Responsibility to protect: An emerging norm in International law or part of sovereignty?

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ABSTRACT

The protection of a state and its internal affairs via the principle of non-intervention and the protection of human rights rest at the very heart of international law. During the 1990s, the two principles were seen as conflicting, the non-intervention principle was widely considered to be ‘traditional’ sovereignty and as such overriding the protection of human rights. The Rwanda genocide, Mass atrocity crimes and crimes against humanity that characterized the state of Rwanda and Srebrenica amongst others raised the need for action by the international community to protect not only states, but also people.

The scholars struggled to find a bridge between the two seemingly opposing interests - protecting the state for a strong international order and protecting the people to save lives. The question was debated during the 1990s as humanitarian intervention, i.e. an intervention for humanitarian purposes, and after 2001 as the responsibility to protect.

Responsibility to protect is based on the notion of a primary responsibility with each and every state to protect its population, and a secondary responsibility with the international community to assist a state, which is unwilling or unable to protect its people. The responsibility to protect was introduced as a novelty, in a post-Cold War context with strong focus on non-intervention. However, scholars are increasingly challenging the view of responsibility to protect as a novelty, instead seeing it as a part of sovereignty

This article finds that responsibility to protect is part of sovereignty, as a duty of a state, corresponding to the right of non-intervention. If the reign fails to protect its people, or is itself abusing its people, the right of non-intervention becomes void. The law is clear on the matter, however, barely mentioned in the numerous reports, articles, speeches or books since the beginning of the 1990s. The world may not yet be ready for the full protection of human rights. Powerful national, economical and geopolitical interests, so called realpolitik, may still ensure that the law is not implemented.
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AIMS/OBJECTIVES.

The aims of this study include inter alia;

- To clarify the legal framework relevant for sovereignty and the responsibility to protect.
- To determine if responsibility to protect is a novelty i.e. an emerging norm or if it’s part of existing sovereignty

PRIMARY OBJECTIVE.

- To clarify the legal scope of responsibility to protect as endorsed by the International community in 2005.

SECONDARY OBJECTIVE.

- To provide a solid ground for assessing and interpreting the concept of sovereignty and the difference between responsibility to protect introduced in 2001 and as agreed upon in 2005.

METHODOLOGY.

The methodology of this paper is legal, i.e. relevant sources of international law are applied to responsibility to protect and sovereignty in order to answer the objective. Court decisions and travaux preparatoire are the main tools used for interpreting the legal sources. This study shall also rely principally on the doctrinal and empirical research methodology, by systematic and thematic analysis of existing data on responsibility to protect and sovereignty. The methods to be employed based on the sources of data will include primary sources such as the United Nations Charter, Security Council Resolutions and case law. Secondary data sourced from published and unpublished materials such as; books, journals and papers, collections from existing documentation on the subject matter from libraries. Data gathered will be analyzed via sequential reasoning and logical presentation.
SOVEREIGNTY

During the 1990s, most scholars interpreted sovereignty as narrowly as the non-intervention principle. Naturally, such an interpretation would place state sovereignty against the possibility of intervening for the protection of human rights. A dichotomy of state sovereignty and protection was emphasized and posed a seemingly insolvable problem for the entire international community. If an intervention for protection of human rights was a violation of state sovereignty, and state sovereignty was the stronger of the two, how would the international community be able to protect human lives in cases of genocide?

As most scholars used the phrases ‘Westphalian sovereignty’ or ‘traditional sovereignty’, it is evident that sovereignty was also seen as something historic and constant over time. Sovereignty was seen as a static non-intervention principle, which protected the state but not the people. In 2014, a scholar challenged the view of sovereignty as static and eternal and instead proposed a constructivist approach shedding light on the historical and social context. Subsequently, in such a way sovereignty is seen as more dynamic and receptive.

