *supra* note 206, at 382. For more nuance, see S.C. Res. 2016, ¶¶ 5–6 (Oct. 27, 2011). More broadly, international opinion was mixed. The Organization of the Islamic Conference generally supported the intervention. Payandeh, *supra* note 206, at 380. The African Union and the Arab League were ambivalent. *Id.* at 382. Bolivia, Venezuela, and Cuba condemned the military intervention, while Colombia and Mexico expressed support. *Id.*

246. But as the conflict continued, NATO expanded its targets to include “command and control” centers, a result of which was the May 1 bombing of the Gaddafi family compound whose casualties included children. For this analysis, see Zifcak, *supra* note 30, at 66.

247. *Id.* at 69.

248. In the face of this continuing crisis, the Security Council has struggled to reach a consensus on the appropriate response, in stark contrast to the speedy consensus achieved on the Libyan crisis in 2011. From when it first met at the end of April to address the growing crisis in Syria, there had been two broad positions on the Syrian crisis. One camp is described by one scholar as the “broadly Western position,” Zifcak, *supra* note 30, at 74, held by the United Kingdom, France, and the United States among others. This camp has (1) condemned the violence against civilians and called for its cessation; (2) called international accountability for crimes perpetrated; and (3) continually invoked RtoP to advocate even coercive measures such as sanctions. The other camp, loosely led by Russia and China, includes India, Brazil, and South Africa. This camp has consistently expressed concern at the crisis in Syria and also called for its cessation. However, it has been firmly opposed to any foreign

By March 2015, members of the Security Council had made at least ten attempts to pass resolutions variously addressing the conflict in Syria, and Russia and China vetoed four of these.²⁴⁹ Notwithstanding China and Russia's complex political interests, these countries explicitly connected their position on Syria-related resolutions to their concerns about the expansive interpretation of Resolution 1973 in the Libya case.²⁵⁰ They worried about the precedent Libya had set for the meaning of RtoP in practice, particularly as it relates to foreign intervention on the soil of a sovereign state. Explaining a Russian veto of a draft resolution on Syria, for example, the Russian Permanent Representative stated:

The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by the statement that compliance with the Security Council resolutions in Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect²⁵¹

In May 2014, the Security Council voted on a different resolution that would have referred the Syria situation to the ICC.²⁵² This resolution also failed as the result of vetoes by Russia and China. Russia viewed an ICC investigation as counterproductive for resolving the political crisis in Syria, and as a step in the progression towards even more coercive action.²⁵³ China similarly protested the referral as undermining sovereignty principles.

intervention under RtoP, which it holds would violate the Syrian government's sovereign right to resolve its domestic matters as it sees fit. *See id.* at 7.

249. The Security Council has adopted the following resolutions on Syria: S.C. Res. 2043 (Apr. 21, 2012); S.C. Res. 2059 (July 20, 2012); S.C. Res. 2118 (Sept. 27, 2013); S.C. Res. 2139 (Feb. 22, 2014); S.C. Res. 2165 (July 14, 2014); and S.C. Res. 2170 (Aug. 15, 2014).

250. *See Zifcak, supra* note 30, at 76. Zifcak explains that whereas in the Libya case China and Russia were willing to abstain rather than oppose Resolution 1973, in the Syria case they exercised their veto powers "because in Libya, NATO had pushed the boundaries of Resolution 1973 far beyond its primary objective, which had been to protect the civilian population from attacks by government forces. China, Russia and the IBSA countries could swallow the objective. But committed as firmly as they were to the sovereignty principle, they could abide by the aim of regime change." *Id.* at 87.

251. S.C. Draft Res. S/2011/612 (Oct. 4, 2014).

252. Disturbingly, this draft resolution excepted other non-states parties to the Rome Statute such as the United States from the jurisdiction of the ICC's investigation.

253. "The draft resolution rejected today reveals an attempt to use the ICC to further inflame political passions and lay the ultimate groundwork for eventual outside military intervention." U.N. SCOR, 69th Sess., 7180th mtg. at 12-13, U.N. Doc. S/PV.7180 (May 22, 2014).

