

JURISDICTION WITHOUT TERRITORY: FROM THE HOLY ROMAN EMPIRE TO THE RESPONSIBILITY TO PROTECT

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I. TERRITORY AND JURISDICTION IN THE MODERN WORLD	984
A. <i>Universal Jurisdiction and the Holy Roman Empire</i>	984
B. <i>Protection, Control, and the Modern State</i>	989
II. INTERNATIONAL JURISDICTION AND HUMANITARIAN ACTION	993
A. <i>International Jurisdiction Under the U.N. Charter</i>	993
B. <i>Humanitarian Action Under the U.N. Charter</i>	996
C. <i>The Emergence of the Responsibility to Protect Concept</i>	999
III. AUTHORITY, JURISDICTION, AND THE RESPONSIBILITY TO PROTECT	1003
A. <i>Jurisdiction and the Territorial State</i>	1003
B. <i>Jurisdiction and the Limits of International Authority</i>	1004
C. <i>The Encounter Between Jurisdictions</i>	1008
D. <i>The Nature of International Authority</i>	1009
IV. THE LIMITS OF INTERNATIONAL AUTHORITY	1013

The relationship between jurisdiction and territory has long been a contested one. As the modern State gradually replaced the Holy Roman Empire to become the dominant form of political organization in Western Europe, questions about the limits and divisibility of power began to be framed as questions about the relationship between jurisdiction and territory. The emergence of the territorial State during the sixteenth and seventeenth centuries posed a challenge to the universal jurisdiction of both the Pope and the Holy Roman Emperor within Europe. Both the Pope and the Emperor claimed the right to exercise jurisdiction over the world as a matter of right, even if they had no control over particular territories as a matter of empirical fact. The relationship between jurisdiction and territory was not only an issue within Europe. During the sixteenth and seventeenth centuries, debates about the authority of European sovereigns to rule newly discovered territories in the New World also began to be articulated in terms of the relation between jurisdiction and control over territory. Disputes amongst European powers about which Christian monarchs could claim rights of *dominium* over territory

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in the New World turned on whether the Pope had the authority and jurisdiction to grant such rights.¹

The eventual triumph of the territorial State as the dominant political form globally meant that jurisdiction and territory came to be understood as closely related terms. Richard Ford, for example, argues that modern jurisdiction is always “defined by area.”² While in theory an entity could be defined in terms of genre (for example, as an entity with “authority over ‘all oil, wherever it is found’”), that entity “would not be a jurisdiction but an authority of another kind. A jurisdiction is territorially defined.”³ Yet if we look to the history of the debate over the right of external actors to determine the legitimacy of control over territory, we can see that the relation between jurisdiction and territory has never been finally determined. That debate stretches across six hundred years, from fifteenth century arguments about the extent of papal or imperial jurisdiction to decide who has authority over territories in Europe or the New World, through to contemporary debates about whether the international community has jurisdiction to intervene in situations where States are ruled by tyrants or by governments that are unable or unwilling to protect the population.

This Essay focuses upon one contemporary manifestation of that ongoing battle over the relationship between jurisdiction and control over territory—the emergence and institutionalization of the “responsibility to protect” concept. The idea that States and the international community have a responsibility to protect populations has shaped internationalist debates about conflict prevention, the use of force, and international administration since its development by the International Commission on Intervention and State Sovereignty (ICISS) in 2001.⁴ The responsibility to protect concept is premised on the notion, to quote former Secretary-General Kofi Annan, that “the primary *raison d’être* and duty” of every State is to protect its population.⁵ If a State proves unable to protect its

1. See, e.g., FRANCISCO DE VITORIA, *POLITICAL WRITINGS* 84–92 (Anthony Pagden & Jeremy Lawrance eds., 1991); RICHARD HAKLUYT, *A DISCOURSE CONCERNING WESTERN PLANTING, WRITTEN IN THE YEAR 1584*, at 129–51 (Charles Deane ed., 1877); see also KEN MACMILLAN, *SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD: THE LEGAL FOUNDATIONS OF EMPIRE, 1576–1640*, at 64–74 (2006) (discussing the English response to papal claims of authority and jurisdiction to distribute lands in the New World).

2. Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 852 (1999).

3. *Id.*

4. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY [ICISS], *THE RESPONSIBILITY TO PROTECT* 16 (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (last visited June 6, 2009).

5. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005).

citizens, the responsibility to do so shifts to the international community. The concept was endorsed by the General Assembly in its World Summit Outcome, and has since garnered the support of States, international organizations and civil society, and informed major projects of institutional transformation at the United Nations.

Part I of the Essay sets the scene by situating the responsibility to protect concept within the longstanding debate about the relationship between jurisdiction and territory. The competition for authority between States and the Holy Roman Empire, both within and beyond Europe, has involved debates over the meaning of jurisdiction, *imperium*, territory, and possession. Those questions were not resolved with the demise of the Holy Roman Empire and the emergence of the modern State in Europe, but have continued to play out in battles over the proper relation between state jurisdiction and international jurisdiction. Part II outlines the ways in which the relation between state (or domestic) jurisdiction and international jurisdiction was defined in the Charter of the United Nations (U.N.), and traces the growing importance of the claim that authority must be constrained in particular ways in order to be legitimate in the post-United Nations era. I argue there that the drive for humanitarian action to defend the rights of individuals quickly undermined any tidy settlement of these jurisdictional questions. The jurisdiction of the United Nations to shape the way in which States are governed has long been a source of contest, as has the jurisdiction of the Security Council to police the common interest. Debates about the limits of international authority have intensified since 1989 with the growth of support for the concepts of humanitarian intervention and, more recently, the responsibility to protect. Part III examines the way in which the scope and limits of the international responsibility to protect have been expressed in jurisdictional terms. In the lead up to the 2005 World Summit, many States, particularly from the global South, were very concerned at the potential expansion of international authority that might follow from any official endorsement of the responsibility to protect concept. As a result, States looked to jurisdiction as a means of limiting the situations in which an international responsibility to protect might arise. Yet while legal determinations of jurisdiction are often thought to be about the delimitation of authority, they are also very productive sites for generating a sense of what is possible on either side of the limit.⁶ It is through the institutional practices of jurisdiction that authority is made intelligible.

6. For the argument that discourses concerned with boundaries or limits have this productive quality, see R.B.J. WALKER, *INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY* (1993); Leslie J. Moran, *Placing Jurisdiction, in JURISPRUDENCE OF JURISDICTION* 159 (Shaun McVeigh ed., 2007).

This Part shows that the legal articulation of the triggers to international jurisdiction produced new representations of the nature and extent of both state and international authority. Part IV concludes by drawing out some of the key implications that emerge from the jurisdictional practice related to the implementation of the responsibility to protect concept.

I. TERRITORY AND JURISDICTION IN THE MODERN WORLD

A. *Universal Jurisdiction and the Holy Roman Empire*

How does jurisdiction (“the power of stating what is lawful”⁷) relate to control over territory? Is control over territory the source or the effect of jurisdiction? Such questions were of great importance in medieval and early modern Europe. The answers to these questions turned, among other things, on the relationship between fact and right. The debate, as with many debates over authority in Europe during that time, was framed using the language and concepts of Roman law.⁸ The most important of these Roman law concepts to this debate were those of *ius*, *dominium*, *imperium*, and *iurisdictio*.

In early Roman law, the concept of *ius* was used to refer to the outcome of a “method of divine judgement.”⁹ Disputants were required to take an oath attesting to the righteousness of their claim, and these claims would then be tested by “ordeal or other supernatural judgement. The favorable verdict was a *ius*.”¹⁰ A *ius* was thus both “something objectively right” and something intimately connected with “private, bilateral relationships” and the “right way in which two disputants should behave towards each other”¹¹ A *ius* could also come into existence through agreements, such as agreements between neighbors. The objective and relational quality of *ius* distinguished it from the concept of *dominium*. Classical lawyers distinguished between “having *dominium* in something and having a *ius* in it.”¹² *Dominium* was not constituted through agreements or relationships. Instead, it was “simply given by the fact, as it

7. PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 60 (1999).

8. *See id.* at 38–67 (discussing the twelfth-century recovery of Roman law in Western Europe). For two analyses of the importance of Roman law to debates about the limits of imperial authority during the medieval and early modern periods, see DAVID ARMITAGE, *THE IDEOLOGICAL ORIGINS OF THE BRITISH EMPIRE* 29–36 (2000); ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C.1500—C.1800*, at 11–28 (1995).

9. RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 8 (1979).

10. *Id.*

11. *Id.*

12. *Id.* at 10.

seemed to the Romans, of a man's total control over his physical world"¹³ In the later Empire, the distinction between notions of *ius* and *dominium* would become much less clean-cut. As the Emperor became more powerful and able to intervene in all aspects of life, the idea that a citizen might have "total control over his physical world" began to seem "increasingly implausible."¹⁴ Everything, including *dominium*, was mediated through the Emperor. The Emperor was the citizen "with whom all other Roman citizens had the most extensive relationships."¹⁵ *Dominium* began increasingly to be seen as a form of *ius*.

Nonetheless, the distinction between *ius* as an objective right that was ultimately determinable by divine judgment, and *dominium* as a form of property that was determined by control over the physical world, would reappear in medieval debates over the reach of papal or imperial authority. Central to those debates was the question of whether either the Pope or the Holy Roman Emperor could properly claim to exercise universal jurisdiction (*ius dicere*) as *dominus mundi* or lord of the world. The idea that the papacy and the Emperor exercised dual forms of universal jurisdiction shaped medieval legal thought.¹⁶ The extent of papal and imperial jurisdiction, and the relation between jurisdiction and control (or *ius* and fact), had important implications both within and beyond Europe.