The key, however, is a striking lack of legal definition of sovereignty in the mainstream discourse. Several treaties, with annexed commentaries, do define sovereignty, sovereign equality and the corresponding legal rights and duties of states, however, not invoked by the scholars to explore the legal boundaries of sovereignty. International law may not be crystal clear, but using the right tools it can be more distinct than in the 1990s.¹

HISTORICAL BACKGROUND

Sovereignty is one of the oldest notions of modern international law, and is mainly debated during times of crisis or conflict. The exact meaning seems difficult to grasp, even more so as many scholars insist on knowing the ‘true sovereignty’. In Bruno Simma’s commentaries to the UN Charter, Fassbender notes that the one who cannot acknowledge the ‘untamed’ side of sovereignty - cannot fully understand it.²

¹ Henry Kissinger (2014), introduction and chapter 1, World order. “Reflections on the character of nations and the course of History”
² Fassbender/Bleckmann, Simma, p 70 para 1.
THE WESTPHALIAN SOVEREIGNTY

In 1648, the European Thirty Years War ended with the Peace of Westphalia. The Peace Treaty was indeed a novelty, and had the international community embarking on a journey towards contemporary international law. A persistent misunderstanding is that the treaty itself established a system of sovereign and equal states under the norms of territorial integrity and non-intervention. Scholars refer to the so-called ‘Westphalian sovereignty’ or ‘Westphalian system’ as ‘traditional’ or ‘absolute’ sovereignty.

An influential and often cited writer, Leo Gross, was in 1948 hailing the Peace of Westphalia as the ‘majestic portal’ leading from the old world into the new. Gross strongly held the peace treaty as the nascence of international law, creating ‘a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority’. According to Gross, the underlying political meaning of this new world order had, up until 1948, ‘undergone little change’. ³

In the mainstream view of the Peace of Westphalia, Gross has had, and still has, many likeminded scholars. However, looking at the historical context of the Peace Treaty, the main purpose does not seem to be the equality of sovereign states, but restraining the influence from the Roman Empire. Reading the treaty, it becomes evident that the concept of sovereignty is rather decolonization from the Empire, than an international system of sovereign equality and non-interference. Sovereignty is mentioned only three times in relation to the issue.

Firstly, sovereignty should transfer from the Emperor to the Sovereign of France; secondly, the Emperor was to resign and, again, transfer the sovereignty to France, and; thirdly, entities within France had to be incorporated with France. The treaty called for a jurisdiction and sovereignty ‘without any contradiction from the Emperor, the Empire, House of Austria, or any other’ and that neither the Emperor nor the House of Austria could ‘pretend any Right and Power over the said Country’s.’ ⁴

Although one still finds a generalized, even routine, acceptance of ‘Westphalian Sovereignty’, an increasing number of scholars are challenging the idea. More scholars are now referring to the fact that the Westphalian history was written mainly during the nineteenth century, strongly influenced by the advent of the nation state.

⁴ Treaty of Westphalia, 1648, Article LXXI, LXXII, LXXVI.
THE WESTPHALIAN MYTH

The scholar Stephen C Neff says it is ‘curious’ how the so-called ‘Westphalian system’ seems to be equal to a radical view of absolute sovereignty belonging to the nineteenth century, rather than the seventeenth. Neff continues to explain the Treaty of Westphalia as an agreement within the framework of the Roman Empire, providing a division between national and international spheres.\(^5\)

Another scholar, Andreas Osiander, challenges the prevailing views of the ‘Westphalian sovereignty’ even further by renaming it the ‘Westphalian myth’. In his article with the same name, Osiander gives a simple, yet clear picture of the reasons for the wars, as well as the reasons for the peace. Nowhere in the wars and the treaty can Osiander find the ‘majestic portal’ from the old world to the new, creating a system of equal sovereign states. Just like Neff, Osiander sees the ‘Westphalian system’ as a product of the nineteenth century rather than the seventeenth. The history of the ‘Westphalian Peace’ was at large written under the era of the rising nation state and its nationalism, which has most likely strongly influenced the interpretation of the treaty and its implications. Osiander also highlights Gross’ influence on the twentieth century international relations scholars in them keeping the myth of Westphalia alive. In his article, Osiander offers an abundance of quotes and examples of misinterpretation.\(^6\)