It is important to note that even as this debate regarding whether the appropriate collective international response to the crisis in Syria includes coercive measures, many western and Gulf states are active participants in the armed conflict in Syria.²⁵⁴

Nonetheless, a focus on less controversial, non-coercive RtoP commitments such as refugee cost-sharing increases the likelihood that states with concerns about the pretextual (or any) use of collective coercive measures would actually cooperate under the RtoP framework to address the Syrian regional refugee crisis.²⁵⁵ There is good reason to be skeptical that Chinese and Russian opposition to RtoP, even as a matter of principle, is rooted entirely in sovereignty concerns.²⁵⁶ However, it is noteworthy that the only action that the Security Council had sufficient consensus to pursue by July 2015 in Syria was non-coercive, with one exception.²⁵⁷ Furthermore even if China and Russia were to oppose non-coercive international action under RtoP, their cooperation is only necessary for pillar III measures under Chapter VII of the UN Charter. Recall that adopting a CPA under RtoP would not require Chapter VII measures. Thus the success of my proposal is not contingent on

254. See *U.S. To Send 400 Troops To Train Syrian Rebels*, BBC NEWS (Jan. 16, 2015), <http://www.bbc.com/news/world-middle-east-30847689> (discussing the United States' involvement in training Syrian moderate rebels).

255. This position is consistent with the work of constructivist scholars who have argued the value of normative consensus facilitating international cooperation. See Jose Alvarez, *Why Nations Behave*, 19 MICH. J. INT'L L. 303 (1998); Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT'L L. 107 (1998); Ann Florini, *The Evolution of International Norms*, 40 INT'L STUD. Q. 363 (1996); Alexander Wendt, *Constructing International Politics*, 20 INT'L SECURITY 71 (1995). TWAIL scholars, too, have foregrounded the importance of "an inclusive and participatory international law . . . [that] should evolve in a manner which is fair and acceptable to all parties rather than through formulations which reflect the views of dominant states alone." *TWAIL and Individual Responsibility*, *supra* note 222, at 94.

256. With respect to Russia, for example, its recent breaches of Ukrainian sovereignty belie its purported principled commitment to sovereign equality.

257. See S.C. Res. 2043, (Apr. 21, 2012) (establishing the UN Supervision Mission in Syria (UNMIS) to monitor cessation of armed conflict); S.C. Res. 2059, (July 20, 2012) (renewing UNMIS mandate); S.C. Res. 2118, (Sept. 27, 2013) (enabling destruction of the Syrian chemical weapons stock pile); S.C. Res. 2139, (Feb. 22, 2014) (demanding immediate humanitarian access in Syria), S.C. Res. 2165 (July 14, 2014) (authorizing UN cross-border delivery of humanitarian aid to Syria). The sole exception is S.C. Res. 2710, ¶ 12 (Aug. 15, 2014) (imposing sanctions on six individuals affiliated with the Islamic State and the Al-Nusra Front).

all five permanent members of the Security Council embracing RtoP.

There is a more important benefit of prioritizing non-coercive measures than Chinese and Russian support for RtoP. Prioritizing non-coercive measures would deepen the support of middle powers such as India, Brazil and South Africa for RtoP. Along with Russia and China, India, Brazil and South Africa have opposed coercive action under RtoP that they view as harmful to vulnerable populations.²⁵⁸ They, too, have opposed violations of state sovereignty under RtoP, but they have weighed their sovereignty concerns against the protection needs of at-risk populations. Their Security Council voting records for the Libyan crisis in 2011 and more recently for Syria provide evidence of a more nuanced engagement with RtoP.²⁵⁹ More generally, Brazil has taken the lead in pushing for development of RtoP's non-coercive commitments, much in the way that I propose in this Article. It has promoted what has been called "responsibility while protecting," which emphasizes the non-coercive and preventative aspects of RtoP.²⁶⁰ This initiative has received broad-based support from other countries.²⁶¹

