



FACULTY OF LAW  
Lund University

Elina Jonsson

Responsibility to Protect  
An emerging norm or part of sovereignty?

Master thesis  
30 credits

Bengt Lundell

Master's Programme in International Human Rights Law  
Raoul Wallenberg Institute of Human Rights and Humanitarian Law

Spring 2014

# Contents

<b>ABSTRACT</b>	<b>1</b>
<b>ACRONYMS</b>	<b>2</b>
<b>1 INTRODUCTION</b>	<b>3</b>
1.1 Objective	4
1.2 Methodology	4
1.3 Material	4
1.4 Theory	4
1.5 Delimitations	5
1.6 Definitions	5
1.7 Outline	5
<b>2 LEGAL FRAMEWORK</b>	<b>6</b>
2.1 Sources of international law	6
2.2 Treaty law	7
2.3 Customary law	7
2.3.1 <i>State practice</i>	7
2.3.2 <i>Opinio juris</i>	8
2.3.3 <i>Emerging norms</i>	8
2.3.4 <i>Jus cogens or peremptory norms</i>	9
2.3.5 <i>Erga omnes</i>	10
2.4 Summary	11
<b>3 SOVEREIGNTY</b>	<b>13</b>
3.1 A historical background	13
3.1.1 <i>The 'Westphalian sovereignty'</i>	13
3.1.2 <i>The 'Westphalian myth'</i>	14
3.2 Two dimensions of sovereignty	15
3.2.1 <i>Internal dimension</i>	15
3.2.2 <i>External dimension</i>	15
3.3 Legal definition of sovereignty	15
3.3.1 <i>Sovereign equality</i>	15
3.3.2 <i>The non-intervention principle</i>	17
3.4 Legal definition of a state	17
3.5 Rights and duties of states	18
3.6 Summary	19

<b>4</b>	<b>QUEST FOR RESPONSIBILITY</b>	<b>21</b>
4.1	Sovereignty vs responsibility	21
4.2	Sovereignty as responsibility	22
4.3	The Kosovo report	23
4.4	A call for consensus	23
	4.4.1 <i>Two concepts of sovereignty</i>	24
	4.4.2 <i>The dilemma of intervention</i>	25
4.5	Summary	25
<b>5</b>	<b>RESPONSIBILITY TO PROTECT</b>	<b>28</b>
5.1	The ICISS report 2001	28
5.2	The two roots of Responsibility to Protect	28
	5.2.1 <i>Sovereignty as responsibility</i>	29
	5.2.2 <i>Humanitarian intervention</i>	30
5.3	A shift of terminology	30
	5.3.1 <i>Primary and 'secondary' responsibility</i>	30
	5.3.2 <i>Humanitarian intervention vs Responsibility to protect</i>	31
5.4	Endorsing the Responsibility to protect	31
	5.4.1 <i>Endorsing an 'emerging norm'</i>	32
	5.4.2 <i>'From an era of legislation to an era of implementation'</i>	33
5.5	Consensus and implementation	33
	5.5.1 <i>Consensus at the World Summit in 2005</i>	33
	5.5.2 <i>The consensus version</i>	34
	5.5.3 <i>Implementation in 2009</i>	35
5.6	Summary	36
<b>6</b>	<b>CONCLUSIONS</b>	<b>39</b>
	<b>ANNEX</b>	<b>42</b>
	<b>REFERENCES</b>	<b>45</b>

# Abstract

The main controversy in international law the past decades has been the approach to a non-international conflict exposing civilians to threats of genocide or mass atrocities. One corner stone of international law is the protection of a state and its internal affairs, *the principle of non-intervention*; another one is *the protection of human rights*.

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 genocides in Rwanda and Srebrenica, however, 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.

The aim of this thesis is to clarify the legal framework relevant for sovereignty and the responsibility to protect, in order to assess if responsibility to protect is a novelty, i.e. an *emerging norm* or if it is part of existing sovereignty. An emerging norm expresses both a *willingness* to change, but also a possibility to *dismiss* change. If responsibility to protect is instead an existing part of sovereignty, the question is rather the one of implementation of the law. A responsibility included in sovereignty since centuries, is not negotiable.

Firstly, one has to assess if there is *state practice* and *opinio juris* needed for an emerging norm; secondly, one has to define sovereignty in international law, and; thirdly one has to apply the legal terms *jus cogens* and *erga omnes*. As the human rights concerned are *jus cogens*, and as there seems to be *opinio juris* for international responsibility, *erga omnes*, there are strong indications that responsibility to protect is part of sovereignty.

In conclusion, this thesis 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.

--

**Keywords** sovereignty, responsibility to protect, jus cogens, erga omnes, intervention

# Acronyms

ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ILC	International Law Commission
PCIJ	Permanent Court of International Justice
R2P	Responsibility to Protect
SCR	Security Council Resolution
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	United Nations Charter
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
UNSG	United Nations Secretary General
VCLT	Vienna Convention on the Law of Treaties

# 1 Introduction

The United Nations rose from the ashes of the Second World War and was initially based on worldwide consensus. The Charter of the United Nations and the Universal Declaration of Human Rights (UDHR) laid the foundation for a new world order. Soon, however, the world was divided into East and West and in 1946 Churchill coined the expression 'iron curtain'. Only a year later the Cold War was considered a fact and it lasted until the dissolution of the Soviet Union on 25 December in 1991. The term 'cold war' alluded on a cold rather than a hot conflict and the very key to keeping the conflict cold was the strong emphasis on the *non-intervention principle*. The principle defines the right of a state to conduct its internal affairs without interference from any other state.

In the immediate aftermath of the Cold War the international community found itself in a world full of possibilities. The formerly paralyzed UN Security Council turned surprisingly active and not only one, but two Secretaries-General foresaw a promising era of responsibility and protection of human rights. Meanwhile, the UN and the international community failed to act to prevent or halt the genocides in Rwanda and Srebrenica. Throughout the 1990s the quest for responsibility grew increasingly stronger, challenging the persistent focus on the non-intervention principle also when humans were at risk.

In 2000, the Kosovo report assessed the legitimacy of the NATO intervention in Kosovo 1999, calling for a framework for protection of human rights despite the principle of non-intervention. And the Secretary-General Kofi Annan ended the 1990s debate by appealing to the international community for consensus on the need for intervention for protection.

A year later, the International Commission on Intervention and State Sovereignty (ICISS) responded to the Annan appeal by introducing the Responsibility to Protect (R2P). The concept was thought to bridge the gap between the non-intervention principle and the need for protection of human rights. The concept was thoroughly elaborated, presenting principles, methods and thresholds for preventive, reactive and rebuilding measures. In 2005, the UN heads of states endorsed a significantly reduced version of R2P.

The concept of R2P was mainly described as a novelty in merging the understanding of non-intervention and the need for protection, which, throughout the 1990s discourse, had been seen as conflicting and irreconcilable. Moreover, most scholars referred to sovereignty as 'traditional' or 'Westphalian', without further specifying a definition, although implying a historical-political concept equal to the non-intervention principle.

Since 2001, the views on R2P have diverged quite a bit. Some scholars have claimed the concept to be an *emerging norm* in international law, while others have found it to be 'the emperor's new clothes' or simply - much ado about nothing. Another few scholars have included R2P in the already existing sovereignty. These scholars have challenged the view on sovereignty as eternal and static, by deconstructing it through a historical-social lens. Such an interpretation of sovereignty is more dynamic and inclusive than the one forfeited in the 1990s discourse - and ultimately sheds new light on R2P. If sovereignty in itself embraces both the non-intervention principle and the need for protection of human rights, there is no longer a contradiction between non-intervention and protection.

The 1990s discourse lacks a contextualization of sovereignty, an understanding of the Cold War influence and, in particular, it lacks legal references. Due to the vague and unchallenged view on sovereignty as 'traditional', scholars are struggling to make sense of another reality. Although the discourse is increasingly identifying blind spots, it is still missing some pieces regarding the legal rather than political definition of sovereignty.

## 1.1 Objective

The objective of this thesis is 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? While an *emerging norm* represents novelty and goodwill, *sovereignty* calls for implementation of existing legal structures; thus two completely opposite directions. A secondary objective is to provide a solid ground for answering the question, i.e. assess the relevant sources of international law, the interpretation of the concept of sovereignty and the difference between R2P as introduced in 2001 and as agreed upon in 2005.

## 1.2 Methodology

The methodology of this thesis is legal, i.e. relevant sources of international law are applied to R2P and sovereignty in order to answer the objective. Court decisions and *travaux préparatoire* are the main tools used for interpreting the legal sources. Doctrine is used to a lesser extent, as the purpose of the thesis is to challenge the contemporary scholars understanding of sovereignty. Emphasis has thus been on primary sources.

## 1.3 Material

According to the Statute of the International Court of Justice, the primary legal sources consist of treaty law and customary law. Thus, the initial part of the thesis is focused on the relevant treaties regarding sovereignty and responsibility to protect, mainly the UN Charter, the Vienna Convention on the Law of Treaties, the Friendly Relations Declaration, the Montevideo Convention on Rights and Duties of States and the Draft Declaration on Rights and Duties of States. The following part is focused on customary law by assessing decisions and advisory opinions by the International Court of Justice. The final part is focused on key UN reports on humanitarian intervention and the responsibility to protect. Doctrine has been carefully applied throughout the thesis.