Another strong opponent is the more recent Australian scholar Luke Glanville, who suggests a ‘constructivist understanding’ of sovereignty. Glanville wants to place the interpretation of sovereignty in its historical context in order to understand its origin, as well as its evolution over time. Glanville says that sovereignty has been too narrowly interpreted the past century, especially during the Cold War, when it clearly fit the stalemate between two super powers and their spheres of interest. According to Glanville, the perception and reproduction of the concept of sovereignty must be challenged at all levels, from the notion of ‘absolute sovereignty’ and ‘Westphalian peace’ to the recent discourse on the sovereignty as responsibility.\(^7\)

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\(^7\) Glanville, Sovereignty and the Responsibility to Protect - A New History, 2014
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NON- INTERVENTION PRINCIPLE

The non-intervention principle gives a sovereign state the right to conduct its internal affairs without any outside interference and is one of the cornerstones of state sovereignty. The principle is formulated in article 2 (7) of the UN Charter:

'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state [...]'

In the Nicaragua case, the International Court of Justice established that the opinio juris of states regarding the principle of non-intervention is reflected in numerous declarations and resolutions, especially the Friendly Relations Declarations, and is thus a universally applicable customary rule. In the Nicaragua case, the Court defined the elements of the non-intervention principle as both the principle of state sovereignty to decide freely on internal matters and the principle of non-intervention for subversive activities in another state. The Court emphasized that, despite recent interventions to support anti-government forces, there is no general right of intervention in contemporary international law.8

In the Corfu Channel case, the International Court of Justice assessed if the UK entering Albanian territorial waters in order to gather evidence, was a justified intervention or a violation of territorial sovereignty. The Court found that it was a violation of Albanian sovereignty; as such an intervention under the given circumstances would be reserved for the most powerful states only. The Court also stated that it saw the assumed right of intervention as an expression of a policy of force, which has given rise to abuses in the past and cannot, according to the Court, be a part of international law. Although the Court found the Albanian negligence a mitigating circumstance, it still found the UK guilty of a violation, in order ‘to ensure respect for international law’. The Court also dismissed the UK claim of self-protection or self-help, saying that respect for territorial sovereignty is ‘an essential foundation of international relations’. The ruling is seen as a precedent.9

The principle of non-intervention also prohibits indirect intervention, as formulated in the Friendly Relations Declaration: ‘no State shall organize, assist, ferment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State’. The International Court of Justice confirmed the prohibition of indirect intervention in the Nicaragua case.

8 Nicaragua v. US, ICJ 1986, para 183-225
9 Corfu Channel, ICJ 1949, p 35
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The Nicaraguan Contras was active in Nicaragua, aiming to violently overthrow the Nicaraguan government, and was supported with logistics, intelligence and funding by the US. Thus, the Court ruled that U.S and CIA had breached the non-intervention principle through all three indirect activities.\(^{10}\)

**RIGHTS AND DUTIES OF STATES**

The Montevideo Convention of 1933 defines the rights and duties of states as determined by both customary and treaty law. States are, according to the Convention, only limited by the rights of other states under international law.\(^{11}\) The restriction mentioned by the PCIJ above, where ‘the main restriction to the independence of a state, is the prohibition to exercise its power in the territory of another state, unless there would be ‘a permissive rule derived from international custom or from a convention’.\(^{12}\)

In the Draft Declaration on Rights and Duties of States, the Commission emphasized its aim for the declaration to be in harmony with the provisions of the UN Charter and to embrace certain basic rights and duties of states. The Draft Declaration is precise and consists of fourteen articles stating four rights and ten duties of states. The rights include independence, territorial jurisdiction, sovereign equality and self-defense. The duties include inter alia non-intervention - both direct and indirect, respect of human rights, not to threaten peace and order, settling disputes peacefully, refraining from the use of force, not supporting another state using force, not recognizing territorial acquisition by force, fulfilling obligations under international law and respecting the principle of sovereignty.\(^{13}\)

**QUEST FOR RESPONSIBILITY**

The Cold War brought a persistent non-interventionist view on sovereignty and such a narrow interpretation disregarded the corresponding duty for a sovereign state to protect its people. After the implosion of the Soviet Union, a new era began in the Security Council and parallels to that a revival for human rights. The world had great expectations for an increasingly responsible world order, and although the Rwanda genocide and the mass atrocity crimes and crimes against humanity in Srebrenica came as a shock, and strengthened the quest for responsibility and the right to intervene even more.