In light of the benefit that improved international assistance would have on the protection of Syrian refugees, for example, there is good reason to believe that India, Brazil and South Africa would support the use of RtoP for that purpose. If these three countries were to lead the charge for RtoP-based international refugee cost-sharing in Syria, they could play an important role in motivating many countries such as African Union and Arab League member states to push for this action through the United Nations. India, South Africa and Brazil could also take the lead in using the RtoP frame to lobby for more international assistance to refugees, from northern states

258. See S.C. Draft Res. S/2011/612, *supra* note 251; S.C. Draft Res. S/2012/77 (Feb. 4, 2012).

259. See *No Fly Zone*, *supra* note 216; *Secretary General Welcomes Security Council Follow-Up to Resolution 2235 (2015)*, UNITED NATIONS (Sept. 10, 2015), <http://www.un.org/press/en/2015/sgsm17064.doc.htm>.

260. Permanent Rep. of Brazil to the U.N., Letter dated Nov. 11, 2011 from the Permanent Rep. of Brazil to the United Nations addressed to the Secretary-General, U.N. Doc. A/66/551 (Nov. 11, 2011).

261. See Permanent Rep. of Brazil to the U.N., *supra* note 260, ¶ 10; HANNS SEIDEL FOUNDATION, *THE RESPONSIBILITY TO PROTECT—FROM EVASIVE TO RELUCTANT ACTION?* 4 (Malte Brosig ed., 2012); Gareth Evans, Co-Chair, Global Centre for the Responsibility to Protect, Keynote Address at Stanley Foundation Workshop: Responsibility While Protecting: What's Next? 5 (Aug. 23, 2012).

that have shown a commitment to RtoP but have not yet or insufficiently contributed to the RRP. The addition of calls from these states, to those of host states in the region would help make an international response to the Syrian refugee crisis more of a global priority. More generally, India, Brazil and South Africa are good candidates for spearheading the long-term institutionalization of international cooperation for refugee cost-sharing under RtoP.²⁶²

Would the refugee focus I propose for RtoP result in new principled opposition from states that have otherwise been proponents of the doctrine? For RtoP proponent countries such as the United States, France and the United Kingdom, to oppose non-coercive action to assist refugees would strengthen the case of skeptical states that RtoP is a Trojan horse for coercive foreign intervention. Although this outcome would not benefit refugees, it would productively result in further relegation of RtoP from international relations. Although the focus of this Article is how RtoP might benefit refugee protection, there is valuable insight to be gained from states' unwillingness to embrace my proposal even in principle. A principled rejection of my proposal by states either critical or supportive of RtoP, helps sharpen understanding of different states' visions of the ideal international order. That said, the top three donors to the RRP are also among the leading proponents of RtoP: the United States, the European Union, and the United Kingdom. One way to read this material support for Syrian refugees is that RtoP proponent states would not, *as a matter of principle*, resist development of RtoP to deepen protection for a population they have shown commitment to assisting.

2. Pursuing Interest Convergence

Getting states to agree that, in principle, RtoP entails international refugee cost-sharing, is only the first step. The next step is motivating them actually to share this cost. Although some states may commit to international refugee cost-sharing solely on the basis of a principled commitment to refugee protection, other states may require additional incentives.²⁶³ To respond to the realist account of why RtoP has

262. Without referring to RtoP, Alexander Betts and Gil Loescher share the view that shifts in global power mean the emerging powers such as the BRICS have the potential to transform the global refugee regime. Alexander Betts & Gil Loescher, *Introduction: Continuity and Change in Global Refugee Policy*, 33 REFUGEE SURV. Q. 1, 5 (2014).

263. In their study of state regulation of human trafficking, Beth Simmons and Paulette Lloyd find that "actual policy implementation is contingent,

been ineffective in Syria, I propose that the doctrine can be made more effective by deploying it to leverage interest convergence.²⁶⁴

This is consistent with research showing that international cooperation to share the cost of refugees has been successful where states have “believed that there has been a material, ideational, or institutional relationship between refugee protection . . . and their interests in security, trade, and immigration, for example.”²⁶⁵ What I propose is accounting for the self-interest of states and using it to improve the likelihood of international cooperation to achieve refugee cost-sharing. This is not the same as reducing international cooperation under RtoP to national self-interest.