## 1.4 Theory

During the 1990s, the clear exception to all the mainstream discourse on ‘traditional sovereignty’ was the ‘sovereignty as responsibility’ introduced by Francis Deng and Roberta Cohen in 1996. Such sovereignty was embracing both rights and duties of states and was supporting both non-intervention and the protection of human rights. The concept laid the foundation for the Kofi Annan appeals in 1999-2000 and for R2P 2001.

Since 2001, the R2P discourse has been dominated by a handful of scholars. Gareth Evans, who chaired the ICISS Commission, which published the R2P report in 2001, later published one of the two key works of R2P: ‘The Responsibility to Protect - Ending Mass Atrocity Crimes Once and For All’ in 2001. The other key work is ‘Responsibility to Protect’ written by Alex J. Bellamy in 2009. Thomas G. Weiss and Edward Luck are two other key names, although Edward Luck was mainly active in the implementation process beginning in 2009, which is out of the scope for this thesis. All of these scholars have a quite ambiguous view on sovereignty, but leaning towards the ‘traditional’ understanding.

Francis Deng is one of the few key actors who clearly define an inclusive sovereignty, embracing both rights and duties of states and including both the non-intervention principle and the protection of human rights. The view of sovereignty as responsibility is generally gaining ground. A scholar within the new generation is Luke Glanville, who focuses on a constructivist interpretation of sovereignty throughout history, challenging

the view of ‘Westphalian’ sovereignty and the politics guiding interpretation. Such thoughts shed new light on R2P and are challenging the view of the concept as a novelty.

## 1.5 Delimitations

The study is based on widely accepted legal principles, without challenging their content. The United Nations Security Council is perceived as the right authority to maintain international peace and security, without claims to rewrite the Charter or reform the Council. The thesis focuses solely on the concept of sovereignty in relation to non-intervention and the protection of human rights. Thoughts on the wider R2P as defined in 2001, focusing on prevention, criteria for intervention and rebuilding - are all left aside.

## 1.6 Definitions

The key legal aspects, which are all commonly known to a lawyer, will be presented later in the thesis, such as *jus cogens*, *erga omnes*, state practice and *opinio juris*. However, the following expressions are quite specific to this subject and thus in need of a definition.

**Protection** is short for the protection of human rights and used interchangeably with responsibility, as in the responsibility by the sovereign to protect its people.

**Non-intervention** is short for the non-intervention principle, which defines the right of a state to conduct its internal affairs without interference from other states. In the thesis non-intervention or non-interventionist refers to the interpretation of sovereignty as solely based on the non-intervention principle, without considering competing rights or duties.

‘**Traditional sovereignty**’ or ‘**Westphalian sovereignty**’ is written in quotation marks, as it is the wording used in the discourse to describe a perceived centuries-old, static sovereignty protecting the sovereign and the state. The idea is based on a strong non-intervention principle, excluding duties such as the protection of human rights. Sometimes scholars use the word ‘absolute’, however without recognizing the historical context of an absolute sovereign bound by either God or nature to protect its people.

**Inclusive sovereignty**, **responsible sovereignty** or **positive sovereignty** defines sovereignty as including both rights (non-intervention) and duties (protection of human rights) of states. The conclusion of this thesis is that such an interpretation *is* sovereignty.

## 1.7 Outline

Initially, there is a background of the legal framework of international law relevant for the study of R2P and sovereignty. Thereafter, there is a legal background for sovereignty and a study of the concept of internal and external sovereignty, as well as its inherent rights and duties and the rights and duties of states. The following chapters explore the 1990s idealistic quest for responsibility resulting in the 2001 concept of R2P and the 2005 consensus on a remarkably condensed version of R2P. Each chapter ends with a summary, extracting the key thoughts to be summarized in the final analytical chapter.

--

**The Annex includes a timeline for the evolution of R2P from 1990 to 2009, the core principles of the ICISS report on R2P from 2001 and the World Summit Outcome articles 138-139 on R2P from 2005. It is a highly recommended first read.**



## 2 Legal framework

Throughout the discourse on R2P and its predecessor ‘humanitarian intervention’, scholars have sweepingly been using the phrases ‘traditional sovereignty’ and ‘Westphalian sovereignty’ without a clear legal definition. The discourse has had an orbit around an assumed dichotomy of intervention and protection - either by dismissing protection or struggling to find a bridge between the two. Annan appealed to the international community to reach consensus on the matter, and since the launch of R2P in 2001 many have referred to an emerging norm of international law. In order to bring legal clarity to the issue, one has to assess the legal framework relevant for the interpretation of sovereignty and of the elements of R2P as endorsed at the World Summit in 2005.

The sources of international law are generally considered to be defined in the Statute of the International Court of Justice (ICJ). The two primary sources are treaty law and customary law, which are naturally overlapping. In assessing state sovereignty and the rights and duties of states, treaty law will be key; and in assessing the elements of R2P and the possibility of an emerging norm, both treaty law and custom will be applied. Codified text of treaties will be interpreted literally or through *travaux préparatoire*, while custom will be interpreted in the practice and intent of states, mainly as assessed in the ICJ decisions and advisory opinions.

### 2.1 Sources of international law

The International Court of Justice (ICJ) is one of the main bodies of the United Nations and outlined in the Charter and in the ICJ Statute<sup>1</sup> annexed to the Charter. All member states of the United Nations are parties to the ICJ Statute. The Court rules in cases between the member states, or any other parties, and gives advisory opinions on legal issues when so requested by the Security Council, the General Assembly, or any other UN organ or agency authorized by the General Assembly.<sup>2</sup>

Article 38 (1) of the ICJ Statute defines the sources of international law, as applicable in the Court’s ruling. The primary sources include international conventions, international custom and general principles, while the subsidiary sources include judicial decisions and teachings. An enumeration of legal sources have met with criticism, however, the sources are recognized as international law and the Court has reasoned in consistence with the legal sources in its decisions without any alternative approach emerging in state practice.<sup>3</sup>

In the interpretation of the hierarchy of the legal sources, general legal principles are applicable also in international law. A special rule overrides a general rule, *lex specialis derogat generali*, and a later rule overrides an earlier one, *lex posterior derogat priori*. In addition there is the rule, which is superior regardless of the circumstances, *lex superior derogat inferiori*, a rule. In international law, it is easier to see the evolution of treaties than custom. The principles mirror the intention of the legislator - a special rule or a new rule is meant to define or specify the subject concerned, while a superior rule is agreed to be of greater importance and thus exempted from negotiation or derogation.<sup>4</sup> Both non-intervention and human rights belong to the superior rules, i.e. of greater importance.

---

<sup>1</sup> Statute of the International Court of Justice, 1945.

<sup>2</sup> Charter of the United Nations, 1945, Chapter XIV, paras 92-96.

<sup>3</sup> Thirlway, ‘The Sources of International Law’, *International Law*, Evans, pp 97-99.

<sup>4</sup> Thirlway, ‘The Sources of International Law’, *International Law*, Evans, 2010, p 113.

## 2.2 Treaty law

The first legal sources defined in the ICJ Statute are the conventions. Conventions, or treaties, are agreements between states, which constitute *treaty law*. The 1969 Vienna Convention on the Law of Treaties (Vienna Convention) codifies the principles for the formation and implementation of treaties. In article 31 (1) it is stated that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terminology and in the light of its object and purpose. The last words are of particular interest for the discourse on sovereignty - to interpret legal definitions of sovereignty along its purpose.

## 2.3 Customary law

The second primary source of international law defined in the ICJ Statute is international custom or *customary law*. Custom, as the word implies, is not based on written agreements, but on the behavior of states. The Statute defines custom as ‘general practice accepted as law’, which in legal terms is referred to as *state practice* and *opinio juris*. The latter is short for *opinio juris sive necessitatis*, which means ‘a sense of legal obligation or necessity’ and is also referred to as the *intent* of a state. The two elements of state practice and *opinio juris* exist in parallel where one element cannot constitute customary law without the other. Actions without a clear intent are not enough, and neither is a clear intent without accompanying actions. In the *North Sea Continental Shelf* case, the Court emphasized the need for both elements in order to distinguish state practice as a *legal obligation* from state practice out of courtesy, convenience or tradition.<sup>5</sup>

The difference between treaty law and custom, is that a treaty only applies to its parties, while custom applies to all states of the world, regardless if the respective state participated in the forming of the custom or not. An established rule of customary law does not require state practice or *opinio juris* by a particular state, as it is already proven to be custom and thus applicable to all states.<sup>6</sup> Moreover, a rule of customary law does not cease to exist just because of codification. In the case of *Military and Paramilitary Activities in and against Nicaragua*, the US was accused of breaching international law in regards to the principles of non-intervention and the prohibition of the use of force. US claimed that multilateral treaties between US and Nicaragua were not applicable, as all parties to the treaties were not parties to the case, although possibly affected by the outcome. The ICJ accepted the claim and instead based the case on customary law, clarifying that although the content was codified in a treaty custom was still applicable.<sup>7</sup>

In referring to the general principles of law above, a treaty rule is *lex specialis* and will primarily guide the Court in its decisions. If there is no applicable treaty rule, the Court will discern an applicable rule in customary law, i.e. in the practice and intent of states. A superior rule in customary law, a so called peremptory norm or *jus cogens*, will however always trump a treaty rule. See below.