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\(^{10}\) Nicaragua v. US, ICJ 1986.
\(^{11}\) Montevideo Convention, 1933.
\(^{12}\) S.S. Lotus, PCIJ 1927, pp 18-19
\(^{13}\) Draft Declaration on Rights and Duties of States, 1949. Fassbender/Bleckmann, Simma, p 78, para 29.
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In 1996, the view of sovereignty as equating non-intervention was challenged and the expression ‘sovereignty as responsibility’ emerged. Such an including view was not embraced overnight, but slowly paved the way for a broader understanding of sovereignty. A widespread confusion of sovereignty as ‘traditional’ or ‘responsible’ or ‘individual’ was however still flourishing. Kofi Annan ended the 1990s discourse by appealing to the international community to reach consensus in bridging the gap of this seemingly irreconcilable and endlessly colliding pair of sovereignty and protection.

SOVEREIGNTY VS RESPONSIBILITY

In the annual report of the Secretary-General to the General Assembly in 1991, Javier Pérez de Cuéllar elaborated on the perceived dilemma between the protection of human rights and the respect for sovereignty. Perez referred to the protection of human rights as a keystone of peace and stated that violations of human rights would threaten peace, while disregard of sovereignty would ‘spell chaos’. The Secretary-General enforced the view of sovereignty as non-interventionist; thus excluding the protection of human rights.

However, sovereignty and the principle of non-intervention were not, according to Perez, to be seen as a barrier behind which a state could systematically violate human rights with impunity. Perez emphasized that the strong principle of sovereignty could be ‘weakened’ to prevent mass atrocity crimes and crimes against humanity, and to end grave violations of human rights. Again, the wording places the right to intervene to protect human rights out of the scope of sovereignty, ought to be carried out with great caution so as not to abuse or ‘erode’ sovereignty.

Still, Perez tried to shift focus from the ‘right to intervene’ to a ‘collective obligation of States’ to bring relief and redress in humanitarian crises. Perez tried to mitigate the perceived tension between protection of human rights and respect for state sovereignty.

Only a year later, the succeeding Secretary-General, Boutros Boutros-Ghali, stated that ‘it is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands’ but that it was ‘in fact never as absolute as it was conceived to be’. The phrase is quite characteristic for the 1990s discourse, where scholars tried to understand the contrast between an idea of a centuries-old absolute doctrine and the protection of human rights. The shadows of the Cold War did not yet allow a constructivist approach.

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According to Boutros-Ghali sovereignty must not be weakened, as it was crucial to security and cooperation. Sovereignty could ‘take more than one form and perform more than one function’ and solve issues both ‘within and among’ states. Boutros-Ghali stated that the rights of individuals and peoples were a ‘universal sovereignty’, which ‘increasingly finds expression in the gradual expansion of international law’. In other words, there were seeds for both the 1990s discourse and the later constructivism.

RESONSIBILITY TO PROTECT (R2P)

Responsibility to protect embodies a political commitment to end the worst forms of violence and persecution. It seeks to narrow the gap between Member states’ pre-existing obligations under international humanitarian and human rights law and the reality faced by populations at risk of genocide, war crimes, ethnic cleansing and crimes against humanity.\(^{16}\)

Kofi Annan was strongly affected and exasperated by the failure to intervene in the Rwanda genocide, the mass atrocity crimes and crimes against humanity committed in the Balkans and later the un-authorized intervention in Kosovo by NATO. In an attempt to bridge the perceived gap between non-intervention and the right to intervene for the protection of human rights, Annan introduced two concepts; sovereignty as responsibility and humanitarian intervention.