Below I offer three bases for incentivizing states to cooperate under RtoP to share the cost of refugee protection: regional instability, managing migration and international security. I am less concerned with finding ways to incentivize countries surrounding a conflict to provide refugee protection because these countries typically do not have a choice. Instead regional instability, managing migration and international security are factors that could be used to motivate three types of countries. The first is wealthy countries that are geographically relatively removed from high conflict regions such as northern states including the United States, Canada, Australia, and western European countries. The second category is wealthy countries that despite some geographic proximity to conflict have not historically hosted disproportionately high numbers of the global refugee population such as the Gulf Cooperation Council countries.²⁶⁶ The third category is China and Russia, which by

calculated, and quite responsive to material costs and benefits.” Beth Simmons & Paulette Lloyd, *Subjective Frames and Rational Choice: Transnational Crime and the Case of Human Trafficking 3* (July 17, 2010) (unpublished manuscript), <http://ssrn.com/abstract=1653473>.

264. In other words: “There is . . . an untapped interest-convergence between North and South having the potential to address the problems inherent in a system of individuated state responsibility.” Hathaway & Neve, *supra* note 12.

265. Betts, *supra* note 78, at 64.

266. These countries are Saudi Arabia, Kuwait, Bahrain, Qatar, the United Arab Emirates, the Sultanate of Oman, and Yemen. Betts and Loescher have described GCC states as “new humanitarian donors” in the context of refugee protection. Betts & Loescher, *supra* note 262, at 6. They have contributed to funding the RRP6, and Kuwait especially has been among the biggest donors to the RRP. 2014 SYRIA REGIONAL RESPONSE PLAN STRATEGIC OVERVIEW: MID-YEAR UPDATE 9 (2014), <http://www.unhcr.org/syriarrp6/midyear/docs/syria-rrp6-myu-strategic-overview.pdf>. The RtoP-based framework I propose

virtue of being veto-holding members of the UN Security Council play an outsized role in shaping international responses to mass atrocities. Both these countries have publicly played a limited role in funding or facilitating international funding for refugee protection relative to their means and influence.

a. Regional Instability

When mass displacement triggers the international community's responsibilities under RtoP, this displacement will likely also pose a threat to regional stability if the international community fails to assist meaningfully with shouldering the cost of refugee protection. The conflict in Syria is a case in point. As discussed above, both the volume and composition of the Syrian refugee population is destabilizing the Middle East, as host countries in the region fail to meet the needs of these refugees and their host communities. Without international assistance to the nations hosting the refugees, the economies, and social and political fabrics of these nations are unraveling. In Lebanon there is the risk of further sectarian violence and in all five host countries anti-refugee sentiments are fueling tensions that may breed violence.²⁶⁷

Regional instability in the Middle East implicates the national interests of key players within the region and within the international community. Under the RtoP frame the UN Refugee Agency in partnership with host governments, could do more to take advantage of the national interest that wealthy or

would establish contribution benchmarks that fundraisers could use to spur larger contributions from GCC countries. GCC countries do not dominate the list of top donors to the RRP but, the RRP does not capture their full contribution to the Syrian refugee protection effort. Media outlets regularly report sizeable bilateral donations to regional refugee hosts, and even directly to Syrian refugee communities. See, e.g., *Gulf Countries: Growing Aid Powers*, IRIN (Sept. 17, 2014), <http://www.irinnews.org/report/100625/gulf-countries-growing-aid-powers> (noting that countries like Saudi Arabia and Kuwait are increasing their humanitarian aid); *UN Lauds UAE Aid to 99,000 Syrian Refugees*, NATIONAL (Mar. 19, 2015, 7:36 PM), <http://www.thenational.ae/uae/government/un-lauds-uae-aid-to-99000-syrian-refugees> (discussing the UN aid package delivered to Syrian refugees living in Jordanian refugee camps). But see James Cusick, *Exclusive: Syrian Aid in Crisis as Gulf States Renege on Promises*, INDEPENDENT (May 5, 2013), <http://www.independent.co.uk/news/world/middle-east/exclusive-syrian-aid-in-crisis-as-gulf-states-renege-on-promises-8604125.html> (arguing Arab states and aid groups have failed to deliver their promised aid).