The question of the extent of papal jurisdiction was at the heart of the dispute about the legitimacy of Alexander VI's Bulls of Donation, through which the Spanish Crown claimed *dominium* over the New World. The papal bull *Inter caetera*, issued by Alexander VI in 1493, granted to "the illustrious sovereigns" King Ferdinand and Queen Isabella, and to their "heirs and successors, kings of Castile and Leon," "all islands and mainlands found and to be found, discovered and to be discovered" in the Atlantic world "towards the west and south" of a line bisecting the Atlantic ocean.¹⁷ The proviso to this "gift, grant, and assignment" was that "no right acquired by any Christian prince, who may be in actual possession of said islands and mainlands" could be

13. *Id.*

14. *Id.*

15. *Id.* at 12.

16. JAMES MULDOON, *EMPIRE AND ORDER: THE CONCEPT OF EMPIRE, 800–1800*, at 65 (1999).

17. ALEXANDER VI, *THE BULL INTER CAETERA (1493)*, as reprinted in *EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648*, at 71, 75–78 (Frances Gardiner Davenport ed., 1917).

“withdrawn or taken away.”¹⁸ By implication, *imperium* and *dominium* did not vest with indigenous peoples.¹⁹

The Spanish crown interpreted *Inter caetera* and the other Bulls of Donation as grants that authorized Spanish *dominium* over the lands they “discovered” in the New World. Ferdinand and Isabella appeared to believe not only that the Pope had the authority to dispose of *dominium* over lands in the New World, but that they needed a papal grant in order to acquire *dominium* over such lands.²⁰ The Bulls of Donation were drafted in consultation with Ferdinand and Isabella, and proof of the value that the Spanish monarchs attached to the bulls can be seen “in their anxiety that the things which they desired should be incorporated in them, and also in the revisions to which . . . they subsequently caused them to be subjected.”²¹ The bulls continued to be invoked both by the Spanish crown and by its imperial rivals in debates over the legal justifications for Spanish conquest of the New World until the late seventeenth century.²² To take just one example, when Sir Francis Drake returned to England after his circumnavigation of the world in September 1580, with reports of having claimed land including Nova Albion (today’s California or Oregon) and with commodities from the West Indies and South America, the Spanish ambassador Mendoza lodged a formal complaint with Queen Elizabeth.²³ Mendoza claimed “that these territories belonged to the King of Spain by virtue of first discovery and the papal bull of donation.”²⁴

In return, almost every “French or English attack on the claims to Spanish sovereignty overseas . . . [began] with a rejection of the validity of both the Bulls and the terms of the Treaty of Tordesillas.”²⁵ Most challenges to the validity of the Bulls of Donation argued that the Pope did not have jurisdiction to grant rights to territory. Perhaps the most famous of these were the challenges to Spanish conquest of the New World posed by Francisco de Vitoria and his followers. Vitoria argued that “the [P]ope has no dominion (*dominium*) in the lands of the infidel” and those who think that the Pope “has temporal authority and jurisdiction over all princes in the world, are wrong.”²⁶ According to Vitoria, “*the [P]ope has*

18. *Id.* at 77.

19. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 17 (2004).

20. H. Vander Linden, *Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493–1494*, 22 *AM. HIST. REV.* 1, 15–16 (1916).

21. *Id.* at 16.

22. MACMILLAN, *supra* note 1, at 66–74; PAGDEN, *supra* note 8, at 48.

23. MACMILLAN, *supra* note 1, at 52, 75.

24. *Id.* at 75.

25. PAGDEN, *supra* note 8, at 48.

26. VITORIA, *supra* note 1, at 84.

no power, at least in the ordinary course of events, to judge the cases of princes, or the titles of jurisdictions or realms . . .”²⁷ While Vitoria did accept that the Pope had authority “to use temporal means” where necessary to fulfill a spiritual purpose,²⁸ he considered that this did not give the Pope authority “to award rights of *imperium* and *dominium* over *terra incognita*, which was within the jurisdiction of temporal, Roman law.”²⁹ The spiritual jurisdiction of the Pope thus did not extend to the temporal world. A similar challenge to the legitimacy of the Bulls of Donation was made by the Anglican priest Richard Hakluyt the younger. Hakluyt argued that the Pope had no authority to dispose of or distribute “kingdomes and empires . . .”³⁰ According to Hakluyt, ecclesiastical jurisdiction “hath nothinge to doe with absolution donation and devidinge of mere temporalities and earthly kingdomes.”³¹ The Bulls of Donation therefore posed no limitations upon the rights of the English to trade, settle, or plant in the New World, as “no Pope had any lawfull auctoritie to give any suche donation at all.”³²

There were, however, some advisers to the English crown who accepted that the Pope had jurisdiction to make the donation of territory and invest the Spanish king with rights to the New World. In particular, this argument was made by the “English renaissance polymath” John Dee,³³ who was one of the advisers commissioned by Elizabeth to consider whether, and on what basis, English activities in the New World could be justified. Dee’s writings drew on his training in geography and mathematics, as well as his knowledge of law and history.³⁴ Unlike some of his contemporaries, Dee was prepared to concede that Alexander VI had “authoretie” to “gift” land in the New World and that such an act was “of force sufficient by Gods lawe or mans lawe against all other Christian princes.”³⁵ Dee was willing to accept that the Pope had such authority because he saw “the jurisdiction assumed by the [P]ope and his bull” as “legally analogous to that of Elizabeth” and the letters patent she issued to petitioners seeking authorization to claim *dominium* over

27. *Id.* at 87 (emphasis in original).

28. *Id.* at 92.

29. MACMILLAN, *supra* note 1, at 68.

30. HAKLUYT, *supra* note 1, at 130.

31. *Id.*

32. *Id.* at 129; *see also* MACMILLAN, *supra* note 1, at 67 (discussing Hakluyt’s challenge to papal authority).

33. Ken MacMillan, *Introduction: Discourse on History, Geography, and Law*, in JOHN DEE, *THE LIMITS OF THE BRITISH EMPIRE* 1, 2 (Ken MacMillan & Jennifer Abeles eds., 2004).

34. *See generally* DEE, *supra* note 33.

35. *Id.* at 91; *see also id.* at 92–93 (challenging the Iberian interpretation of the grant as being too liberal because, according to Dee, the bull was intended by the Pope to be proscriptive and to limit Spanish domination of the New World to a particular geographically defined area); MACMILLAN, *supra* note 1, at 49–78 (providing a detailed analysis of Dee’s arguments).

territories in the New World.³⁶ For Dee, Elizabeth, as “the leader of the Anglican Church and a holder of *imperium*,” was able to “authorize settlement in the New World,” in the same way that “the [P]ope, the leader of the Catholic Church and a holder of *imperium*” was able to donate territory.³⁷ Just as the Spanish *conquistadores* traced their rights to territory in the New World to the Bulls of Donation, English settlers and trading companies traced their rights to territory in the New World to the letters patent issued by Elizabeth. Both the papal bulls and the letters patent were represented as exercises of jurisdiction, through which the power to authorize rights to territory was expressed in writing. These documents did not simply claim jurisdiction but also *performed* jurisdiction. By this I mean that jurisdiction involves the process by which a worldly claimant to authority is transformed through the successful performance of the power to declare the law. To the extent that the Pope or Elizabeth claimed to have a form of jurisdiction that enabled them to declare rights to title in far-flung territories, they represented themselves as something other than mere tyrants or *de facto* rulers whose armies or followers were able to gain control of territory by force.

In addition to debates over the extent of the spiritual jurisdiction exercised by the Pope, the extent of the Holy Roman Emperor’s jurisdiction was also contested within Europe and beyond. The secular jurisdiction of the Holy Roman Emperor was conceived of as universal. The medieval jurist Bartolus of Sassoferrato made this clear in his defense of the claim that the Emperor was lord of the world despite the fact that “foreign peoples, the cities of Italy, and the kings of France and England did not obey him.”³⁸ Bartolus sought to show that the Emperor’s universal jurisdiction could survive and co-exist with the new forms of territorial jurisdiction beginning to be exercised by princes and kings. The Emperor was lord of the world, not because he was lord of all the particular things, places, and people in the world, but rather because “he alone had *dominium* over the world considered as a single whole.”³⁹ Bartolus defended this claim by distinguishing between the universal jurisdiction of the Emperor and the particular jurisdictions of other rulers, such as the Kings of England and France. The two could coexist because they were of a different nature. The universal jurisdiction of the Emperor involved jurisdiction “over the world considered as a single whole” rather than as a collection of “particular things,” while the jurisdiction of Kings constituted jurisdiction over particular things (such as

36. MACMILLAN, *supra* note 1, at 73, 107.

37. *Id.* at 73.

38. CONSTANTIN FASOLT, *THE LIMITS OF HISTORY* 192 (2004).

39. *Id.*

England or France).⁴⁰ Jurisdiction was not an effect of power, but a form of power. The Emperor had universal jurisdiction over the world as a matter of right, not as a question of fact. However, when ambitious monarchs like Charles V or Ferdinand II succeeded to the title of Emperor, they sought to combine temporal authority with the universal rights to which they felt entitled as rulers of the Roman Empire.⁴¹ As a result, the reach of imperial authority became far more worldly and far more threatening to peace in Europe.

The rulers of emerging States in Europe thus faced “two universal antagonists outside their own realms,” in the form of the Papacy and the Empire.⁴² Both claimed authority as a supranational body descended from the Roman Empire, and both alleged that this legacy gave them universal jurisdiction, understood as the power to state what is lawful for the whole world. Those who opposed medieval forms of government sought to counter papal and imperial authority with detailed arguments showing why the claim to be *dominus mundi* or lord of the world was flawed. As the next Section shows, these statist arguments were premised on the claim that sovereignty, and thus jurisdiction, depended upon *de facto* control over territory. Worldly authority, to be legitimate, must be effective.