The Canadian government responded to the appeal by Kofi Annan and established the International Commission on intervention and State Sovereignty to propose a bridge between non-intervention and protection. The bridge was in 2001 introduced as the Responsibility to Protect and focused on a responsibility or duty with the state to protect its people, rather than a right for another state to intervene. R2P was largely based on the 1990s ‘sovereignty as responsibility’ and ‘humanitarian intervention’ and was fumbling to broaden the interpretation of sovereignty. At the same time the Commission used the language of ‘traditional sovereignty’ implying historic and static non-interventionist sovereignty. The Commission was seemingly unaware of the long shadows cast from the Cold War, and thus far from a constructivist approach.

\(^{16}\) United Nations Office “Genocide Prevention and the Responsibility to Protect”
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SOVEREIGNTY AS RESPONSIBILITY

According to the Commission ‘the norm of non-intervention’ in a ‘Westphalian concept’ has come to ‘signify the legal identity of a state in international law’ - a norm providing stability and predictability in international relations.\(^\text{17}\)

However, such a narrow interpretation of the principles of state sovereignty, equality, non-intervention and the prohibition of the use of force does not help protect people in times of crisis. In this context, the Commission tried to define several gaps - the one between non-intervention and the right to intervene for protection, and the one between the provisions of the UN Charter and the actual practice of states, to mention but a few.\(^\text{18}\)

The Commission claimed that the conditions for sovereignty had changed considerably since 1945. New states had emerged and, according to the Commission, international law had evolved and laid many constraints on states. One could argue, however, that sovereignty was not affected by international law evolving, as much as by the existence of the Cold War, which was hampering the implementation of already existing law.\(^\text{19}\)

The main argument of the Commission was that the protection of human rights was not to be in opposition to, but entailed in state sovereignty. State sovereignty is the authority over a people and its resources within a territory, however not an absolute authority. A sovereign is always constrained by international law.\(^\text{20}\) The Commission underlines that sovereignty does not, even for the strongest advocates of non-intervention, include a right for a state to act willfully against its own people. On the contrary, sovereignty implies a dual responsibility, externally to respect the sovereignty of other states and internally to respect the population; a dual responsibility, which is acknowledged in treaties, UN practice and state practice.\(^\text{21}\) According to the Commission, there is no ‘weakening’ of state sovereignty, but a shift from sovereignty as control to sovereignty as responsibility. When signing the UN Charter, the state accepts the responsibilities enshrined therein.\(^\text{22}\)

The Commission does not, however, find a historic platform for its inclusive sovereignty and does not openly find a constructivist and contextual approach - or a legal approach. Quite to the contrary, the inclusive sovereignty is rather seen as a novelty, as the

\(^{17}\) ICISS, 2001, para 2.7-8.
\(^{18}\) ICISS, 2001, para. 2.24
\(^{19}\) ICISS, 2001, para 1.33
\(^{20}\) ICISS, 2001, para 2.7.
\(^{21}\) ICISS, 2001, para 1.35
\(^{22}\) Ibid
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Commission finds ‘this modern understanding of the meaning of sovereignty’ key for the Commission’s concept responsibility to protect. The Commission elaborates on the Secretary General’s address to the General Assembly two years earlier, on the two Concepts of sovereignty. The Commission says that the concept of individual sovereignty, or the protection of individual’s fundamental rights and freedoms, should not be seen as challenging the ‘traditional notion of state sovereignty’, but be embraced into state sovereignty to create ‘greater self-empowerment and freedom for people’.

The Commission underlines that the responsibility for the people lies firstly with the sovereign state; secondly, with the sovereign state supported by the international community and thirdly the international organizations or international community. The first two are referred to as primary responsibility, and the third secondary responsibility. The Commission underlines the key for placing the responsibility with the sovereign state, and defines a gap - ‘a responsibility deficit’ - for situations where the state is unable or unwilling to protect its people or is itself the perpetrator.

**PRIMARY AND SECONDARY RESPONSIBILITY**

One of the novelties of the responsibility to protect, echoing the Francis Deng concept of sovereignty as responsibility, was the focus of a primary responsibility with the state concerned. In such a way focus was shifted from the right of a state to intervene, and break the non-intervention principle, and instead a responsibility of a state to protect human rights as included in sovereignty both in custom and the Charter. The Commission finds the state the most suitable entity to protect a people, also reflected in international law and the modern state system. Thus, the Commissions forefends a primary responsibility for protecting a people resting with the state.