267. See Rasim Ozan Kutahyali, *Syrian Refugees Under Attack in Turkey*, ALMONITOR (Aug. 14, 2014), <http://www.al-monitor.com/pulse/originals/2014/08/kutahyali-syrian-refugees-under-attack-turkey-gaziantep.html> (reporting on attacks on Syrian refugees living in Gaziantep).

powerful states within and outside of the region have in regional stability.

The geopolitical importance of the Middle East has meant that even states with fraught relationships have been willing to cooperate to maintain a measure of stability in the region. One example of this is the surprising move in 2013 towards cooperation between the United States and Russia to convince President Assad to relinquish chemical weapons, which stands in stark contrast to the adversarial relationship between the two countries on the issue of military intervention.²⁶⁸ This example suggests that moving beyond military intervention may create space under RtoP for international cooperation on other important measures to protect populations at risk of mass atrocities, especially where regional stability is at stake.²⁶⁹

A significant shortcoming of relying on the national interest in regional stability, is that there are regions in the world in which many other members of the international community have little interest. The Syrian crisis is not the only crisis to have caused regional instability. Crises in Libya, the Central African Republic, South Sudan and Mali, to name a few, have all caused mass displacement that both requires international cooperation under RtoP and threatens regional stability. Not all regional instability, however, will implicate the national in-

268. *Syria Chemical Weapons Agreement Reached Between United States, Russia*, CBS NEWS (Sept. 14, 2013, 6:44 PM), http://www.cbsnews.com/8301-202_162-57602958/syria-chemical-weapons-agreement-reached-between-united-states-russia.

269. At least one commentator has argued that the United Nations Security Council Resolution adopted on September 27, 2013, which calls for implementation of the US-Russia negotiated plan for Syria to relinquish its chemical weapons, has successfully “shifted the debate on the use of force from claims of unilateral intervention to collective security action [which is in line with the spirit of the Responsibility to Protect.” Carsten Stahn, *Syria, Security Resolution 2118 (2013) and Peace Versus Justice: Two Steps Forward, One Step Back?*, EJIL TALK (Oct. 3, 2013), <http://www.ejiltalk.org/syria-security-resolution-2118-2013-and-peace-versus-justice-two-steps-forward-one-step-back>. Significantly, France, the United Kingdom, Luxembourg, Argentina, Australia, and South Korea openly supported the inclusion of an ICC referral of the Syrian situation to the International Criminal Court. “This move was sacrificed for the purpose of facilitating a diplomatic compromise over [the UN Security Council Resolution].” *Id.* In the adoption of this Resolution, China again emphasized its opposition to military solutions. *Security Council Requires Scheduled Destruction of Syria’s Chemical Weapons, Unanimously Adopting Resolution 2118 (2013)*, UNITED NATIONS (Sept. 27, 2013), <http://www.un.org/press/en/2013/sc11135.doc.htm> (summarizing the 7038th Security Council Meeting, including Foreign Minister of China, Wang Yi’s, statement of opposition to using military forces in Syria).

terests of many of the states whose cooperation is required to fund refugee protection. For example, the array of states that have a national interest in the regional stability of the Middle East may view themselves as having far less of a stake in the collapse of the Central African Republic and the regional instability that displacement from the conflict has caused. As a result, using state interest in regional stability to motivate international cooperation will unfortunately make this cooperation more likely in some parts of the world but not in others.

b. Managing Migration

More comprehensive international cost-sharing for in-region refugee protection can be framed as an important strategy for managing unauthorized migration to northern states.²⁷⁰ For many northern states, immigration control is a policy priority. Anti-immigrant sentiment in some northern states is powerful enough to shape policy even in countries that relatively small numbers of asylum seekers and unauthorized migrants.²⁷¹ At the same time, due in part to growing levels of international mobility, mass displacement has increasing repercussions for regions geographically distant from the conflicts causing the mass displacement.