B. *Protection, Control, and the Modern State*

As the State emerged to challenge the authority of the Holy Roman Empire, scholars like Thomas Hobbes developed detailed arguments grounding the authority of the State in its capacity to guarantee protection. Indeed, to invoke protection as the “primary *raison d’être*” of the State is to be in a complicated relation to a long tradition of absolutist theories such as that of Hobbes.⁴³ In his *LEVIATHAN*, Hobbes argued that the creation of a political order depended upon the establishment of a common power with the capacity to protect its subjects. This common power is “made by covenant of every man with every man.”⁴⁴ Through that covenant, the commonwealth was entrusted with sovereign power for a particular end—“the procuration of *the safety of the people . . .*”⁴⁵ According to Hobbes, the lawful authority is the one who achieves protection in the broad sense of bringing into being a condition in which the

40. *Id.*

41. *See id.* at 93 (discussing Ferdinand II).

42. ARMITAGE, *supra* note 8, at 33.

43. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005, *supra* note 5.

44. THOMAS HOBBS, *LEVIATHAN* 114 (Oxford Univ. Press 1996) (1651).

45. *Id.* at 222.

safety of the people can be achieved. This was the “office,” or in other words the responsibility, of the sovereign.⁴⁶

Hobbes thus based his defense of power on its present efficacy rather than on the validity of its origins. His was a theory that spoke to conditions of conquest and of civil war. Hobbes argued that the continual debate about the legitimacy of the conditions under which authority was first constituted was radically destabilizing and ultimately irresolvable. By refusing to anchor the legitimacy of the commonwealth in its capacity to represent a romantic or historical collectivity of the people, Hobbes “pulled the rug out” from under arguments based on the nation as a “platform of resistance” to tyranny or misrule.⁴⁷ For Hobbes, the question of public authority did not turn on issues of authenticity, or on who was the true representative of God or the people. The authority of such a common power was instead grounded on its capacity in fact to ensure protection in accordance with the terms of the covenant. Indeed, Hobbes argued that the “obligation of subjects” to obey the sovereign would “last as long, and no longer, than the power lasteth, by which he is able to protect them.”⁴⁸ The linkage of sovereignty and protection thus emerged alongside the modern State, as a way of distinguishing the State’s *de facto* capacity to protect from *de jure* claims to authority, whether those claims were made by the peasantry (such as the revolutionary claimants to authority in seventeenth century England), the Pope, the Holy Roman Emperor, or rival claimants to territory in the new world.⁴⁹ Jurisdiction and the freedom to legislate at will were not a matter of right, but a consequence of the fact of control. The State was the form in which human beings could declare their independence from past obligations and ancient texts, and express their freedom to shape the future.⁵⁰

With the triumph of the modern State and the demise of the Holy Roman Empire, debates over the divisibility of power ceased to be framed in terms of the competition between imperial and state jurisdic-

46. The history of linking sovereignty and protection in order to justify state authority has been invoked by Edward Luck, the U.N. Special Advisor on the Responsibility to Protect. See Edward C. Luck, U.N. Special Advisor, Statement to the UNSC Working Group on Conflict Resolution and Prevention in Africa, (Dec. 1, 2008), *available at* <http://www.responsibilitytoprotect.org/index.php/eupdate/1965> (last visited June 6, 2009) (“From the dawn of the nation-state era, it has been the intrinsic and inherent responsibility of the sovereign to offer protection to its people. In return, they offer their loyalty. What higher purpose could sovereignty serve?”).

47. ISTVAN HONT, *JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE* 130 (2005).

48. HOBBS, *supra* note 44, at 147.

49. Anne Orford, *Lawful Authority and the Responsibility to Protect*, in *LEGALITY AND LEGITIMACY IN INTERNATIONAL ORDER* (Richard Falk et al. eds., forthcoming 2009).

50. FASOLT, *supra* note 38, at 7–10.

tion. However, this is not to say that the demise of the Holy Roman Empire meant that power was understood to be unified in the form of the sovereign, as the mythologizing of absolutist theorists of the State would seem to suggest. It was certainly no longer plausible to argue that the Holy Roman Emperor had universal jurisdiction as lord of the world, while princes had rights to particular jurisdiction, and that both forms of jurisdiction could apply over the same territory. However, the idea that power might be divided, or that people, places, and things might be subject to plural sources of law, did not disappear. Instead, it changed form. In particular, it persisted in two debates that inform contemporary international law.

The first debate concerns the question of whether the recognition of a government, or even of a new State, by external actors should be understood as declaratory or constitutive. According to the declaratory theory, which was dominant until at least the late eighteenth century, the “legal status” of a ruler was understood to be “derived and perfected from within.”⁵¹ As a result, “internal legality determines external legality”⁵² Within Europe, the law of nature and of nations had little to say about the basis of state legitimacy. The question of whether a duly appointed or elected ruler properly had authority over territory was not treated as a question for interstate relations. If the people of a State thought a person “worthy of election to the throne of their country and useful to their welfare,” that election was not “capable of being validly challenged by other States.”⁵³ To give foreign rulers or powers “the *right to recognition* . . . would mean intervention and result in submission which would stultify the fundamental right of States to equality guaranteed by the law of nature and nations.”⁵⁴ If the legitimacy of a government were understood to depend upon external recognition or championing by external powers, the uneasy peace that existed in the aftermath of the European wars of religion could quickly unravel. Thus the *de facto* existence of control over territory was sufficient to establish sovereignty.

Yet beginning in the early nineteenth century, the law of nations began to treat statehood as a question that was not determined only internally. International lawyers such as Henry Wheaton were confronted with “frequent changes in membership of the Family of Nations” as a result of revolutions in Europe and the New World,⁵⁵ and questions about

51. C.H. Alexandrowicz, *The Theory of Recognition In Fieri*, 1958 BRIT. Y.B. INT’L L. 176, 179.

52. *Id.*

53. *Id.* at 177.

54. *Id.*

55. *Id.* at 196.

the normative criteria of statehood began to appear in urgent need of resolution. Wheaton and his contemporaries began to argue that while “internal sovereignty” was a question of “factual formation[,]” “external sovereignty” of a State “was not *derived* from within,” but instead required “action from without which must be taken by the existing Member States of the Family of Nations.”⁵⁶ States began to treat external recognition as an act that “renders the sovereignty of a new State perfect and complete.”⁵⁷ In this sense, *de facto* control over territory was no longer sufficient to ground a claim to statehood.

The second way in which an uncertainty about the relation between right and power, or jurisdiction and control over territory, persisted was in relation to the question of whether individuals within a State had fundamental rights that derived from a source other than the positive law of the State. While States were understood to have public authority over all people and things within their jurisdiction, from the seventeenth century onwards private individuals were also understood to have a form of “subjective right” to property in their persons, liberty, and estates that could coexist with, and constrain, public authority.⁵⁸ These inalienable property rights were argued to derive from a source other than social, political, or legal convention and to fix “limits on the powers of government.”⁵⁹

As the next Part shows, both the debate about the role of external actors in determining the legitimacy of governments and the debate about the extent to which fundamental rights represented a constraint on state action became linked to international jurisdiction with the creation of the United Nations.

56. *Id.* at 195; see also JENNIFER L. BEARD, *THE POLITICAL ECONOMY OF DESIRE: INTERNATIONAL LAW, DEVELOPMENT AND THE NATION STATE* 124–49 (2007) (offering a critical reading of these practices of recognition).

57. Alexandrowicz, *supra* note 51, at 195.

58. This modern division of jurisdiction and property is explained by Hugo Grotius. 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 457 (Liberty Fund, 2005) (1625) (commenting that “altho’ Jurisdiction and Property are usually acquired by one and the same Act, yet they are in themselves really distinct; and therefore Property may be transferred, not only to those of the same State, but even to Foreigners too, the Jurisdiction remaining as it was before.”); see also JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 56 (2d ed. 2006) (offering a contemporary differentiation of public authority and private ownership: “Territorial sovereignty is not ownership of but governing power with respect to territory.”).

59. Cary J. Nederman, *Property and Protest: Political Theory and Subjective Rights in Fourteenth-Century England*, 58 *REV. POL.* 323, 327 (1996).

II. INTERNATIONAL JURISDICTION AND HUMANITARIAN ACTION

A. *International Jurisdiction Under the U.N. Charter*

International law has long treated effective control over territory as an important criterion of statehood.⁶⁰ In that sense, statehood is premised upon *de facto* authority. Yet the creation of the United Nations in 1945 saw the emergence of an international regime in which the principles of self-determination, sovereign equality, and the prohibition against acquisition of territory through the use of force were also treated as central to determining the lawfulness of particular claimants to authority.⁶¹ These principles shaped the process of decolonization and delegitimized alien rule. The preamble of the U.N. Charter also expressed a determination “to reaffirm faith in fundamental human rights” and “the dignity and worth of the human person.”⁶² That faith would inform the body of international human rights law and international humanitarian law that developed over the course of the twentieth century as a constraint on state action. Under the U.N. Charter, the lawfulness of authority over a given territory was thus treated as a matter both of fact and of right.

That understanding of state authority informed the way that the U.N. Charter attempted to formulate the relationship between state and international jurisdiction. As the authority of sovereign States was understood to be an expression both of effective control over territory and of fundamental principles such as the right to self-determination, external intervention in the internal affairs of States was *prima facie* illegitimate. Yet, because the legitimacy of state authority had become a matter for international law, as overseen by an organization with supranational authority, intervention in the internal affairs of States must also, in some circumstances, be legitimate. As the earlier debates about the role of external actors in recognizing elected monarchs or revolutionary States made clear, the treatment of authority as a matter for international law opened up new possibilities for destabilizing external intervention and new threats to peace. It was the task of the U.N. Charter to articulate the jurisdictional grounds upon which the new organization might exercise its authority to police and perfect the State, while at the same time establishing a commitment to fundamental principles of sovereign equality and self-determination.