### 2.3.1 State practice

The essence of state practice is the mutual behavior among states. State practice shows a widespread and consistent practice *by* states and *between* states, including actions such as signing of treaties, public statements, declarations and decisions. State practice also includes passivity, which is interpreted as a tacit agreement of actions by other states.

---

<sup>5</sup> North Sea Continental Shelf, ICJ 1969, para 77.

<sup>6</sup> Thirlway, ‘The Sources of International Law’, *International Law*, Evans, 2010, p 106.

<sup>7</sup> Nicaragua v. US, ICJ 1986, paras 36-56.

Practice does not, however, have to include each and every state, in order to constitute customary law for the entire international community.<sup>8</sup>

In the *Nicaragua* case, the Court highlighted the many interventions carried out by one state into another state in order to support that country's domestic opposition. The Court held that such an intervention, although practiced by states, does not amount to custom, as it does not express the view of a *legal right* of intervention in support of domestic opposition. Such practice does not have the complementary *opinio juris*. According to the Court, neither the US nor Nicaragua had been supporting such a legal right to intervene.<sup>9</sup>

Moreover, the Court emphasized that state practice does not have to be in 'absolutely rigorous conformity' with a customary rule to establish customary law. On the contrary, a general consistency with the rule is sufficient.<sup>10</sup>

### 2.3.2 *Opinio juris*

*Opinio juris* is a subjective element expressing the state's belief that it acts in accordance with an already existing legal obligation. While state practice can quite easily be quantified and measured, *opinio juris* is a more delicate matter. The Court has assessed *opinio juris* in several decisions and advisory opinions.

In the *North Sea Continental Shelf* case, the Court states that a 'settled practice' is not enough, but have to be complemented with an 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law', i.e. *opinio juris*.<sup>11</sup>

Some scholars in the 1960s held that General Assembly resolutions showed both state practice and *opinio juris*. However, both in the *Nicaragua* case and the *Nuclear Weapons* case, the Court treated General Assembly resolutions as evidence of *opinio juris*, but not state practice. The quantitative state practice requires more than just one resolution.

In the *Nicaragua* case, the Court examined the parties' participation in the formation of declarations and resolutions, particularly the General Assembly resolution *Friendly Relations Declaration*. The declaration concerns relations between states and matters of particular interest to the case, such as self-determination and sovereignty. The Court found that consent to such resolutions showed acceptance of the principles' universal application and was thus an expression of *opinio juris*.<sup>12</sup>

In the *Nuclear Weapons* advisory opinion, the Court said that the annual adoption by a majority of states of General Assembly resolutions recalling specific content and requesting a new convention expressed *opinio juris*, not state practice.<sup>13</sup>

### 2.3.3 Emerging norms

Customary law is based on the actions and legal intent of states, and slowly evolving along the changed behavior of states. A novel practice is either accepted or rejected by a majority of the international community. Most novelties are already in accordance with customary law and thus accepted tacitly, while more significant changes may emerge into a new customary rule.<sup>14</sup>

---

<sup>8</sup> Thirlway, 'The Sources of International Law', *International Law*, Evans, 2010, pp 102-105.

<sup>9</sup> *Nicaragua v. US*, ICJ 1986, paras 187-201.

<sup>10</sup> *Nicaragua v. US*, ICJ 1986, para 186.

<sup>11</sup> *North Sea Continental Shelf*, ICJ 1969, para 77.

<sup>12</sup> *Nicaragua v. US*, ICJ 1986, para 188.

<sup>13</sup> *Nuclear Weapons Advisory Opinion*, ICJ 1996, para 73.

<sup>14</sup> Thirlway, 'The Sources of International Law', *International Law*, Evans, 2010, pp 102-105.

In the *Nicaragua* case, the Court stated, as mentioned above, that state practice does not have to be in absolute conformity with a customary rule - it is enough that the state is consistent with the rules in general. An inconsistency is seen as a breach of a rule and not as recognition of a new rule. According to the Court, a state defending its inconsistent behavior by claiming an exception or justification of the rule - should be seen as confirming rather than weakening the rule.<sup>15</sup> Thus, a deviation from a customary rule is seen as an exception rather than a new rule.

Later in the *Nicaragua* case, the Court emphasized that a new customary rule can only emerge if the practice is 'settled' and accompanied by *opinio juris*.<sup>16</sup> The requirements for a widespread and consistent state practice and a strong legal obligation, *opinio juris*, are high - in part because the practice of a state may diverge quite a bit from its affirmation of a customary rule. In the *Nicaragua* case, the Court referred to the *North Sea Continental Shelf* case to describe the need for states to show 'evidence of a belief' in a 'subjective element', i.e. *opinio juris*.<sup>17</sup>

In the *Continental Shelf* case, the Court explained how a customary rule might emerge from a treaty rule - when non-parties to a treaty begin using the treaty in their own international relations. As an example, the Court mentioned a provision in the Geneva Convention, which had gained acceptance as a norm-creating provision and thus generated a customary rule - a rule 'passed into the general corpus of international law'. Once the emerging rule had been accepted as a customary rule by the *opinio juris* - it was binding for all states including non-parties to the Convention.<sup>18</sup> The provision concerned had to be of a 'fundamentally norm-creating character', without any 'unresolved controversies', and without any possibility of reservation.<sup>19</sup> The Court also emphasized that through a 'very widespread and representative participation' in the convention, the time element was of less importance.

Concerning the time aspect, the Court emphasized that a short period of time is not in itself a hindrance to the formation of a new customary rule. A conventional origin of the rule is helpful, as it will then much faster and easier gain the key requirement - 'extensive and virtually uniform' state practice in such a way as to show also *opinio juris*.<sup>20</sup>

In the *Nuclear Weapons* advisory opinion, the Court pointed to the tension between a budding *opinio juris* and a strong conflicting state practice. Such a tension hampers the emergence of a customary rule, and does indeed require more time.<sup>21</sup>

### 2.3.4 Jus cogens or peremptory norms

International law can roughly be divided into law altered through agreement, *jus dispositivum*, and law compelling to all states, *jus cogens*. The latter, *jus cogens*, is also referred to as *peremptory norms* and is part of customary law.

According to article 53 in the Vienna Convention, a peremptory norm is accepted and recognized by the whole international community - and allows no derogation. Thus, a peremptory norm is a superior rule not to be restricted by any treaty or any other customary norm. A treaty conflicting with a peremptory norm, old or new, is according to

---

<sup>15</sup> Nicaragua v. US, ICJ 1986, para 186.

<sup>16</sup> Nicaragua v. US, ICJ 1986, para 207.

<sup>17</sup> North Sea Continental Shelf, ICJ 1969, para 77.

<sup>18</sup> North Sea Continental Shelf, ICJ 1969, para 71.

<sup>19</sup> North Sea Continental Shelf, ICJ 1969, para 72.

<sup>20</sup> North Sea Continental Shelf, ICJ 1969, para 74.

<sup>21</sup> Nuclear Weapons Advisory Opinion, ICJ 1996, para 73.

the Vienna Convention Articles 53 and 64, void. A peremptory norm can only be modified by a succeeding norm of ‘the same character’.

Sometimes the notion of compelling law is criticized for limiting the authority of a state. However, considering the content of the rules, mainly referring to the protection of humanity, sovereignty, dignity and human rights, few states would openly challenge these rules. The Commission states that the peremptory norms arise from the notion of actions intolerable because of their threat to the survival of states and the most basic human values.<sup>22</sup> A *jus cogens* rule is, however, not legally binding because of its important content, but because of the international agreement of the importance of the content. In other words, there is an *opinio juris* among states that certain actions are not acceptable, and thus a need for a superior and compelling rule. When declaring some ‘clearly accepted and recognized’ peremptory norms, the Commission also refers to the Vienna Convention, and includes norms on the outlawing of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.<sup>23</sup>

The Vienna Convention clearly states that a peremptory norm is a norm recognized *as such* by the international community. In the Commentaries to the Responsibility of States, the International Law Commission refers to the definition in the Vienna Convention, and finds the peremptory norm in international practice as well as in the jurisprudence of international and national tribunals and in legal doctrine.<sup>24</sup>

The presence of *jus cogens* in case law has been scarce and only mentioned in separate or dissenting opinions. In the *Nicaragua* case, *jus cogens* is mentioned in a separate opinion only, and in other cases, the Court has used an ambiguous language.

In the advisory opinion on *Nuclear Weapons*, the Court elaborated on the rules of humanitarian law as ‘fundamental to the respect of the human person’. The Court referred to the *Corfu Channel* case from 1949 stating that the Hague and Geneva conventions enjoyed broad support due to their respective considerations of humanity. In the *Nuclear Weapons* case, the Court stated that ‘these fundamental rules are to be observed by all states’ as they constitute ‘intransgressible principles of international customary law’.<sup>25</sup> It is not clear, however, if the Court means peremptory norms in particular or customary law in general.