The failure of the international community to assist with cost-sharing creates untenable conditions in the region for Syrian refugees, forcing them to risk their lives and journey further to escape.²⁷² For example, between 2013 and 2014, the number of forced migrants attempting to reach Italy by boat *quadrupled*, and Syrian refugees are a significant part of the reason for this.²⁷³ As the Syrian crisis enters its fifth year, conditions in the region are increasingly fueling forced migration

270. Strengthening in-region protection is not a substitute for complying with obligations that these states have under international refugee or human rights law to protect refugees and other migrants arriving in their territories. U.N.H.C.R., EXPERT MEETING, *supra* note 190 (“International cooperation is a complement to states’ protection responsibilities and not a substitute for them.”). It instead reflects the reality that in many cases it is neither desirable nor feasible to resettle large numbers of refugees far away from their countries of origin.

271. Australia is an example of such a country.

272. See Press Release, U.N.H.C.R., Total Number of Syrian Refugees Exceeds Four Million for First Time (July 9, 2015), <http://www.unhcr.org/559d67d46.html>.

273. See Claire Schaeffer-Duffy, *Desperate Syrian Refugees Enter Europe Via “Ghost Ships,”* NAT’L CATHOLIC REP. (Jan. 29, 2015), <http://ncronline.org/news/global/desperate-syrian-refugees-enter-europe-ghost-ships>.

beyond the Middle East.²⁷⁴ Regional hosts are imposing restrictions on refugee access to their territories.²⁷⁵ Conditions for those refugees that do settle in the region are increasingly harsher as they struggle to meet their basic needs, and as they confront xenophobic discrimination.²⁷⁶ Reports document greater numbers of Syrian refugees crossing the Mediterranean ocean to seek refuge in Europe as they escape a region whose capacity to host them is severely strained.²⁷⁷ As mentioned above, only a small number of European countries have shown willingness to grant Syrian refugees asylum and countries at Europe's frontier with the Middle East have actively taken measures to repel Syrian refugees. But with the continuing growth of the refugee population and the lack of resources to support this population in the region, Syrians are endangering their lives in greater numbers to get to Europe, with increasing success.

It is in the interests of European states especially to invest in better in-region protection of Syrian refugees. It is also in their interest to develop a comprehensive plan for the protection of Syrian refugees arriving in Europe that does not leave it to frontier European states alone to accommodate these refugees. Well-funded, in-region protection and a comprehensive plan for asylum seekers arriving in Europe will serve the interests of Syrian refugees and of European states. Indeed, following the increase in Syrian and other refugees traveling to Europe in August and September 2015 European leaders pledged an additional 1 billion euros to the UN Refugee Agency and the

274. See *Worsening Conditions Inside Syria and the Region Fuel Despair, Driving Thousands Towards Europe*, U.N.H.C.R. (Sept. 8, 2015), <http://www.unhcr.org/55eed5d66.html> (discussing how events such as the mortar attacks on Damascus and vehicle explosions in various cities have caused people to migrate).

275. See *id.* ("Syrians now face increasing challenges to find safety and protection in neighbouring countries, which, faced with overwhelming refugee numbers, insufficient international support and security concerns, have taken measures this year to stem the flow of refugees—including restricting access or closer management of borders and introducing onerous and complex requirements for refugees to extend their stay.")

276. For a discussion of what constitutes unlawful xenophobic discrimination under international human rights law, see E. Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees*, 45 GEO. J. INT'L L. 323 (2014).