The U.N. Charter attempts to settle these jurisdictional questions by authorizing international intervention in two distinct situations. First, the

60. CRAWFORD, *supra* note 58, at 37–89.

61. *Id.* at 96–173.

62. U.N. Charter pmbl.

preamble to the Charter provides that “armed force shall not be used, save in the common interest”⁶³ and all Members agree to “refrain in their international relations from the threat or use of force” in any manner “inconsistent with the Purposes of the United Nations.”⁶⁴ The Charter vests the international police function in the Security Council—the organ given the “primary responsibility for the maintenance of international peace and security.”⁶⁵ Like the other organs of the United Nations, the Security Council is effectively given the power to determine the extent of its jurisdiction, including its jurisdiction to authorize force when there is a “threat to the peace, breach of the peace, or act of aggression.”⁶⁶ To the extent that there are limitations on Security Council jurisdiction, they have been seen to flow from Articles 24 and 39 of the Charter, which establish the scope of the police function of the Security Council and its role within the broader Charter system.⁶⁷ The Council determines whether a particular event triggers its jurisdiction under Chapter VII, and decides what measures should be taken to restore peace and security.⁶⁸ Any decision by the Security Council to authorize the use of force against a State requires its Members to submit to the discipline of a multilateral decision-making process.⁶⁹ This commitment to multilateralism has been seen as a significant bulwark against a resurgence of imperialism.⁷⁰ It means that a powerful State does not have the right to undertake police action against another State without Security Council authoriza-

63. *Id.*

64. *Id.* art. 2(4).

65. *Id.* art. 24(1); *see also* Hans Kelsen, *Collective Security Under International Law* 4, 114, 142 n.20 (Int'l Law Studies Series No. 49, 1957) (characterizing the collective security system established under the U.N. Charter in terms of international police action); Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325, 344 (1995) (analyzing the Security Council as “the technician of peace, the police”).

66. For the broad principle that each U.N. organ “must, in the first place at least, determine its own jurisdiction,” *see* *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, 1962 I.C.J. 151, at 168 (July 20); *see also* THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 5–6 (2002) (discussing the practice by which the political organs of the United Nations have determined their own jurisdiction).

67. U.N. Charter art. 24 (providing that “In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations”); *id.* art. 39 (granting to the Security Council the authority to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to “decide what measures shall be taken . . . to maintain or restore international peace and security”).

68. *Id.* art. 39.

69. *Id.* art. 27.

70. *See generally* Ralph Zacklin, Former Assistant Secretary-General for Legal Affairs, United Nations, Hersch Lauterpacht Memorial Lecture at the University of Cambridge: The United Nations Secretariat and the Use of Force in a Unipolar World (Jan. 22–24, 2008) (transcript available in the Lauterpacht Centre for International Law), *available at* http://www.lcil.cam.ac.uk/lectures/2007-08_ralph_zacklin.php (last visited June 6, 2009).

tion. For lawyers, the “hard” or enforceable legal regime governing peace and security is premised upon a commitment to the core principles of sovereign equality, self-determination, and territorial integrity. These principles have been seen as desirable both in achieving realist ends (preserving the *status quo* and the international order from the threat of world wars and mass destruction) and for more idealistic reasons (a commitment to international justice and the defense of newly decolonized States from hegemonic powers with imperial appetites).

The Charter also envisages a second and more expansive jurisdiction to regulate Member States. The Charter seeks to advance peace, justice, and the public good by encouraging States to protect and promote human rights and to achieve economic development. The U.N. Charter not only established a “hard” regime governing public law questions relating to territory and the use of force, but also a “soft” regime concerned with economic and social issues.⁷¹ The soft regime was institutionally based in the more democratic organ of the General Assembly. The more expansive jurisdiction of the General Assembly was balanced against the lack of enforcement mechanisms available to it. Resolutions could be passed dealing with a wide range of issues of social and economic importance, but no real mechanisms existed for obliging States to comply with these resolutions.⁷² The broad “public good” jurisdiction of the international community is also limited by Article 2(7) of the U.N. Charter.⁷³ Article 2(7) limits (or, more often, fails to limit) soft forms of U.N. intervention (for example, involving the work of human rights bodies or the General Assembly) in what might otherwise have been understood to be the sphere of a State’s domestic jurisdiction.

The relation between hard (or public) and soft (or private) U.N. activity became the subject of contest almost as soon as it was enshrined in the U.N. Charter. Already by the 1950s, the distinction between the work of the Security Council and that of the General Assembly began to break down. The General Assembly started to concern itself with security matters, beginning with the *Uniting for Peace* Resolution passed in 1950 in response to the Soviet veto of Security Council resolutions endorsing

71. Koskenniemi, *supra* note 65, at 336.

72. *Id.* at 338–39.

73. The U.N. Charter provides that:

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

U.N. Charter art. 2(7).

U.N. intervention in the Korean War.⁷⁴ Peacekeeping thus emerged in the early 1950s, alongside the process of decolonization, as a means of responding to conflict over territory, threats to the sanctity of former colonial investments, and civil war in post-colonial States. As the General Assembly began to be dominated by newly decolonized States, it also began to pass resolutions, such as those concerned with the new international economic order, questioning the liberal distinction between public and private, order and justice.⁷⁵ The Security Council, in turn, began to concern itself with broader public good questions—both within and between States. In addition, at various times during the 1960s and 1970s, States justified their use of force against neighboring countries by reference to the notion of humanitarian intervention. Nonetheless, during the Cold War period, the notion that a powerful State or a coalition of allies might intervene to rescue or protect the people of another State could not easily be represented as an apolitical action.

B. Humanitarian Action Under the U.N. Charter

The jurisdictional basis for humanitarian intervention within this regime was always uncertain. Where occupation by foreign States or administration by international organizations was permitted, it was conceived of as temporary, that is, authorized for limited periods and for restricted ends. Humanitarian intervention was largely conceived of as an exceptional measure undertaken in situations of emergency and extreme human suffering, brought somewhat uneasily under an international jurisdiction to protect peace and security, or more controversially, to represent universal values. Nonetheless, the institutional and ideological conditions of the post-Cold War period led to the growth of support amongst policy makers and academics for the idea that force could legitimately be used as a response to situations of massive human rights violations within a State. The expanded vision of the meaning of international peace and security was, in part, a product of the post-Cold War revitalization of the Security Council. During the Cold War, the Security Council had been paralyzed by reciprocal use of the veto exercisable by the five permanent members. The ending of the Cold War meant an end to that deadlock. The ideological climate of the 1990s also contributed to the plausibility, for some, of the notion that military inter-

74. The Uniting for Peace Resolution, G.A. Res. 377A (V), U.N. Doc. A/RES/377A (V) (Nov. 3, 1950). For a discussion of the context in which the Uniting for Peace Resolution was passed, see William Stueck, *The United Nations, the Security Council, and the Korean War*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945*, at 265 (Vaughan Lowe et al. eds., 2008).

75. See, e.g., Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. Doc. A/RES/29/3281 (Dec. 12, 1974).

vention might be benevolent and disinterested—that powerful States might really come to liberate and not to occupy. It was in this new environment that the Security Council, post-1989, proved willing to interpret its jurisdiction to authorize force so as to include situations of civil war or humanitarian crisis.

The willingness of the Security Council to expand its jurisdiction with a broad reading of “threats to the peace” was first evidenced by the statement issued from its 1992 Summit Meeting. The members of the Security Council there declared that the “absence of war and military conflicts amongst States does not in itself ensure international peace and security,” and that “non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.”⁷⁶ The range and nature of resolutions passed by the Security Council in the decade following the end of the Cold War reinforced the sense that the Council was willing to treat the failure to guarantee democracy or human rights, or to protect against humanitarian abuses, as a threat to peace and security.

While these resolutions were hotly debated, they were generally thought to have “stretched the literal text of Chapter VII” rather than to have violated the Charter prohibition on recourse to force.⁷⁷ These decisions were not seen to threaten the key principles of sovereign equality, territorial integrity, and self-determination. The notion that international police action was exceptional still governed. More serious questions of legality and legitimacy arose when the enthusiastic embrace of multilateral intervention extended to support for military action undertaken by regional organizations without Security Council authorization, most notably the 1999 intervention in Kosovo by the North Atlantic Treaty Organization (NATO), but also the interventions by the Economic Community of West African States in Liberia and Sierra Leone. The gradual movement towards the acceptability of collective humanitarian intervention reached a crisis point with these actions undertaken by coalitions of States without Security Council authorization. The ensuing debate over humanitarian intervention can be seen as a breaking down of the unstable boundary between the hard and soft activities of the United Nations—between policing and justice.

In addition to the debates around humanitarian intervention, humanitarian action proceeded under the U.N. Charter in other less visible, but no less productive, ways. The soft U.N. regime overseen by the General Assembly involved lawyers in promoting human rights, protecting

76. The President of the Security Council, *Note by the President of the Security Council*, ¶ 11, *delivered to the Security Council*, U.N. Doc. S/23500 (Jan. 31, 1992).