In the *Congo v Rwanda* case, the Court reaffirmed its advisory opinion on the Genocide Convention in 1951<sup>26</sup>, stating firstly that ‘the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation’ and secondly their ‘universal character’. The Court also acknowledged the existence of *jus cogens*, stating that the prohibition of genocide was ‘assuredly’ a peremptory norm.<sup>27</sup>

### 2.3.5 Erga omnes

An obligation *erga omnes* is an obligation owed to the international community as a whole and is closely linked to the idea of universal jurisdiction. The *erga omnes* principle implies the right to react against a violation of *jus cogens* and is not exclusively for the violated state or citizen of a state, but for all states and all citizens. The importance of these rules is stronger than the nation-state borders. If a violation is committed to a people

---

<sup>22</sup> Draft articles on Responsibility of States, Commentaries, 2001, article 40, para 3.

<sup>23</sup> Draft articles on Responsibility of States, Commentaries, 2001, article 26, para 5.

<sup>24</sup> Draft articles on Responsibility of States, Commentaries, 2001, article 40, paras 2.

<sup>25</sup> Nuclear Weapons Advisory Opinion, ICJ 1996, para 79.

<sup>26</sup> Reservations to the Genocide Convention, Advisory Opinion, ICJ 1951, p. 23.

<sup>27</sup> Congo v. Rwanda, ICJ 2006, para 64.

within a state's territory, an *erga omnes* obligation raises the chances of action from the international community. Examples include punishing war criminals in other states than the state of the crimes. It is important to bear in mind that rules of *jus cogens* are *erga omnes*, i.e. of importance to the entire humanity, while rules of *erga omnes* are not necessarily *jus cogens*. *Jus cogens* is always binding, while *erga omnes* is not.

The concept of *erga omnes* first appears in the *Barcelona Traction* case, where the Court draws a clear distinction between the obligations of a state towards the international community as a whole, i.e. obligations *erga omnes* and obligations arising vis-à-vis another state in relation to diplomacy. According to the Court, the *erga omnes* obligations are by nature of concern to all states and all states should have a legal interest in their protection.<sup>28</sup> The International Law Commission refers to the *Barcelona Traction* case, finding an increased recognition of the fact that a state committing wrongful acts is responsible towards several or many states, even the entire international community.<sup>29</sup>

In the *East Timor* case, the Court stated that the assertion of the right of peoples to self-determination, as evolved from the Charter and UN practice, has an 'irreproachable' *erga omnes* character, and that the principle has been recognized in the jurisprudence of the Court. Moreover, the Court defines *erga omnes* as an essential principle of contemporary international law.<sup>30</sup> In the advisory opinion on the *Wall in the OPT*, the Court referred to the *East Timor* case, in stating that the right of peoples to self-determination is a right *erga omnes*.<sup>31</sup> In the *Barcelona Traction* case, the Court also specifies that *erga omnes* obligations stem from prohibition of aggression and genocide and protection of basic human rights, including protection from slavery and racial discrimination.<sup>32</sup>

In the *Congo v Rwanda* case, the Court refers to both the *Genocide Convention* and the *Bosnia and Herzegovina v Yugoslavia* case stating that the principles in the Genocide Convention are recognized as binding, and that there is a 'universal character both of the condemnation of genocide and of the co-operation required', which implies that the rights and obligations in the Convention are *erga omnes*.<sup>33</sup> The wording was reiterated in the *Application of the Genocide Convention*, and in addition the Court said that states' obligations to prevent and punish the crime of genocide was not 'territorially limited'.<sup>34</sup>

## 2.4 Summary

The sources of international law are clearly defined in the ICJ Statute, where the primary sources are considered to be treaty law and customary law. In interpreting international law, general legal principles such as *lex specialis*, *lex posterior* and *lex superior* are applicable. Thus, a specific treaty will supersede a general treaty and a latter treaty a former treaty. Customary superior rules - peremptory norms or *jus cogens* - are rules compelling to the entire international community without any possibility of derogation.

A treaty is to be interpreted in good faith and in accordance with the ordinary meaning of the wording and in light of its objective and purpose. Such a view must be applied also when interpreting the non-intervention principle in the UN Charter. The post-World War II aim was not only to protect states from intervention, but also to protect people from mass atrocities. Although the influence of the Cold War shadowed the human rights' aims

---

<sup>28</sup> *Barcelona Traction*, ICJ 1970, para 33.

<sup>29</sup> Draft articles on Responsibility of States, Commentaries, 2001.

<sup>30</sup> *East Timor*, ICJ 1995, para 29.

<sup>31</sup> *Wall in the Occupied Palestinian Territories*, ICJ 2004, para 88.

<sup>32</sup> *Barcelona Traction*, ICJ 1970, para 34.

<sup>33</sup> *Congo v. Rwanda*, ICJ 2006, para 64.

<sup>34</sup> *Application of Genocide Convention*, Preliminary Objections, ICJ 1996, p 616, para 31.

of the Charter, the aims are there and the Charter is signed by almost all states of the world and is agreed to prevail over all other treaties.

Custom consists of the two parallel and intertwined elements of state practice and *opinio juris*. One cannot comprise customary law without the other. The essence of state practice is a widespread and consistent practice by and among a majority of the states, in general accordance with a rule, but not necessarily every single state and not in exact conformity with a rule. The *opinio juris* requires a state to see its actions in accordance with a legal obligation. Signing a General Assembly resolution on a specific matter may express *opinio juris*, but is not considered to amount to state practice by itself.

Customary law is by nature evolving slowly. Due to the fact that state practice is a general behavior among a majority of states, an exception will not automatically emerge into a new rule. Quite to the contrary, deviations are seen as breaches, which rather strengthen than weaken rules. A new customary rule can only emerge if there is a settled practice and a strong *opinio juris* without any controversies and without possibilities of reservation. If an emerging norm is uncontroversial with a conventional content, the process may be quick, while contested content will take a long time to form a new rule.

A part of customary law is *jus cogens* or the peremptory norms, the compelling rules from which there can be no derogation. The content of *jus cogens* rules refers to values key to humankind such as humanity, sovereignty, dignity and human rights; including the outlawing of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture - and the right to self-determination. Peremptory norms are legally binding not because of the content in itself, as a natural law view, but because of an *agreement* that rules regulating these issues must be compelling, as a positivist view. Therefore the responsibility to uphold these principles, part from being legally binding, is not based on moral views but on a legal agreement. The Vienna Convention clearly states that a peremptory norm is a norm recognized *as such* by the international community

A state violating the *jus cogens* rules is committing a crime not only to the victims - a single state or its citizens - but also to the entire international community. Thus, the international community has the right to respond to the violations and have jurisdiction over the perpetrators. Such principles are *erga omnes* and they raise the chances for people to receive assistance and to punish perpetrators. Like *jus cogens*, *erga omnes* stem from the prohibition of aggression and genocide and the protection of human rights, including protection from slavery and racial discrimination. *Erga omnes* echoes *jus cogens* and sheds light on possible violations by a state within its own territory and strengthens the possibilities of combating crimes of *jus cogens* and assist a population in need. It is important to emphasize that *jus cogens* is always binding and always *erga omnes*, while *erga omnes* is not necessarily neither binding nor *jus cogens*.

The legal vocabulary is key to the following assessment of sovereignty, sovereign equality and the rights of duties of states. It is also key to answer the objective of the thesis, as R2P is built on *jus cogens* rights and *erga omnes* responsibility.

## 3 Sovereignty

During the 1990s, most scholars interpreted sovereignty as narrowly as the non-intervention principle. Naturally, such an interpretation would place sovereignty against the possibility of intervening for the protection of human rights. A dichotomy of 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 sovereignty, and 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.

### 3.1 A 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.<sup>35</sup>

#### 3.1.1 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’.<sup>36</sup> 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

---

<sup>35</sup> Fassbender/Bleckmann, Simma, p 70 para 1.

<sup>36</sup> Gross, *The Peace of Westphalia*, AJIL, Vol. 42, Issue 1, January 1948, pp 20-41.



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 Countrys [*sic*]'.<sup>37</sup>

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.

### 3.1.2 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.<sup>38</sup>

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.<sup>39</sup>

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.<sup>40</sup>

---

<sup>37</sup> Treaty of Westphalia, 1648, Article LXXI, LXXIII, LXXVI.

<sup>38</sup> Neff, 'A Short History of International Law', *International Law*, Evans, page 11-12.

<sup>39</sup> Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 2001.

<sup>40</sup> Glanville, *Sovereignty and the Responsibility to Protect - A New History*, 2014.

## 3.2 Two dimensions of sovereignty

In essence, sovereignty consists of two dimensions - the internal and the external. Internally, the sovereign state decides on its own affairs without interference from other states, and externally the sovereign state is equal to all other states.