277. Between April 2011 and September 2015, 512,909 Syrians applied for Asylum in Europe. More than half of those, 290,753 Syrians, have applied for asylum in 2015 alone. See *Europe: Syrian Asylum Applications*, *supra* note 73.

World Food Program for Syrian refugee in-region assistance.²⁷⁸ This suggests that further issue-linking between the need for international cooperation and the interests of international actors may result in more material support for Syrian refugees.

Of course, as with regional stability, international migration concerns of northern states will not be equally salient for all mass displacement crises.

c. International Security

International security concerns arising from mass displacement are related to regional stability and international mobility. Political and economic collapse in the Middle East threatens the national security even of countries geographically remote from the region. Syrian refugees in the region forced into starvation, for example, are more vulnerable to recruitment by radical terrorist organizations and organized crime rings.²⁷⁹

To be clear, a key driver of the international security and other concerns I raise here is the failure of the international community to assist a refugee population in dire need.²⁸⁰ Yet issue-linking regional instability, migration management, and international security to refugee cost-sharing as a means of motivating international cooperation is admittedly risky. All three may be manipulated to cast refugees *themselves* as inherently threatening to a given region and the world beyond it, as opposed to what I propose here, which is recognizing the failure of international cooperation as the true threat. Highlighting regional stability, migration and security concerns may have the perverse effect of entrenching anti-refugee sentiments all over the world, and in the case of refugees from the Middle East, reinforcing pernicious racism and islamophobia, resulting in policies that worsen the circumstances of Syrian refugees.²⁸¹

278. See Banulescu-Bogdan & Fratzke, *supra* note 68.

279. Benedetta Berti, *Syrian Refugees and Regional Stability*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Feb. 5, 2015), <http://carnegieendowment.org/sada/index.cfm?fa=show&article=58979>.

280. Of course the conflict in Syria is the fundamental driver of the displacement crisis. But as mentioned earlier, many foreign nations are complicit in the violence in Syria.

281. Chimni warns of the transformation of “the language of burden sharing” into “a language of threats to the security of states.” B.S. Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13 J. REFUGEE STUD. 243, 252 (2000). For a detailed argument against the securitization of refugee protection, see B.S. Chimni, *The Global Refugee Problem in the 21st Century and the Emerging Security Paradigm: A Disturbing Trend*, in *THE LEGAL VISION OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY* (Anghie & Sturgess eds., 1998). He recognizes that refu-

Already there have been questionable efforts by lawmakers in the United States to limit its assistance to Syrian refugees on account of ostensible terrorism-related concerns, despite executive branch assurances that assistance can be extended without jeopardizing US national security.²⁸² It will fall to issue-linking actors such as the UN Refugee Agency, with the assistance of domestic and international refugee protection “norm entrepreneurs” to refocus attention on how the failure of international cooperation itself is a key threat. Already private citizens, civic organizations and even mayors in the United States have begun to articulate a counter-narrative rejecting Islamophobic opposition to Syrian refugees, emphasizing common humanity and their government’s capacity to screen national security threats while assisting refugees.²⁸³ These actors will have the difficult task of highlighting the dangers of a poorly managed refugee crisis while at the same time combatting attempts to vilify refugees. The alternative is the status quo, where the continuing failure of the international community to assist with refugee cost-sharing is creating the very conditions that fuel the instability and insecurity that domestic and international actors should seek to avoid at all costs.

gees have security implications for host states and the international community, *id.* at 285, but he warns that if it is normalized, the language of state, regional, and international security can result in the erosion of refugee wellbeing, as states use it as an ostensible justification for restricting refugees’ access to their territories. Chimni, *Globalization*, *supra*. He argues further that normalization of the language of security in the refugee protection context means refugee flows will more easily justify use of force against the country of origin. *Id.*

282. See, e.g., Kathleen Newland, *The U.S. Record Shows Refugees Are Not a Threat*, MIGRATION POL’Y INST. (Oct. 2015), <http://www.migrationpolicy.org/news/us-record-shows-refugees-are-not-threat> (“The United States has resettled 784,000 refugees since September 11, 2001. In those 14 years, exactly three resettled refugee have been arrested for planning terrorist activities—and it is worth noting two were not planning an attack in the United States and the plans of the third were barely credible.”); *U.S. Tightens Approval of Syrian Refugees Among Terror Concerns*, CCTV AMERICA (Feb. 23, 2015), <http://www.cctv-america.com/2015/02/23/u-s-tightens-approval-of-syrian-refugees-among-terror-concerns> (reporting U.S. State Department and the FBI assurances that refugee screening procedures are intensive and adequate).