77. FRANCK, *supra* note 66, at 137.

refugees, and introducing the “rule of law” into the economic development agenda. While the big questions of intervention and authority were debated in relation to the use of force and formal control over territory, international governance quietly expanded through the consensual involvement of the aid, human rights, development, and humanitarian communities in the administration and management of economic and social life within African, Middle Eastern, Asian, Latin American, and Eastern European States.⁷⁸ The 1990s saw the publication of subtle analyses by humanitarian actors of the problems that increased soft interventions had begun to produce, particularly in Africa. These analyses, authored by people who had been involved in development, refugee, famine assistance, and emergency relief work, were framed in terms of responsibility and protection. They explored the difficult issues raised by the involvement of the development enterprise in contributing to conditions leading to genocide,⁷⁹ the responsibility of protection agencies in situations where humanitarian spaces and refugee camps were providing safe havens for belligerents,⁸⁰ and the effects of the over-inflated claims that humanitarians made in representing their capacity to offer protection to people at risk.⁸¹ This literature began to ask questions about the lawfulness or ethics of humanitarian internationalists, both in terms of how they represented their presence and how they understood their responsibility for the effects of their actions and decisions. It also addressed issues of effectiveness, asking whether humanitarian protection was in fact assisting populations at risk, and whether humanitarian actors were fulfilling their responsibilities to those people they claimed to be assisting. Academic commentators in turn argued that representatives of the international community were involved in governing, and suggested that the responsibility of these actors would be better addressed if international presence were recognized as an ongoing factor shaping the dynamics of conflict in the Third World rather than characterized as a series of temporary interventions.⁸²

78. Anne Orford, *The Gift of Formalism*, 15 EUR. J. INT'L L. 179 (2004).

79. See, e.g., PETER UVIN, *AIDING VIOLENCE: THE DEVELOPMENT ENTERPRISE IN RWANDA* (1998).

80. See, e.g., FIONA TERRY, *CONDEMNED TO REPEAT?: THE PARADOX OF HUMANITARIAN ACTION* (2002).

81. See, e.g., ALEX DE WAAL, *FAMINE CRIMES: POLITICS AND THE DISASTER RELIEF INDUSTRY IN AFRICA* (1997).

82. See, e.g., DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004); ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* (2003).

C. *The Emergence of the Responsibility to Protect Concept*

The responsibility to protect concept can be seen as one outcome of these converging sets of institutional and academic deliberations. As I have already noted, the concept of the responsibility to protect was propelled into the internationalist mainstream by ICISS in its report of 2001. The ICISS was an initiative sponsored by the Canadian government in response to the perceived tension between state sovereignty and humanitarian intervention in the aftermath of the NATO action in Kosovo. In 2001, the ICISS issued a report entitled *The Responsibility to Protect*.⁸³ The responsibility to protect report was presented as a new way of talking about humanitarian intervention, as well as a new way of talking about sovereignty.⁸⁴ Both were organized around protection. The new way of talking about sovereignty was to argue that “its essence should now be seen not as *control* but as *responsibility*.”⁸⁵ If a State is unwilling or unable to meet this responsibility to protect its population, it then falls upon the international community to do so. The new way of talking about humanitarian intervention involved re-characterizing the debate “not as an argument about any *right* at all but rather about a *responsibility*—one to protect people at grave risk.”⁸⁶ The people at grave risk were those “[m]illions of human beings” who, in the words of the ICISS report, “remain at the mercy of civil wars, insurgencies, state repression and state collapse.”⁸⁷ With the emergence of the responsibility to protect concept, we see a movement away from that representation of intervention as an exceptional interference in the domestic affairs of States, and towards the representation of international presence as authorized, and indeed mandated, by international legal obligations. The General Assembly, in its 2005 World Summit Outcome, endorsed the notion of both an individual and an international responsibility to protect, stating that “[t]he international community, through the United Nations, also has the responsibility . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁸⁸

The ICISS report set out a broad range of techniques envisaged as available to meet the responsibility to protect, well beyond the use of force or military intervention. According to the ICISS, the responsibility to protect encompasses a responsibility to prevent conflict, to react to

83. ICISS, *supra* note 4.

84. *Id.* at 16.

85. Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 *WIS. INT'L L.J.* 703, 708 (2006).

86. *Id.*

87. ICISS, *supra* note 4, at 11.

88. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. GAOR, 60th Sess., 8th plen. mtg., U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

conflict, and to rebuild after conflict.⁸⁹ In doing so, it expands the range of techniques legally available for meeting the responsibility to protect at a distance to include the provision of development assistance or “support for local initiatives to advance good governance, human rights, or the rule of law,”⁹⁰ the deployment of good offices missions or mediation efforts, monitoring and reporting on human rights abuses, receiving and analyzing “sensitive information from [M]ember [S]tates,”⁹¹ promoting better terms of trade for developing economies, reforming military and state security services, and prosecuting “perpetrators of crimes against humanity” before the International Criminal Court.⁹² According to ICISS, the responsibility to protect also brings with it a responsibility on the part of the international community “to build a durable peace” in the aftermath of military intervention.⁹³ “If military intervention is to be contemplated, the need for a post-intervention strategy is also of paramount importance.”⁹⁴ In turn, ICISS envisaged that the responsibility to rebuild that accompanies military intervention “may mean staying in the country for some period of time after the initial purposes of the intervention have been accomplished.”⁹⁵ The General Assembly accepted this broad vision of the kinds of techniques that might be authorized as an exercise of the responsibility to protect and accepted the ambitious scope of that responsibility.⁹⁶ U.N. members undertook to help States build “capacity to protect their populations,” assist “those which are under stress before crises and conflicts break out,” establish “an early warning capability,” and take “collective action, in a timely and decisive manner, through the Security Council . . . should peaceful means be inadequate” to protect populations.⁹⁷

The institutionalization of the responsibility to protect concept has led to a process of systemic integration at and around the United Nations. Throughout his campaign for U.N. Secretary-General, Ban Ki-moon made clear that he was a strong supporter of the responsibility to protect. Ban told U.S. audiences in 2006 that “the concept of the international community’s responsibility to protect . . . should be further substantiated” and vowed that as Secretary-General he would “speak out in favor” of the

89. ICISS, *supra* note 4, at 19, 29, 39.

90. *Id.* at 19.

91. *Id.* at 22.

92. *Id.* at 24.

93. *Id.* at 39.

94. *Id.*

95. *Id.*

96. 2005 World Summit Outcome, G.A. Res. 60/1, *supra* note 88, ¶ 139.

97. *Id.* ¶¶ 138–39.

responsibility to protect.⁹⁸ Since his appointment as Secretary-General, Ban has said he will “spare no effort to operationalize the responsibility to protect,”⁹⁹ and has spoken of the need to “turn promise into practice, words into deeds.”¹⁰⁰ The Secretary-General signaled the emphasis to be placed on the responsibility to protect with the creation of two senior positions to oversee its implementation. Francis Deng was appointed to the newly styled position of U.N. Special Adviser on the Prevention of Genocide in 2007 and Edward Luck was appointed to the new position of Special Adviser to the Secretary-General on the Responsibility to Protect in 2008. The two advisers “share an office on genocide prevention and RtoP [the responsibility to protect], helping the United Nations to speak and act as one.”¹⁰¹ According to Luck, the aim of the responsibility to protect concept is to create “interagency cooperation,” “a common policy and operational strategy,” and an “integrated framework” for activities in areas including conflict prevention, capacity-building, humanitarian assistance, peacekeeping, and security sector reform.¹⁰² A range of actors, from U.S. Naval Academy counter-insurgency specialists to U.N. officials, human rights activists, and Christian aid workers, have now begun enthusiastically to re-describe and re-conceptualize their missions in terms of protection. These actors have also begun to integrate activities across a remarkable range of areas within a protection framework and to call upon States to do the same.¹⁰³ Moves to institu-

98. Ban Ki-moon's *Positions on Human Rights, The Responsibility to Protect, International Criminal Court*, UNSGSELECTION.ORG (Oct. 19, 2006), <http://www.unsgselection.org/content/latest-developments/issue-34-19-october-2006-ban-ki-moon's-positions-on-human-rights-the-responsibility-to-protect-international-criminal-court/173> (last visited June 6, 2009).

99. Ban Ki-moon, U.N. Secretary-General, Address to the Summit of the African Union (Jan. 31, 2008), available at http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=180# (last visited June 6, 2009).

100. Ban Ki-moon, U.N. Secretary-General, Address at Event Entitled “Responsible Sovereignty: International Cooperation for a Changed World” (July 15, 2008) (transcript available from the U.N. Department of Public Information), available at <http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm> (last visited June 6, 2009) [hereinafter Ki-moon, Responsible Sovereignty].

101. *Id.*

102. EDWARD C. LUCK, STANLEY FOUND., POLICY ANALYSIS BRIEF: THE UNITED NATIONS AND THE RESPONSIBILITY TO PROTECT (2008), available at <http://www.stanleyfdn.org/publications/pab/LuckPAB808.pdf> (last visited June 6, 2009).

103. See, e.g., Letter from William R. Pace, Executive Director, World Federalist Movement-Institute for Global Policy, to Heads of Governments and Foreign Ministers (Sept. 22, 2008), available at http://www.responsibilitytoprotect.org/index.php/civil_society_statements/1859?theme=alt1 (last visited June 6, 2009) (urging governments to “support the Responsibility to Protect through words and actions in the upcoming 63rd Session of the [U.N.] General Assembly”). Thirty-five non-governmental organizations signed the letter, including Human Rights Watch (U.S.), the International Crisis Group (United States), the International Refugee Rights Initiative (Uganda), the Executive Secretariat of the International Conference on the Great Lakes Region (Burundi), Coalition for the International Criminal Court (South Africa),

tionalize the responsibility to protect are thus leading to a coordinated project of intensification and rationalization of international administration.