### 3.2.1 Internal dimension

The internal dimension of sovereignty precedes the external one, and was a tool to end the civil wars of England and France in the sixteenth and seventeenth centuries. The idea was to create a strong basis for the sovereign to unite the country, through state monopoly on the use of force, a central authority and a territorial jurisdiction. In such a way could the 'modern centralized territorial State' eventually emerge in Europe.<sup>41</sup> The internal dimension also entail the relation between the sovereign and the people - a conditional relation where an absolute sovereign was held accountable by God or nature and a popular sovereign was held accountable by the people through the social contract.

### 3.2.2 External dimension

The external dimension focuses on the independence of the state in relation to other states. A state cannot interfere in another state's internal affairs and cannot breach international peace and security. If the internal dimension of sovereignty led to the modern centralized territorial state, Fassbender says in the Simma commentaries, the *external* sovereignty ultimately led to the evolution of modern international law.<sup>42</sup> Sovereignty implied independence from a foreign influence, which in the 1600s was the Roman Empire. In line with the evolution into equally sovereign and territorially defined states, the external dimension has become increasingly clear in defining a state, its territorial integrity and the rules regulating the relationship between independent states.

## 3.3 Legal definition of sovereignty

The division of sovereignty into an internal and external dimension is a way of explaining the concept, however, there is also a legal base for sovereignty - or sovereign equality - and the rights and duties of states, which was largely neglected in the 1990s discourse.

### 3.3.1 Sovereign equality

The UN is based on the principle of 'sovereign equality' of all its members, article 2 (1) of the Charter. The phrase consists of two elements, sovereign and equality, closely linked yet different. Sovereignty relates to the governance of a state and the control of its internal affairs, as well as the duty not to intervene in other states' internal affairs. Thus, sovereignty appeals to all states regardless of size or power. Equality on the other hand, as the equal treatment of all states of the international community, is naturally of greater importance to smaller states in their relation to more powerful ones, than vice versa.<sup>43</sup>

A more elaborate definition of the principle of sovereign equality of states may be found in the *Friendly Relations Declaration*, codifying the principles of customary law and reaffirming the UN Charter. In the Declaration, the principle of sovereign equality gives States 'equal rights and duties [...] notwithstanding differences of an economic, social, political or other nature'. Thereafter the declaration lists the specific elements of sovereign equality; judicial equality, rights of sovereignty, duty to respect other states, inviolable territorial integrity and political independence, compliance with international obligations and peace, and to choose and develop its own political, social, economic and

---

<sup>41</sup> Fassbender/Bleckmann, Simma, p 71, paras 5-6.

<sup>42</sup> Fassbender/Bleckmann, Simma, p 71, paras 5-6.

<sup>43</sup> Fassbender/Bleckmann, Simma, p 73, para 15.

cultural system. Furthermore, the declaration stresses the need of States' full compliance with sovereign equality for the implementation of the purposes of the United Nations.

The *Draft Declaration on Rights and Duties of States* wording in article 5, that 'every State has the right to equality in law with every other State', is according to the commentaries expressing the meaning of 'sovereign equality' in article 2 (1) of the Charter.<sup>44</sup> Such an interpretation does give less emphasis to sovereignty than to equality. Also the use of sovereignty as an adjective and not a noun implies a stronger support for the principle of equality than the one of sovereignty.<sup>45</sup>

The International Court of Justice has not considered the principle of sovereign equality in-depth, except in separate opinions, but focused on the more specific principle of non-intervention and the prohibition of the use of force. Still, the internal and external dimensions of sovereignty are both more or less clearly defined in international law.

The internal dimension of sovereignty, i.e. a state with a central authority and a territorial jurisdiction, is defined in several treaties. As mentioned above, the *Friendly Relations Declaration* acknowledges a state's right to choose and develop its political, social, economic and cultural system, while the *Draft Declaration on the Rights and Duties of States* acknowledges a state's right to, without interference from another state, freely exercise its legal powers including choice of government. Article 1 (2) of the Charter defines the self-determination of peoples as one of the purposes of the United Nations, while the definition of non-intervention in article 2 (7) does mention the domestic jurisdiction of a state. Both the *Friendly Relations Declaration* and the *Draft Declaration* list the duty to respect human rights - although dissenting voices expressed in the commentaries that the duty to respect human rights should have been much stronger 'to rid the peoples of the world of the scourges of exploitation and oppression'.<sup>46</sup>

The external dimension of sovereignty is focusing on the relations between equal and geographically defined states, in particular the non-intervention principle and the prohibition of the use of force. Again, article 1 (2) of the Charter respects the principle of equal rights and self-determination, article 2 (1) the principle of 'sovereign equality', article 2 (4) the duty of states to refrain from the threat or use of force against the 'territorial integrity or political independence of any state' and in article 2 (7) the principle not to intervene in matters of domestic jurisdiction. The *Friendly Relations Declaration* and the *Draft Declaration on Rights and Duties of States*, both reiterate all of these four principles enshrined in the Charter. All three treaties also emphasize the duty not to threaten international peace and security or international peace and order.

A key to current sovereignty is the *principle of territoriality* or *territorial integrity*, defining sovereign authority within geographical borders, rather than by ethnicity, language or other less tangible features. Both the internal and external dimensions of sovereignty are built on the notion of a state with defined borders and effective principles of non-intervention and non-interference - the *nation state* as per the past two centuries.

According to the Permanent Court of International Justice, international law is based on voluntarism through either the signing of conventions or actions in accordance with custom. Therefore there cannot be presumed any restrictions to the independence of a state. However, there are restrictions, and the main restriction to the independence of a

---

<sup>44</sup> *Draft Declaration on Rights and Duties of States*, Commentaries, ILC 1949.

<sup>45</sup> Fassbender/Bleckmann, Simma, p 83, para 46.

<sup>46</sup> *Draft Declaration on Rights and Duties of States*, Commentaries, ILC 1949, note 21.

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’.<sup>47</sup>

### 3.3.2 The 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.<sup>48</sup>

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.<sup>49</sup>

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. 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 US and CIA had breached the non-intervention principle through all three *indirect* activities.<sup>50</sup>

## 3.4 Legal definition of a state

The Convention on the Rights and Duties of States, signed by twenty American states in Montevideo, 1933, although never into force as a treaty, is considered to express *customary law* in defining four criteria for the recognition of a state:

“The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”

---

<sup>47</sup> S.S. Lotus, PCIJ 1927, pp 18-19.

<sup>48</sup> Nicaragua v. US, ICJ 1986, paras 183-225.

<sup>49</sup> Corfu Channel, ICJ 1949, p 35.

<sup>50</sup> Nicaragua v. US, ICJ 1986.

### 3.5 Rights and duties of states

The *Montevideo Convention* 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.<sup>51</sup> 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’.<sup>52</sup>

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 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.<sup>53</sup>

The *Friendly Relations Declaration* is not as precise on the specific rights and duties as the *Draft Declaration*. The language lacks the strong post-World War II focus on the protection of human rights as in the Montevideo Convention, the Draft Declaration and the Charter. Instead, the language of the declaration and the strong emphasis on non-intervention relating to political independence and self-determination reflects the Cold War and the ongoing decolonization process.

However, the Friendly Relations Declaration referral to the Charter implies a duty to refrain from the threat or use of force, to settle disputes peacefully and not to intervene, as in the Draft Declaration. Moreover, states are to cooperate for the maintenance of peace and security, promotion of human rights and joint and separate action with the UN. All states have the right to decide on its internal affairs and all states have the duty to respect this right, i.e. not to intervene. Regarding the non-intervention principle, the Friendly Relations Declaration emphasizes that no state has the right to intervene in another state’s internal affairs - directly or indirectly - ‘for any reason whatever’.

Later, the Friendly Declaration says that the ‘alien subjugation, domination and exploitation’ violates the principle of equal rights and self-determination - as does a ‘denial of fundamental human rights, and is contrary to the Charter’. It continues that the state has a duty to promote ‘respect for and observance of human rights and fundamental freedoms in accordance with the Charter’. ‘Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence.’

Although sovereign equality, with its focus on equality rather than sovereignty is more prone to non-interventionism rather than protection, the Friendly Declaration does emphasize the *duty* to fulfill in *good faith* the *obligations* by the Charter, principles and agreements - and that all principles are interrelated.

The *Draft Articles on Responsibility of States for Internationally Wrongful Acts* mentions the Draft Declaration as the ‘codification of the rights and duties of states’, and referred

---

<sup>51</sup> Montevideo Convention, 1933.

<sup>52</sup> S.S. Lotus, PCIJ 1927, pp 18-19.

<sup>53</sup> Draft Declaration on Rights and Duties of States, 1949. Fassbender/Bleckmann, Simma, p 78, para 29.

to its article 13 emphasizing the need to carry out duties of international law in good faith and without invoking domestic legislation as an excuse for failure to perform its duty. The Draft Articles also refer to the *Vienna Convention on the Law of Treaties*, article 27:

‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. [...]’,<sup>54</sup>

Naturally, most rights and duties of states correspond. The right to control its territory, territorial *integrity* - corresponds to the duty to ensure that the territory is not used in a, for other states, harmful manner. The right for a state’s people and entities to receive protection on another state’s territory - corresponds to the duty of protecting foreign citizens and foreign entities within its own territory. The right to conduct internal affairs without external intervention - corresponds to the duty not to intervene in another state’s internal affairs, i.e. the non-intervention principle.