283. Kerry Picket, *Mayors of Eighteen U.S. Cities Tell Obama They Are Ready To Take More Syrian Refugees*, DAILY CALLER (Sept. 24, 2015), <http://dailycaller.com/2015/09/24/mayors-of-eighteen-u-s-cities-tell-obama-they-are-ready-to-take-more-syrian-refugees>; see also Amanda Holpuch, Alan Yuhas, & Sabrina Siddiqui, *Syrian Refugee Crisis: Senators Call on US To Take in 65,000 Refugees*, GUARDIAN (Sept. 3, 2015), <http://www.theguardian.com/world/2015/sep/03/aid-groups-senators-us-take-in-65000-syrian-refugees>.

CONCLUSION

When he launched the fundraising campaign for the Syrian regional refugee crisis, the UN High Commissioner for Refugees provided some perspective on the total figure required at that time:

It represents what the Americans spend in ice cream in 32 days. It represents what the Australians spend in overseas travel in 32 weeks. It represents what German drivers spend on petrol in six weeks. I don't recall any bail out of any average dimension bank in the western world that has not cost 5, 6, 7 or 10 times more. So, what we are asking for is indeed massive from the point of view of what is normally the support given by the international community to humanitarian needs. But it is really . . . very little compared to what is spent on other purposes in other parts of the world.²⁸⁴

The failure of international cooperation to protect Syrian refugees is not rooted in an absolute lack of global resources. The same can be said of every other refugee crisis the world has confronted. A key challenge to overcoming the endemic maldistribution of refugee protection cost and responsibility in the international system has been the absence of an institutional frame within which international actors can be motivated to pursue this cooperation. In this Article, I have argued the RtoP can play an important role in alleviating this problem (even if it cannot solve it) by providing an institutional frame for international cooperation where refugees are fleeing RtoP crimes. I have also made the case that reaping whatever benefits RtoP may hold, requires an approach to the institutional development of the doctrine that pursues both interest and norm-convergence.

If states resist the use of RtoP for refugees in the manner that I have proposed *as a matter of principle*, the terms of their resistance are nonetheless useful. Consider the BRICS, which fear that RtoP may be a neo-imperial wolf in sheep's clothing. If these states oppose the application of RtoP to assist southern states with refugee protection, they will require a more nuanced articulation of the basis of their suspicion of RtoP, or risk undermining their own campaigns for a more globally responsive international order. This nuance can then inform how scholars approach reform of the legal regime regulating international responses to mass atrocities in a way that addresses the principled concerns of southern states. For states such as Canada, the United States, France and the United Kingdom, opposition to my proposal strengthens concerns by southern states that the latter are not the intended beneficiaries of the

284. *Geneva/Syria*, UNIFEED (June 7, 2013, 12:41 PM), <http://www.unmultimedia.org/tv/unifeed/2013/06/geneva-syria-11>.

international legal regime. Opposition would also further legitimate normative opposition to RtoP.

If states were to adopt my proposal, the circumstances of a significant proportion of current and future refugees would be greatly improved. However, the plight of refugees fleeing danger from non-RtoP crimes would remain unchanged. For this and many other reasons, the international legal regime regulating forced migration requires a comprehensive overhaul in order to ensure the rights of forced migrants and those of citizens of receiving states. Until this overhaul occurs, there is an urgent need for experimentation with existing “tools” such as RtoP, to mitigate the devastation and human suffering that refugee crises otherwise inevitable produce.