States and regional organizations have also embraced the responsibility to protect concept, apparently with much greater willingness than was the case with humanitarian intervention. Member States voted unanimously in the General Assembly at the 2005 World Summit to adopt the responsibility to protect as an obligation both of individual Member States and of the international community.¹⁰⁴ Since then, representatives of States including Australia, France, Sweden, the United Kingdom, and the United States have specifically invoked the responsibility to protect to explain actions taken or proposed by their governments. In addition, regional organizations such as the African Union (A.U.) have formally endorsed the responsibility to protect concept.¹⁰⁵ Thus the responsibility to protect concept is increasingly being invoked as one of the purposes towards which state institutions are being directed.¹⁰⁶

The responsibility to protect concept thus appears to envisage a greatly expanded scope of authority for the international community. Under the U.N. Charter, humanitarian intervention and international administration were occasionally tolerated as temporary or emergency measures, but *de jure* authority was always understood to remain with the sovereign State. In contrast, the advocates of the responsibility to protect concept seek to make an argument for the lawfulness of both state and international authority, without reference to self-determination, popular sovereignty, or other *de jure* bases for determining who should have the power to govern in a particular territory. The responsibility to protect concept rejects the automatic priority of claims to authority based on right, whether that right be understood in historical, universal, or democratic terms. Rather, the legitimacy of authority is determinable by

the Church of Sweden (Sweden), DanChurch Aid (Denmark), the National Council of Churches in Australia (Australia), and the World Federalist Movement (Canada).

104. 2005 World Summit Outcome, G.A. Res. 60/1, *supra* note 88, ¶ 139.

105. African Union, Executive Council, *The Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus*, AU Doc. Ext/EX.CL/2 (VII) (Mar. 7–8, 2005) (adopting the principle of the responsibility to protect); *see also* African Commission on Human and Peoples' Rights, *Resolution on Strengthening the Responsibility to Protect in Africa*, A.C.H.P.R./Res. 117 (XXXXII) (Nov. 28, 2007) (endorsing the 2007 Security Council decision to deploy an A.U./U.N. Hybrid Operation in Darfur as an exercise of the responsibility to protect).

106. This practice is arguably contributing to a reformulation of the international law relating to nonintervention. For a reformulation of the *opinio juris* element of customary international law formation in terms of "the arguments used by political elites to drive the institutions of the [S]tate into motion," *see* Anthony Carty, *The Iraq Invasion as a Recent United Kingdom 'Contribution to International Law'*, 16 EUR. J. INT'L L. 143, 144 (2005).

reference to the *fact* of protection.¹⁰⁷ The legitimacy of authority—whether of States or of the international community—depends on the capacity to provide effective protection to populations at risk. By focusing upon *de facto* authority, the responsibility to protect concept implicitly asserts not only that an international community exists, but also that its authority to govern is, at least in situations of civil war and repression, superior to that of the State.

III. AUTHORITY, JURISDICTION, AND THE RESPONSIBILITY TO PROTECT

Many States were concerned at the potential expansion of international authority that might flow from the endorsement of the responsibility to protect concept, and sought to limit the scope of international protective authority with a narrow definition of the triggers to international jurisdiction. This Part explores the ways in which the World Summit Outcome articulates the nature and extent of state and international jurisdiction in relation to the responsibility to protect. Discussions about the limits of a particular jurisdiction are often the site of “law’s own most self-reflexive operations.”¹⁰⁸ Jurisdiction involves the establishment or articulation of power as and through public law. In articulating the nature and limits of power through public law, legal determinations of jurisdiction give a conventional or shared meaning to authority and to its objects. As Shaunnagh Dorsett and Shaun McVeigh suggest, “[i]t is through jurisdiction that a life before the law is instituted, a place is subjected to rule and occupation, and an event is articulated as juridical.”¹⁰⁹ The jurisdictional practices related to the responsibility to protect are the specific techniques by which life in the new zones of protection is marked as belonging to international law; places are subjected to the rule of international law and events are articulated as legally relevant.

A. Jurisdiction and the Territorial State

The traditional principle that each State has jurisdiction over its territory is reinforced in the World Summit Outcome. It stresses that each “individual [S]tate” has “the responsibility to protect its populations

107. See ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* (forthcoming 2010).

108. BRADIN CORMACK, *A POWER TO DO JUSTICE: JURISDICTION, ENGLISH LITERATURE, AND THE RISE OF COMMON LAW, 1509–1625*, at 22 (2007).

109. Shaunnagh Dorsett & Shaun McVeigh, *Questions of Jurisdiction*, in *JURISPRUDENCE OF JURISDICTION*, *supra* note 6, at 3, 5.

from genocide, war crimes, ethnic cleansing and crimes against humanity” and that this extends to “the prevention of such crimes, including their incitement.” Secretary-General Ban Ki-Moon has, in turn, emphasized that “[g]overnments unanimously affirmed the primary and continuing legal obligations of States to protect their populations,” and has described this as the “bedrock” principle of the responsibility to protect.¹¹⁰ The State continues to exercise primary jurisdiction over its territory and has the responsibility to protect the population within that territory. The World Summit Outcome and the officials charged with its implementation thus reaffirm that the world is divided into spatially defined units, within which politics takes place. The responsibility to protect concept takes as a given that physical space exists as a series of defined and bounded territories. Each territory can be “associated or identified with a sovereign”¹¹¹ The entity with primary control over, and responsibility for, the inhabitants of those territories is the sovereign State. If people are not protected or are at risk, this is a manifestation of the failure of the State to meet its responsibility to protect its population.

The responsibility to protect concept thus diagnoses a problem. The problem it diagnoses is the tyranny of state governments and the threat posed to security when the State has unconditional control over a territory and population. Tyranny here has a very modern meaning. Where once tyrants were those who exercised *de facto* authority by force and had a “lack of respect for law,” in the modern world tyrants are those who interfere with the subjective rights of individuals to property in life, liberty, or estate.¹¹²

B. *Jurisdiction and the Limits of International Authority*

The responsibility to protect concept challenges the tyranny of state leaders or militias from the position or “political viewpoint” of the people and their material interests—that is, their need for protection.¹¹³ Yet it does not propose to vest the power wrested from the State in the people, or at least not immediately. Instead, the responsibility to protect litera-

110. See Ban, *Responsible Sovereignty*, *supra* note 100.

111. Shaunnagh Dorsett, *Mapping Territories*, in *JURISPRUDENCE OF JURISDICTION*, *supra* note 6, at 137–38.

112. See FASOLT, *supra* note 38, at 201, 281 n.130 (discussing Bodin’s assertion that “the true mark of the tyrant is not his relationship to law but his lack of respect for property” and commenting that this “is about as good a definition of tyranny as can be expected under modern circumstances.”). For a discussion of the political theory of “‘subjective’ property rights,” see Nederman, *supra* note 59, at 324.

113. My analysis of the difference between the subject of the political viewpoint from which a problem is diagnosed, and the subject of the political practice needed to respond to that problem, is informed by LOUIS ALTHUSSER, *MACHIAVELLI AND US 25–26* (François Matheron ed., Gregory Elliot trans., 1999).

ture fixes another place—"the place of the force that must be constituted" in response to the political problem it has diagnosed.¹¹⁴ In the World Summit Outcome, this place is called "the international community."¹¹⁵ The international community is the name given to the place of the force that must be constituted to resolve the problem of state tyranny or the failure of protection. The responsibility to protect concept provides that in certain situations, where a State manifestly fails to protect its population, state authority must give way to that of the international community.

The jurisdictional basis for an international responsibility to protect is quite different to the jurisdictional basis previously proffered for humanitarian action under the U.N. Charter, whether that action took the form of military intervention, conflict prevention, or international administration. Early reports and documents relating to the responsibility to protect had referred in very broad terms to the situations in which the international community might have jurisdiction to exercise that responsibility. For example, the ICISS report had referred to the "[m]illions of human beings" who "remain at the mercy of civil wars, insurgencies, state repression and state collapse."¹¹⁶ The report discussed the need to deliver "practical protection for ordinary people, at risk of their lives, because their [S]tates are unwilling or unable to protect them."¹¹⁷ According to the report, States have a responsibility to protect their populations from threats including "mass killing," "systematic rape" and "starvation."¹¹⁸ Both "the [S]tate whose people are directly affected" and "the broader community of [S]tates" have a responsibility to provide "life-supporting protection and assistance to populations at risk."¹¹⁹ Where there is a threat of "large scale loss of life" or "large scale 'ethnic cleansing,'" the report found that military intervention by the international community is justified.¹²⁰

In contrast, when the World Summit of the General Assembly endorsed the responsibility to protect, it made a significant change in the formulation of jurisdiction. The World Summit Outcome describes the international responsibility to protect as a responsibility "to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."¹²¹ The proposal to link the responsibility to protect

114. *Id.* at 25.

115. 2005 World Summit Outcome, G.A. Res. 60/1, *supra* note 88, ¶ 139.

116. ICISS, *supra* note 4, at 11.

117. *Id.*

118. *Id.* at 17.

119. *Id.*

120. *Id.* at 32 (emphasis omitted).

121. 2005 World Summit Outcome, G.A. Res. 60/1, *supra* note 88, ¶ 139.

populations with the four crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity was put forward by Pakistan's Ambassador to the United Nations, H.E. Akram Mounir, in the lead-up to the 2005 World Summit.¹²² Pakistan, like "most countries of the South at the level of the Non-[A]ligned Movement," was strongly opposed to the concept of the responsibility to protect.¹²³ The introduction of the amendment linking the responsibility to protect to specific crimes was designed to address the fears of those who viewed the principle "as an instrument that could be used by the powerful countries against the weaker ones."¹²⁴

Thus the protective jurisdiction of the international community as articulated in the World Summit Outcome is organized around the subject matter jurisdiction of international criminal law. This appears to be quite a novel use of international criminal law categories. The subject matter jurisdiction of international criminal law has traditionally been understood to represent "principles on the basis of which States can exercise criminal jurisdiction" outside their own territories "in conformity with international law."¹²⁵ It has been used to explain when a foreign State and, later, the international community, might exercise criminal jurisdiction—that is, the power to judge and to punish. There have been other moves to extend the reach of international criminal law beyond the sphere of criminal jurisdiction and punishment. In particular, in its 2007 judgment in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice found that Contracting Parties to the Genocide Convention have a "normative and compelling" obligation to "take such action as they can to prevent genocide from occurring . . ."¹²⁶ This interpretation of the obligation to take action to prevent genocide from occurring envisages something beyond the exercise of criminal jurisdiction and punishment—something more akin to an international responsibility to protect populations wherever they are situated. According to the Court, the obligation to prevent is not "limited by territory" and applies "to a State wherever it may be acting or may be able to act in

122. Jean Ping, Chairperson, African Union Comm'n, Keynote Address at the Round-Table High-Level Meeting of Experts on 'The Responsibility to Protect in Africa' (Oct. 23, 2008), available at http://www.responsibilitytoprotect.org/index.php/civil_society_statements/1910 (last visited June 6, 2009).