### 3.6 Summary

Throughout the 1990s discourse, scholars referred to a ‘traditional’ or ‘Westphalian’ sovereignty almost equated with non-intervention. The non-intervention idea arose with the 1800s nation-state and gained particular strength during the 1900s Cold War. Most scholars seem to have based their understanding of the Westphalian Peace Treaty on writings from 1800s and post-World War II scholars, rather than the actual treaty.

The strong emphasis on non-intervention was the cornerstone of the Cold War and as such not particularly challenged. The international community relied on solid state borders with a strong principle of non-intervention. The slightest deviation could be the domino setting the world in motion towards an escalation between nuclear powers. At the end many dominos, together with a disastrous Soviet economy, ended the Cold War.

The world woke up to a new reality in the 1990s, with non-international conflicts, mass atrocities and an emerging quest for responsibility. Still scholars were under a strong post-Cold War influence, including a strictly non-interventionist interpretation of sovereignty, and thus quite unsuccessfully struggled to find a bridge between the seemingly incompatible principles of non-intervention and protection.

Only recently have an increasing number of scholars challenged the ‘traditional’ or ‘Westphalian’ view of sovereignty - as non-interventionist and static - by introducing a constructivist approach. The scholars deconstruct sovereignty in a socio-historical context to show its change over time and the fact that sovereignty is as dynamic as is all law. The approach is highly commendable, although it is rather socio-political than legal.

It is striking how scholars either adhere to ‘traditional’ sovereignty, or introduce a constructivist approach, without further exploring the legal basis of the concept. Sovereignty as such is narrowly escaping the Charter by being mentioned as an addendum to equality and not being defined separately. Understanding the internal and external dimensions of sovereignty does, however, give room for legal interpretation. The internal dimension calls for the sovereign to unite its people, albeit not without the consent of the people, and can be found in provisions such as internal affairs and human rights. The external dimension calls for protection of the sovereign and its people and can be found in provisions such as the prohibition of aggression and intervention.

---

<sup>54</sup> Draft articles on Responsibility of States, Commentaries, 2001, article 3, para 5-6.

In order to define state sovereignty legally, lacking a clear independent definition in the Charter, a first step would be to define a state and then the rights and duties of a state. States are, according to the Montevideo Convention, only limited by the rights of other states, which gives sovereign states quite some independence. The rights in the Draft Declaration on Rights and Duties of States define four rights and ten duties. The rights include independence, territorial jurisdiction, sovereign equality and self-defense, while the duties include non-intervention, 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.

The post-World War II treaties, including the Charter, and the 1970 Friendly Relations Declaration differ on a few notes. The latter has a stronger focus on non-intervention and self-determination, which may be explained by the influence of the Cold War and the decolonization, and would thus strengthen the constructivist approach claiming that sovereignty is dynamic and influenced by the current political situation.

The international community consists of sovereign and equal states with rights and duties towards not only one another, but also towards its respective peoples. Considering these responsibilities it can be argued that the interpretation of sovereignty as mainly non-interventionist does not hold. Instead, sovereignty is balancing the protection of a state with the protection of a people. In the best of all possible worlds, the two coincide.

## 4 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 parallel to that a revival for human rights. The world had great expectations for an increasingly responsible world order, and although the genocides in Rwanda and Srebrenica came as a shock, they strengthened the quest for responsibility even more.

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.

### 4.1 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. Cuéllar 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’.<sup>55</sup> 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 was not, according to Cuéllar, to be seen as a barrier behind which a state could systematically violate human rights with impunity. Cuéllar emphasized that the strong principle of sovereignty could be ‘weakened’ to prevent or end grave violations of human rights. Again, the wording places the need to protect human rights out of the scope of sovereignty. Protection of human rights had to be carried out with great caution not to be abused or to ‘erode’ sovereignty.

Still, Cuéllar tried to shift focus from the ‘right of intervention’ to a ‘collective obligation of States’ to bring relief and redress in humanitarian crises. Cuéllar 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 so absolute as it was conceived to be’.<sup>56</sup> 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.

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.

---

<sup>55</sup> Report of the Secretary-General on the work of the Organization, A/46/1, 1991, p 5.

<sup>56</sup> Luke Glanville, Chapter on R2P - note 6. Boutros-Ghali 1992-93, 98-99 ‘Changed View of Sovereignty’.



## 4.2 Sovereignty as responsibility

Francis Deng was the United Nations first *Special Rapporteur on the Human Rights of Internally Displaced Persons*. A position specifically handling issues within the realm of a state's internal affairs, thus placing great demands on diplomacy and negotiation. In a speech in 2010, Deng spoke of the challenges of his work and how he and his colleagues were inspired to elaborate on the concept of sovereignty as responsibility.<sup>57</sup>

Deng had asked himself where people could turn for assistance, if a narrowly interpreted sovereignty was invoked as a shield against the outside world and used by states to commit crimes behind borders. The key was to broaden the interpretation of sovereignty into rights and duties and to include human rights protection as a part of sovereignty. *Sovereignty as responsibility* entailed a state's responsibility towards its people, and a responsibility to call on the international community for support. If the state would fail to undertake this responsibility, the international community would assist the state.

Francis Deng found himself in a highly controversial position calling for new strategies. One strategy was to engage in a constructive dialogue with the state on the interpretation of sovereignty. Deng accentuated the difference between approaching a troubled government in solidarity, offering support for its work for human rights and humanitarian assistance - or approaching with a threat of intervention. The former approach fully recognized and respected sovereignty and the inclusion of not only rights but also duties. It was of key importance for Deng to convey the message to the government, that protecting its sovereignty entailed protecting its people. Such an approach, Deng claimed, would also render the state a much-needed international legitimacy. Deng asked the states to find 'the positive responsibilities of sovereignty'. The focus on sovereignty as responsibility would shift the power from the international community to the state itself.<sup>58</sup>

Although the concept bore an air of novelty, it was not entirely new. Sovereignty has not only been interpreted as 'absolute' and non-interventionist throughout centuries, but also as derived from human rights and entailing both rights and responsibilities. Only the sovereign who protects its people is, according to such a view, entitled to the privileges of sovereignty. Sovereignty can thus never be 'weakened' or superseded by the international community aiming to rescue a people from mass atrocities by its sovereign.<sup>59</sup> Sovereignty is self-regulating, as a deserving sovereign is protected, while an un-deserving is not.

Bellamy challenges the view of *sovereignty as responsibility* as 'new' and 'radical', quoting the Thomas Jefferson doctrine of sovereignty as responsibility already in America's Declaration of Independence in 1776:<sup>60</sup>

'Governments [...] deriving their just powers from the consent of the governed - That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government [...] it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security [...]

The French National Assembly continued on the same path in 1789. However, these views on sovereignty were not heard in the 1990s mainstream discourse with its focus on the 1800s nation-state scholars and the 1900s Cold War scholars. The creation of the UN with its founding Charter and later the Universal Declaration of Human Rights was a bit of a step aside from the path. Bellamy writes that the missing piece of the UDHR was the

---

<sup>57</sup> Deng, *Idealism and Realism - Negotiating sovereignty in divided nations*, Uppsala, 2010.

<sup>58</sup> Deng, *Idealism and Realism - Negotiating sovereignty in divided nations*, Uppsala, 2010.

<sup>59</sup> Bellamy, *Responsibility to Protect*, 2009, p 19.

<sup>60</sup> Bellamy, *Responsibility to Protect*, 2009, p 20.

component of sovereignty as responsibility, i.e. possibility for other governments to intervene and shoulder the responsibility of a failing state.<sup>61</sup> Such an international responsibility was (re)entering the discourse with Francis Deng and Roberta Cohen.

However, it was still 1996 and sovereignty as responsibility was far from gaining ground. The 1990s discourse dividing non-intervention sovereignty and the protection of human rights continued, as well as the non-international conflicts and the mass atrocities.

### 4.3 The Kosovo report

The NATO intervention in Kosovo in 1999 raised many questions, such as why the international community did not react earlier, why diplomacy was not fruitful, if NATO had a right to act without the authority of the Security Council, if armed intervention was the only resort, and, most importantly, how the international community would act in future similar situations of crisis. In 1999, Sweden established the Independent International Commission on Kosovo to try to shed more light on these issues.<sup>62</sup>

The report *Conflict, international response and lessons learned* was released a year later and defined a gap between legality and legitimacy. NATO did not receive the authorization by the Security Council, which was needed for a legal intervention, but relied on the support by the majority of the international community, which rendered the intervention legitimacy. The Commission suggested a framework of principles for humanitarian intervention in response to future crises. The framework was to include specified threshold principles for a legitimate claim to humanitarian intervention.<sup>63</sup>

In the report, the Commission mentions sovereignty a few times. In relation to the need to expand international peacekeeping to protect civilians, the Commission says that in other parts of the world there is a much stronger commitment to the protection of sovereignty than in the West,<sup>64</sup> implying that sovereignty entails non-intervention rather than the protection of human rights. Moreover, the Commission raises the history of colonialism and highlights the concern for ‘Western interventionism’.<sup>65</sup> A criticism, which has been echoed throughout the discourse of humanitarian intervention and subsequently the R2P.