The Commission also finds the state the most appropriate entity to identify and prevent domestic crises and conflicts. If a state would be unwilling or unable to fulfill its responsibility to protect, or it itself be the perpetrator, the international community has a residual or secondary responsibility which is a right to intervene. Such a secondary responsibility may require action from the international community in order to support people, and the commission raises a wide range of possibilities, including preventive and

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23 ICISS, 2001, para 1.36.
rebuilding measures. Only if the state would blatantly fail to protect its people, would the international secondary responsibility allow for an intervention, i.e. ‘the principle of non-intervention yields to the international responsibility to protect’.

**ENDORSING THE RESPONSIBILITY TO PROTECT**

The Secretary General endorsed the Responsibility to Protect in his report ‘A more secure world’ in anticipation of the 2005 World Summit. The summit was a follow-up to the Millennium Summit, which set the Millennium Goals, and by the UN referred to as ‘the largest gathering of world leaders in history’ and a ‘once-in-a-generation opportunity to take bold decisions in the areas of development, security, human rights and reform of the United Nations’. It was seen as the perfect venue for endorsing ‘a universal principle of the responsibility to protect civilian populations from crimes against humanity’.

**AGREEMENTS REACHED AT THE WORLD SUMMIT 2005**

At the World Summit in 2005 the world leaders endorsed the concept of R2P in the two articles 138 and 139 in the World Summit Outcome. The articles clearly set out the primary responsibility of the state and the secondary responsibility of the international community, and the four crimes in focus for this responsibility.

Article 138 focuses on the primary responsibility with each state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. The international community is urged to assist states in exercising this primary responsibility.

Article 139 focuses on the secondary responsibility with the international community to help protect people from genocide, war crimes, ethnic cleansing and crimes against humanity. In such a situation, the international community shall use ‘appropriate diplomatic, humanitarian and other peaceful means’ in accordance with Chapters VI and VIII of the Charter. However, if the appropriate peaceful means would not be sufficient and if the concerned state would manifestly fail to protect its population, the international community is prepared to take collective action. Action should be taken in a timely and decisive manner, through the Council and in accordance with the Charter, on ‘a case-by-case basis and in cooperation with relevant regional organizations’.

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27 ICISS, 2001, para 2.31-2.32.
28 ICISS, 2001, basic principles
30 World Summit Outcome, 2005.
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CONCLUSION/RECOMMENDATION.

The purpose of this study was to clarify the legal scope of R2P as endorsed by the international community in 2005. Is R2P an emerging norm or is it part of sovereignty? Two notions being diametrically opposite, as the former shows responsibility as a novelty and the latter shows responsibility as established.

The post-Cold War 1990s gave rise to an intense debate on the notion of humanitarian intervention, placing it against the non-intervention principle. Finally, in 2001, the International Commission on Intervention and State Sovereignty (ICISS) launched a report on a new concept, the Responsibility to Protect. The report, which was overshadowed by the 9/11 war on terror, found new ground in 2004 and was introduced again at the World Summit in 2005. The international community endorsed a significantly condensed version of the R2P in two paragraphs of the Outcome document. The two paragraphs indicated a strong opinio juris on both the crimes and the responsibilities. Remaining is the need for a consistent state practice over time, and considering the failures in the Rwanda genocide, mass atrocity crimes and crimes against humanity in Srebrenica, Kosovo, Iraq, Palestine and Iraq again, there is no possibility to claim a consistent state practice of intervention for protective purposes. The conclusion is that Responsibility to Protect is fulfilling one, but not both the mandatory elements of customary law and is thus not an emerging norm.

RECOMMENDATION

The international community should define sovereignty and R2P legally, through jus cogens (non-derogatory norms in International law) and erga omnes, (international obligations) to establish that the responsibility to protect is part of state sovereignty and thus find common ground for implementation.

However, the national, economical and geopolitical interests are extremely powerful and will continue to influence the possibility to protect people behind closed borders. As long as the leaders of the world are not ready to protect its own people - the law will not be implemented. Unfortunately that is the realpolitik of our day.