123. *Id.*

124. *Id.*

125. LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 21 (2003).

126. Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, ¶ 427 (Feb. 26).

ways appropriate to meeting the obligations in question.”¹²⁷ In addition, the Constitutive Act of the African Union treats the risk of international crimes as jurisdictional triggers for regional intervention.¹²⁸ However, it is with the emergence of the responsibility to protect concept that we see an institutionalization of this expanded role for international criminal law categories in international governance. The risk of international crimes taking place is now posited as the trigger to a broad range of governance and police functions. The jurisdiction of the international community will be triggered by the risk that certain specified crimes may be committed.

As noted above, this trigger was introduced in an attempt to limit what otherwise seemed to be an extraordinarily open-ended authorization of international involvement to take responsibility for protection wherever there was a perceived threat to populations or people. Yet the terms in which international jurisdiction is formulated still envisage an expansive role for the international community in policing the actions of governments. The situation in which that international jurisdiction may be triggered is spelled out most clearly in the context of military intervention. The World Summit Outcome provides that where “national authorities are manifestly failing to protect their populations,” “we” (who this “we” refers to is not spelled out) “are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII.”¹²⁹ In relation to the other techniques of international protection envisaged in the World Summit Outcome, it is far less clear when international jurisdiction will be triggered. For example, the World Summit Outcome provides that “[t]he 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.”¹³⁰ This jurisdiction “to help to protect” appears to exist alongside state jurisdiction without any specific trigger for action. Similarly, “[w]e 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

127. *Id.*, ¶ 183.

128. Constitutive Act of the African Union art. 4(h) (setting out as one of the principles of the Union “[t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.”).

129. 2005 World Summit Outcome, G.A. Res. 60/1, *supra* note 88, ¶ 139.

130. *Id.*

those which are under stress before crises and conflicts break out.”¹³¹ That articulation of the responsibility to protect re-characterizes activities such as conflict prevention, surveillance, human rights monitoring and development as part of a normative framework of international responsibilities. Yet it is not clear under what circumstances the jurisdiction to help States build capacity and to assist “before crises and conflicts break out” will be triggered.

C. The Encounter Between Jurisdictions

The World Summit Outcome thus envisages two forms of authority—one in the form of the State and one in the form of the international community. Both the State and the international community are represented as having an ongoing responsibility to protect populations from specified crimes. The World Summit Outcome thus envisages the existence of complementary jurisdictions. The State has primary authority for protection of its population, and the international community has both a specific authority to take over the role of protector if the State fails in its obligations and an ongoing authority to help protect populations through diplomatic, humanitarian, and other peaceful means, and through capacity-building “before crises and conflicts break out.”¹³² Where two authorities have overlapping jurisdiction, it would seem necessary to provide for some means of determining which authority has jurisdiction in a given situation. Yet the World Summit Outcome does not elaborate how the encounter between these jurisdictions is to be negotiated, or according to what protocols or procedures the movement between jurisdictions will be conducted.¹³³ For instance, it is not clear how, and by whom, the determination will be made that a particular event or action constitutes a risk of genocide, war crimes, ethnic cleansing or crimes against humanity. What kind of information or evidence would be necessary before the international police could be called into action?

In this respect, the World Summit Outcome can usefully be contrasted with the Rome Statute of the International Criminal Court (ICC), which gives detailed treatment to the procedures for moving between complementary forms of jurisdiction over very similar crimes. The Rome Statute creates a regime in which the ICC operates in parallel to

131. *Id.*

132. *Id.*

133. For an analysis of the European tradition of international law as a source of protocols for mediating the encounter between laws, see Anne Orford, *Ritual, Mediation and the International Laws of the South*, 16 GRIFFITH L. REV. 353 (2007). On the need for protocols governing the encounter between jurisdictions, see Christine Black et. al, *Of the South*, 16 GRIFFITH L. REV. 299 (2007).

national courts, both having jurisdiction to prosecute those responsible for genocide, crimes against humanity, war crimes, or aggression. The preamble to the Rome Statute provides that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”¹³⁴ In many situations, the ICC will have jurisdiction over the same crimes. The Rome Statute sets up a mechanism for the complementary administration of criminal justice, or for the “distribution of authority between national jurisdictions, on the one hand, and the jurisdiction of the International Criminal Court, on the other.”¹³⁵ The basic rule governing that distribution is that the ICC is authorized to intervene “only when, but whenever the State primarily responsible for prosecution is not able or willing to genuinely investigate and prosecute.”¹³⁶ In addition, the Rome Statute contains detailed provisions dealing with “the way in which this typically delicate question—whether a State has taken serious action or not—is to be resolved.”¹³⁷ The World Summit Outcome lacks any such procedures for moving or negotiating between the complementary jurisdictions of the State and the international community when it comes to the exercise of the responsibility to protect.

D. *The Nature of International Authority*

Perhaps the lack of clarity about the limits of the international jurisdiction to protect in documents dealing with the responsibility to protect is due to an implicit assumption about the nature of that jurisdiction. If international jurisdiction were by its nature unable to conflict with state jurisdiction, there would be no need to elaborate procedures for moving between these forms of jurisdiction.

This would be the case, for example, if the international jurisdiction envisaged by the responsibility to protect concept were understood as a form of jurisdiction that mirrors the spiritual jurisdiction claimed by the medieval papacy or the universal jurisdiction claimed by the Holy Roman Emperor. The responsibility to protect concept does in some ways seem to be a return to a world-view in which there exists “a single universal society functionally divided into spiritual and temporal spheres of responsibility”,¹³⁸ with the role of representative of spiritual authority

134. Rome Statute of the International Criminal Court pmb., July 17, 1998, 2187 U.N.T.S. 3; U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, June 15–July 17, 1998, U.N. Doc. A/CONF.183/9 (July 17, 1998).

135. Florian Jessberger, *Universality, Complementarity, and the Duty to Prosecute Crimes under International Law in Germany*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 213, 220 (Wolfgang Kaleck et al. eds., 2007).

136. *Id.*

137. *Id.*

138. MULDOON, *supra* note 16, at 66.

played by the international community and that of temporal authority played by the State. With this in mind, we might understand the emergence of the responsibility to protect concept as signaling the intensification of a non-territorial form of jurisdiction that applies to the world as a whole. International jurisdiction understood in such terms, and from the perspective of those claiming to represent the universal, would necessarily take priority over merely particular authority.

The Pope reinforced that vision of the United Nations as an agent of universal jurisdiction with responsibility for overseeing the conduct of temporal authority in his address to the General Assembly in 2008.¹³⁹ In that address, the Pope embraced the responsibility to protect as a common project of the United Nations and the Catholic Church. He traced the lineage of the responsibility to protect to Francisco de Vitoria, and described the principle that those in government have a responsibility to protect the governed as “an aspect of natural reason shared by all nations,” based upon “the idea of the person as image of the Creator”¹⁴⁰ In this view, the expression of the responsibility to protect institutes a form of spiritual jurisdiction, one premised not upon control over territory, but upon the policing of the obligations and duties of responsible subjects. Here, the international community takes up the responsibilities once claimed by the Pope of controlling princes and authenticating obedient subjects. The authority of the international community, like the Holy Roman Empire before it, derives from its direct representation of the idea of justice, unmediated by the will of States or governments.¹⁴¹ The capacity to govern of the international community, like the Holy Roman Empire before it, depends not upon its control over territory, but upon the success of its officials (experts in human rights, development economics, conflict studies, or genocide prevention) in spreading the beliefs underlying Western legality throughout the world.¹⁴²

As it is not possible to return to a period prior to the emergence of the modern territorial State, the new form of spiritual jurisdiction signaled by the responsibility to protect would have to be able to achieve redemption by moving the military machinery of powerful States into action. And this is indeed the aim of coalitions such as the Save Darfur

139. Pope Benedict XVI, Address to the General Assembly (Apr. 18, 2008) (transcript available from The Vatican) *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html (last visited June 6, 2009).

140. *Id.*

141. *See generally* CARL SCHMITT, *ROMAN CATHOLICISM AND POLITICAL FORM* 30 (G.L. Ulmen trans., 1996).

142. ALAIN SUPIOT, *HOMO JURIDICUS: ESSAI SUR LA FONCTION ANTHROPOLOGIQUE DU DROIT* 18–20, 29–30 (2005).

campaign—to persuade the United States, in particular, to move its military into action in Darfur and elsewhere. The frustration expressed by those members of civil society who understand themselves as playing the role of the judges of States without the power to have their judgments enforced suggests that this form of universal authority is not yet realizable.