Later in the report, when mention the ‘reconciliation of the commitment to international protection of human rights with respect for national sovereignty’, the two are again seen as opposing. Insightfully, however, the Commission saw the intervention in Kosovo as a turning point placing the controversial doctrine of ‘humanitarian intervention’ in focus.<sup>66</sup>

### 4.4 A call for consensus

After a quite turbulent 1990s, with humanitarian crises and unauthorized interventions, and in anticipation of the new millennium, the Secretary-General Kofi Annan made compelling appeals to the international community. Annan called for consensus on a solution for the perceived dilemma of sovereignty and protection, i.e. the concept of humanitarian intervention, and introduced the ‘Two concepts of sovereignty’.<sup>67 68</sup>

---

<sup>61</sup> Bellamy, *Responsibility to Protect*, 2009, p 21.

<sup>62</sup> The Kosovo Report, 2000, 19-20.

<sup>63</sup> The Kosovo Report, 2000, pp 10-11.

<sup>64</sup> The Kosovo Report, 2000, pp 10-11.

<sup>65</sup> The Kosovo Report, 2000, pp 10-11.

<sup>66</sup> The Kosovo Report, 2000, pp 19.

<sup>67</sup> Annan, Kofi, *Two Concepts of Sovereignty*, *The Economist*, 18 September 1999.

<sup>68</sup> SG presents his annual report to the GA, press release SG/SM/7136 GA/9596, 20 September, 1999.

#### 4.4.1 Two concepts of sovereignty

Annan compared the 'traditional sovereignty', focusing on the protection of a state, with an 'individual sovereignty', focusing on the protection of the rights and freedoms of a human. The comparison mirrors the inconsistencies of the 1990s discourse on sovereignty and protection in the midst of the turbulent post-Cold War period. It seems that Annan, along with most scholars and practitioners of the 1990s, could not see the forest for the trees. The focus was still on a perceived dichotomy between sovereignty and protection, rather than the two being two sides of the same coin. The stronger the emphasis on a dichotomy, the more confused the discourse and the more difficult the issue to solve.

Throughout the article, Annan returns to the concept of sovereignty as 'traditional' without referring to the origin or meaning of the wording, although 'traditional' implies generations of understanding. Due to the fact that it is contrasted against the protection of human rights, Annan defines sovereignty narrowly without including the protection of human rights as part of sovereignty.

Annan sees a change, where this 'traditional' sovereignty is being 'redefined' and he also sees a 'developing international norm' to protect civilians. At the same time, Annan refers to the Charter for a more inclusive sovereignty, which brings a flavor of anachronism into the reasoning. Possibly the 'traditional' sovereignty is newer than the 'new' sovereignty. Sovereignty including the protection of human rights and a sovereign being an instrument of its people - are not novelties, but part of treaties and revolutions since centuries.

One interesting aspect is that Annan foresees that emerging norms for protection of humans will be met with skepticism and hostility due to our 'understanding of State sovereignty'. Such an insight could have had Annan thinking a little bit more like Deng, to use an already existing 'sovereignty as responsibility' rather than introducing a change.

Thus, the appeal by Annan to the international community was much needed.

Annan elaborated on a few other notes as well, such as recognizing that national interests are impeding the protection of human rights, as the international community is willing to act in some areas, while not in others. Annan claimed that borders should not be seen as an absolute defense, but that the Council must act to halt crimes also within a state, especially in order to deter future crimes. According to Annan there is nothing in the Charter precluding recognition of 'rights beyond borders'. Although the use of force is strongly restricted, it is allowed for the 'common interest' and the Council is required to defend the common interest. Annan underlined that the common interest is the national interest - while asking what the common interest is, who defines it and who defends it.

Annan asks how, at the darkest days of the genocide in Rwanda, one could argue that the only legitimate intervention would be *with* a UN mandate. Then he asks if the intervention in Kosovo was a first step on a slippery slope for intervention *without* a UN mandate. Annan is focusing on the difficulty to reconcile the 'two compelling interests' of sovereignty and protection of human rights and calls for timely intervention by the international community when a state is unable or unwilling to end gross and systematic human rights violations. According to Annan, such an intervention had to be based on 'legitimate and universal principles' and adapted to a world of 'new actors, new responsibilities, and new possibilities for peace and progress'.

Evans writes: '[...] the 'two sovereignties' approach did not so much resolve the dilemma of intervention as simply restate it.'<sup>69</sup>

---

<sup>69</sup> Evans, *The Responsibility to Protect*, 2008, p 38.

#### 4.4.2 The dilemma of intervention

In the Millennium Report, Kofi Annan reiterated the appeal to member states to find consensus for more effective policies to end mass atrocities. Annan highlighted the criticism of ‘humanitarian intervention’ as leading to unjustified interference in a state’s internal affairs and as a larger threat to weak states than strong ones.

Annan acknowledged the arguments, saying that the principles of sovereignty and non-interference offer ‘vital protection’ to small and weak states. However, posed the dilemma - if humanitarian intervention is an ‘unacceptable assault on sovereignty’, how then, can the international community respond to gross and systematic violations of human rights. Again, Annan puts the two principles against each other and says that although most people would agree on both the ‘defence of humanity’ and the ‘defence of sovereignty’, it is not clear which principle should prevail when in conflict.

Moreover, Annan says that humanitarian intervention is politically sensitive ‘but surely no legal principle - not even sovereignty - can ever shield crimes against humanity’ and is again using the word sovereignty as interchangeable with non-intervention. Annan calls on the moral duty of the Security Council to act on behalf of the international community, and also discretely highlights the geopolitical aspect in saying that ‘The fact that we cannot protect people everywhere is no reason for doing nothing when we can’.<sup>70</sup>

#### 4.5 Summary

In the aftermath of the Cold War, the international community showed an increasing quest for the protection of human rights. Two Secretaries-General foresaw an upcoming emphasis on the protection of human rights. Both elaborated on the different aspects of sovereignty and protection, although not yet challenging the idea of ‘traditional sovereignty’. Javier Pérez de Cuéllar underlined that the non-intervention principle must not be a barrier behind which a state can commit crimes in impunity and also underlined that the protection of human rights promotes and maintains peace. Protecting human rights within a state would be an exception to non-intervention rather than ‘weakening’ it.

Cuéllar searched for a compromise in calling for the ‘collective obligation’ of states to intervene in order to bring relief in humanitarian crises. Such an obligation may be referred to as *erga omnes*, an obligation of the international community to respond to breaches of *jus cogens*, such as genocide and other mass atrocities. However, Cuéllar does not himself refer to the *erga omnes* obligation of international law, and misses the opportunity of both simplifying and strengthening his ideas. A decade later, Annan referred to the common interest as the national interest also without referring to law. Common interest could be described as an *erga omnes* obligation to defend human rights, i.e. *jus cogens*, and thus bring a much-needed clarity to Annan’s vague reasoning.

During the 1990s there was a lively debate on the respect for sovereignty on the one hand and the protection of human rights on the other. Scholars were confidently describing sovereignty as ‘traditional’ and ‘centuries-old’, implying that sovereignty was not more and not less than the protection of a state, i.e. the non-intervention principle. The protection of human rights was seen as out of the sovereignty scope, as something opposing and challenging. The confident scholars on the one hand and the struggling human rights defenders on the other, did however face the same dilemma. Two interests - the one of the state and the one of the people - were seen as competing and the state was the stronger of the two. Due to the strong post-Cold War influence, few scholars would challenge the idea of ‘traditional sovereignty’, but would instead propose ‘new norms’ for

---

<sup>70</sup> We The People’s or the Millennium Report, 2000, pp 47-48.

‘new issues’ in a ‘new era’. ‘Traditional sovereignty’ was, however, challenged by the genocides in Rwanda and Srebrenica, increasingly demanding international protection of a people also within a state, although violating the non-intervention principle.

Scholars did not question the motives of ‘traditional’ sovereignty or study the history or definitions of international law. Most scholars accepted ‘traditional’ sovereignty as a fact and a foundation, on top of which a new norm for a new era could be built. However, a foundation built on assumptions was not strong enough to hold a new norm, especially not as the content of the new norm was far from new. The more scholars focused on a dichotomy and a possible bridge between the two, the more insoluble the issue. In reality it was morally impossible to deny people assistance by referring to a vague ‘traditional’ sovereignty. It also seemed impossible for scholars to rid themselves from the Cold War rhetoric. Soon there was a widespread confusion of sovereignty as ‘traditional’ or ‘responsible’ or ‘individual’, scholars were stumbling without any solution in sight.

Meanwhile, Francis Deng, the Special Rapporteur on IDPs, thought differently. Instead of contrasting sovereignty and responsibility, Deng and Cohen introduced the notion of *sovereignty as responsibility*. In the prevailing notion of ‘traditional sovereignty’, Deng saw a narrow interpretation of sovereignty attentively protecting the non-intervention principle. Such an interpretation would allow states to commit crimes behind closed borders, far from the aim and purpose of the Charter and the customary rules of *jus cogens* and *erga omnes*. Thus, Deng broadened the 1990s notion of sovereignty to include also the protection of human rights and thus actually strengthen sovereignty.