Alternatively, we might understand the turn to protection, together with the centralized and integrated form of governance envisaged by the proponents of the responsibility to protect, as indicating an ambition to fashion the international community into something resembling a really big State. If that were the case, there would be no need to provide for a system to determine when a particular state jurisdiction gives way to international jurisdiction, as territorial States would always have to answer or defer to this newly empowered international community. Indeed, there is a sense in which the turn to protection as the ground of authority, and the linking of jurisdiction with the right to judge and punish, appears to mirror the constitution of the modern State. Hobbes' argument that the capacity to provide protection was the marker of legitimate authority worked to discredit papal and imperial claims to *de jure* authority, as well as populist arguments that authority should be grounded on an authentic relation between governors and governed. His turn to protection privileged *de facto* authority over appeals to popular sovereignty, the ancient constitution, the will of the people, or the obligations of history. Something similar is being staged with the turn to protection as the ground of international authority today. The responsibility to protect concept does not consider the legitimacy of authority in relation to a third term—the people, the nation, the *Volk*. So whether or not the representatives of the international community should, say, be present in Iraq is not answerable in terms of the legitimacy of the initial acquisition of control over that territory, or in terms of whether international authority was constituted in accordance with the will of the people. The turn to protection works to delegitimize appeals to those principles of territorial integrity and self-determination that have been significant limiting factors to foreign rule.¹⁴³

Of course, any attempt to transform the international community into a world State would face the same problems that faced various emperors who aspired to turn the Holy Roman Empire into a big centralized State. Such attempts were thwarted by “the scores of European kingdoms and other principalities that . . . had created their own legal and constitutional systems over a period of several centuries and were quite

143. Orford, *supra* note 49.

unwilling to surrender them.”¹⁴⁴ Indeed, those who are charged with institutionalizing the responsibility to protect concept have been careful to avoid any sense that the international community is seeking to supersede state jurisdiction. As Edward Luck has commented:

For all the public pressures to advance RtoP principles, in the end it was sovereign [S]tates that produced Article 4(h) of the [African Union] Constitutive Act and paragraphs 138 and 139 of the [World Summit] Outcome Document. It will take even closer collaboration among States, international bodies, and civil society to begin to realize the promise of RtoP.¹⁴⁵

It is more likely, then, that the responsibility to protect concept will not radically alter the complex set of relations that exist between States and the varied representatives of the international community. Contemporary international relations are characterized by the existence of many overlapping jurisdictions with no accepted system for prioritizing between them. This situation is perhaps close to that which scholars now argue existed in the territories claimed as part of the Holy Roman Empire. New scholarship on the history of the Empire has challenged “the orthodox view of imperial politics as a dualism between emperor and princes.”¹⁴⁶ That scholarship argues that it is necessary to consider the multiple components that made up the imperial political situation and that produced a complex set of overlapping forms of jurisdiction and competence. What was at stake then, as now, was how complementary jurisdictions were to be negotiated, or how one law would encounter another.

Indeed, the public international law of Europe emerged, in part, out of this need to negotiate between forms of jurisdiction. As Christian Europe fragmented into separate nation-states, mediation between estranged nation-states became one of the key aims of the social practices of war, commerce, law, and diplomacy that have since shaped the modern state system. To take one example, norms and protocols governing the movement, immunity, and privileges of diplomats were one of the earliest forms of international law to develop in Europe.¹⁴⁷ Ritual played a central role in diplomatic culture, particularly during the early stages of diplomacy when the modern sovereign State was still in formation. Ceremonies and rituals relating to the movement of diplomats “sanc-

144. MULDOON, *supra* note 16, at 119.

145. Luck, *supra* note 46.

146. PETER H. WILSON, *THE HOLY ROMAN EMPIRE 1495–1806*, at 8 (1999).

147. *See generally* GARRETT MATTINGLY, *RENAISSANCE DIPLOMACY* (1988).

tioned the *movement across* social and political boundaries.¹⁴⁸ The focus on rituals and on the reciprocal exchange of letters, privileges, and obligations contributed to creating the sense of a common culture of norms and values in a Europe which could no longer rely upon a universal authority (whether imperial or religious) to guarantee the law.¹⁴⁹ In this sense, the international law of early modern Europe had an awareness of its limits, which has perhaps been lost with the more universalist ambitions of contemporary international law. If the relation between international and state jurisdictions is to involve something other than dominance and submission, some such attention must be paid to the procedures for moving or negotiating between the complementary jurisdictions of the State and the international community.

IV. THE LIMITS OF INTERNATIONAL AUTHORITY

As territory and jurisdiction became ever more closely intertwined with the emergence of the modern State, questions about jurisdiction increasingly came to be seen as purely technical questions. The practice of jurisdiction is now understood simply to involve determining in what circumstances a particular authority has power to declare the law in a particular territory. Yet as we watch the way that power, territory, control, and law shift and relate over time, we can see that jurisdiction is more than a technical question. When a lawful authority articulates the terms of its jurisdiction, it is forced to confront “in practice, the question of its competence over a given case.”¹⁵⁰ The process of claiming jurisdiction is a form of alchemy. A successful claim of jurisdiction transforms power into authority, or fact into right.

Precisely what new form of “international community” will emerge from the process of transformation now taking place with the institutionalization of the responsibility to protect concept is as yet unclear. There is certainly little attention paid by those advocating the embrace of the concept to the need to articulate the legal limits to the jurisdiction of such an international protective authority. Most of the attention in internationalist literature to date has been on the ways in which the responsibility to protect concept justifies the expansion of international authority in situations where a State has failed to protect its population. That literature is concerned with ensuring that in such cases, the international community can be empowered to prevent, react and rebuild. The

148. JAMES DER DERIAN, ON DIPLOMACY: A GENEALOGY OF WESTERN ESTRANGEMENT 34 (1987).

149. *Id.* at 36.

150. CORMACK, *supra* note 108, at 4.

international community is portrayed as largely unlimited with respect to the actions it can take to achieve its universal mission.¹⁵¹ In terms of the responsibility to prevent, the prospect of increased surveillance of foreign populations is welcomed as a contribution to realizing the promise that never again will genocide be allowed to occur, rather than seen as a threat to civil liberties or self-determination.¹⁵² In terms of the responsibility to react, activists have to date focused most of their energy on arguing for military intervention or criminal prosecution, calling for decisions about the use of force to be made quickly and for the largest degree of force possible to be deployed.¹⁵³ In terms of the responsibility to rebuild, the situation seems to resemble that of the 1990s, when the effect of post-conflict governance in the aftermath of international interventions was to diminish the potential for parliamentary participation and expand the potential for executive governance in the name of achieving social and economic integration.¹⁵⁴ Humanitarian intervention was routinely followed by the creation and legitimization of strong international administrations, marked by an apparent distrust of local parliamentary democracy, an absence of constraints on international executive decisions, and the prioritization of economic liberalization as a policy goal.¹⁵⁵ The ICISS report continues to treat international administration as a technical project concerned with “protection tasks,”¹⁵⁶ such as security sector reform, the facilitation of repatriation, “the recreation

151. See *Behrami v. France*, 45 Eur. Ct. H.R. 85 (2007); *Saramati v. France, Germany & Norway*, 45 Eur. Ct. H.R. 85, 121 (2007) (holding that operations established by Security Council resolutions, such as that conducted in Kosovo, are “fundamental to the mission of the [United Nations] to secure international peace and security” and that to subject the actions carried out under U.N. authority to the scrutiny of the European Court of Human Rights would “interfere with the fulfillment of the [United Nations’] key mission in this field including, as argued by certain parties, with the effective conduct of its operations.”). For a discussion of these admissibility decisions, see Anne Orford, *The Passions of Protection: Sovereign Authority and Humanitarian War*, in CONTEMPORARY STATES OF EMERGENCY: THE POLITICS OF MILITARY AND HUMANITARIAN INTERVENTIONS (Didier Fassin & Mariella Pandolfi eds., forthcoming 2009).

152. At a major conference on *The Responsibility to Protect: A Framework for Confronting Identity-Based Atrocities* held at Cardozo Law School on March 10–11, 2008, the panel of invited speakers on “Preventing Identity-Based Atrocities” included not only the Director of the Program in Holocaust and Human Rights Studies at Cardozo Law School and the Program Director of Human Rights Watch, but also a Professor Emerita at the U.S. Naval Academy, who provided a detailed insight into the way in which the widespread U.S. counter-insurgency surveillance conducted in foreign States could be understood as a form of conflict, and thus, genocide prevention.

153. For a critique of this tendency, see Alex de Waal, *Darfur and the Failure of the Responsibility to Protect*, 83 INT’L AFF. 1039 (2007).

154. ORFORD, *supra* note 82, at 126–43.

155. *Id.*

156. ICISS, *supra* note 4, at 65.

of markets,” and the “pursuit of war criminals.”¹⁵⁷ It is to the question of the limits of the jurisdiction of such an expansive international authority that the responsibility to protect literature must turn if the absolutist tendencies of the turn to protection and the privileging of *de facto* authority are to be avoided.

A focus upon the articulation of jurisdiction can help indicate what is at stake in this process. The attempt to give institutional expression to the concept of the responsibility to protect through articulating the triggers to international jurisdiction necessarily gives rise to questions about the nature, limits, and ends of international authority. The processes of debating, defining, and delimiting jurisdiction allow us to see the work involved in transforming an ideal like protection into institutional practice, and in transforming a conventional basis for the exercise of power into a universal claim to authority. Legal institutions are places where arguments for the legitimacy of authority are made conventional and public, and where official language goes to work to institute a collective opinion about power. Conventional or public representations of authority matter because authority, in order to be lasting, must be recognized as legitimate by rivals and subjects. Authority, in order to be profitable, must be recognized as legitimate by investors. Those who exercise international protective authority in a given territory must therefore be able to articulate that authority in terms of jurisdiction, if they are to be able to undertake the tasks necessary to governing (or protecting) effectively. Whether we think of this new form of international authority as a big State, a new Holy Roman Empire, or a more chastened authority negotiating competencies with the territorial State, it is in the articulation of its jurisdiction that the question of the limits and ends of international authority will have to be addressed.

157. *Id.* at 42, 66.