Deng found an inclusive and positive approach of sovereignty to be a useful tool in his communication with states with internal issues. It was much easier to gain trust speaking of a positive and strengthened sovereignty, including the protection of human rights, than threaten with an intervention by the international community. The purpose was indeed the same - to protect a people - while also empowering a state and delivering tangible results. A strong sovereignty protecting its people is itself protected from intervention.

The broader interpretation of sovereignty, including both rights and duties of states was however far from new, having forfeited through centuries of philosophical thoughts of an absolute sovereign being responsible to God or nature, and the popular sovereign to be bound by the social contract. The idea was especially strong during the American and French revolutions at the end of the 1700s. These ideas, however, had been neglected during the rise of the nation-state and during the Cold War. Now the interpretation would have a crucial impact on the R2P process and the later constructivist approach.

The intervention in Kosovo 1999 raised many questions on legality and legitimacy, as well as non-intervention and protection. The ensuing Kosovo report channeled the questions into suggesting a framework of principles for humanitarian intervention in response to future crises. Concurrently Kofi Annan appealed to the international community for consensus on these sensitive matters.

Kofi Annan was strongly affected by the 1990s debate and especially the failure to intervene in Rwanda and later the un-authorized intervention in Kosovo. In an attempt to influence the debate and to bridge the perceived gap between intervention and protection Annan introduced ‘Two concepts of sovereignty’. The more Annan described a dichotomy, however, the more difficult it seemed to solve.

Annan struggled to define sovereignty and was thus reflecting the 1990s discourse as a whole in only a few pages. Annan refers to ‘traditional’ sovereignty as merely the non-intervention principle and humanitarian intervention as ‘an unacceptable assault on

sovereignty'. Annan searched for a 'new definition of sovereignty', while acknowledging that change would entail 'distrust, scepticism, even hostility'.

In other words, Annan did not find the pragmatic approach, which Deng had found so easily a few years earlier. Evans recall Annan saying a few years later, that he would have wished to steer the debate more in the direction it later took.<sup>71</sup> Annan did mention a few other aspects in the article, such as the role of the Security Council and the strong influence of national interests. However, the most important part of the article, and address, was the appeal to the international community to find consensus on the interpretation of intervention and protection. An appeal resulting in the concept of R2P.

---

<sup>71</sup> Evans, 2008, p 38.

## 5 Responsibility to protect

The Canadian government responded to the appeal by Kofi Annan and established a Commission 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 a 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. And similar to the 1990s debate, the report lacks a clear and consistent legal definition of sovereignty. Despite the two shortages, the Commission enabled a shift of the discourse.

The Report was released a few months after 9/11 and almost consumed by the war on terror, only to be revived in 2004 and turning into an internationally endorsed, albeit significantly reduced, concept in the World Summit Outcome in 2005. The ensuing process of implementation has been focused on the reduced 2005 version of R2P.

### 5.1 The ICISS report 2001

The Canadian Government accepted the challenge and established the International Commission on Intervention and State Sovereignty (ICISS) consisting of commissioners from all over the world. In 2001, the Commission launched the concept of Responsibility to Protect (R2P or sometimes RtoP), with a palette of principles and guidelines for the possible legal and legitimate protection of a people within a state’s borders.

The basic two principles of the core principles of the ICISS report (see Annex):

- a. ‘State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.’
- b. ‘Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.’

After these *two principles*, the Commission presents *four foundations* - sovereignty entailing obligations, the Security Council responsible for the maintenance of peace and security, international humanitarian and human rights law, and a developing practice of states. Thereafter the Commission introduces the *three elements* of the responsibility - to prevent, react and rebuild. And finally the *two priorities* where prevention is the most important dimension and where any *less* intrusive and coercive measures are to be considered before *more* intrusive and coercive ones.<sup>72</sup>

### 5.2 The two roots of Responsibility to Protect

There are many roots for the notion of a responsibility to protect, however, Bellamy underlines two main origins, namely the ‘sovereignty as responsibility’ by Francis Deng and Roberta Cohen in 1996, and the 1990s discourse on the humanitarian intervention.<sup>73</sup>

---

<sup>72</sup> ICISS report, Synopsis, The Responsibility to Protect: Core principles, XI. 2001.

<sup>73</sup> Bellamy, Alex J., Responsibility to Protect, p. 33.

### 5.2.1 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.<sup>74</sup> However, such a narrow interpretation of the principles of 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 protection, and the one between the provisions of the UN Charter and the actual practice of states, to mention but a few.<sup>75</sup>

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.<sup>76</sup>

The main argument of the Commission was that the protection of human rights was not to be in opposition to, but entailed in, sovereignty. 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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

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 Commission finds ‘this modern understanding of the meaning of sovereignty’ key for the Commission’s concept responsibility to protect.<sup>80</sup> 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’.<sup>81</sup>

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, with 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

---

<sup>74</sup> ICISS, 2001, paras 2.7-8.

<sup>75</sup> ICISS, 2001, para. 2.24.

<sup>76</sup> ICISS, 2001, para 1.33.

<sup>77</sup> ICISS, 2001, para 2.7.

<sup>78</sup> ICISS, 2001, para 1.35.

<sup>79</sup> ICISS, 2001, 2.14.

<sup>80</sup> ICISS, 2001, para 1.36.

<sup>81</sup> ICISS, 2001, para 2.13.



or unwilling to protect its people or is itself the perpetrator.<sup>82</sup> The Commission does not, however, relate the international responsibility to the legal notion of *erga omnes*.

In its recommendation to the General Assembly, the Commission proposes a draft declaratory resolution for the principles of the responsibility to protect, with ‘an affirmation of the idea of sovereignty as responsibility’.<sup>83</sup>

### **5.2.2 Humanitarian intervention**

The discussion on military intervention was by no means new in 1999, although revived in the way NATO intervened in Kosovo - with great international support but without authorization by the Security Council. The call from the Kosovo Commission and the Secretary-General to find a framework of universally agreed principles for a possible intervention to protect people was the spark for establishing the ICISS.

The Commission reiterates the UN dedication to the maintenance of international peace and security on the basis of protecting territorial integrity, political independence and sovereignty of its member states. However, most contemporary conflicts are internal and the casualties are mainly civilians. Thus, the Commission says, the UN found itself challenged to reconcile the foundational principles of the maintenance of international peace and security - ‘to save succeeding generations from the scourge of war’ - with the compelling aim to respect human rights for the peoples of the states - ‘we the peoples of the United Nations’.<sup>84</sup> In other words - non-intervention and protection of human rights.

## **5.3 A shift of terminology**

A key to the success for the concept of the ‘responsibility to protect’ was the Commission’s effort to introduce a new terminology. After the 1990s discourse, it was clear that the terminology was neither sufficient nor appropriate, and in itself overshadowed the issues at hand.

### **5.3.1 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 Commission 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.<sup>85</sup> If a state would be unwilling or unable to fulfill its responsibility to protect, or itself be the perpetrator, the international community has a residual or secondary responsibility. 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 rebuilding measures.<sup>86</sup>

---

<sup>82</sup> ICISS, 2001, para 6.11.

<sup>83</sup> ICISS, 2001, para 8.28.

<sup>84</sup> ICISS, 2001, para 2.12.

<sup>85</sup> ICISS, 2001, para 2.30.

<sup>86</sup> ICISS, 2001, para 2.31-2.32.

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’.<sup>87</sup> The ICISS does not however refer to this international responsibility as *erga omnes*.

### 5.3.2 Humanitarian intervention vs Responsibility to protect

The Commission dismissed the use of the phrase humanitarian intervention. One of the reasons was the strong opposition raised by humanitarian agencies and organizations reacting on the militarization of the word humanitarian. Humanitarian relief is supposed to be everything but military, thus the expression could be not only contra-productive, but also dangerous for humanitarians in the field. Another reason was that the phrase ‘humanitarian’ intervention would also prejudge any intervention as humanitarian, even prior to a proper assessment. Yet another reason was, as mentioned above, to move from the sovereignty-versus-intervention polarity into a reconceptualization of sovereignty as responsibility.<sup>88</sup>

First, the Commission defined three ways in which humanitarian intervention was unhelpful. Firstly it focuses on the right of the intervening states, more than on the actual cause, secondly, the narrow focus on intervention does not embrace any preventive or rebuilding aspects, and thirdly, it trumps sovereignty already from the outset, as dissent to humanitarian intervention is by nature anti-humanitarian.<sup>89</sup> Intervention, or humanitarian intervention, did also have connotations to colonialism, arbitrariness and military power, which alarmed quite a few states with colonial history.

Then, the Commission defined three ways in which the responsibility to protect was more helpful. Firstly, the responsibility to protect focuses on the cause, rather than the intervention itself. Secondly, the responsibility to protect places the primary responsibility with the state and only a secondary responsibility with the international community. Thus the notion of RtoP is bridging the gap between sovereignty and intervention, as opposed to the confrontational ‘right to intervene’. Thirdly, the RtoP also includes the preventive and rebuilding aspects.<sup>90</sup>

In shifting from humanitarian intervention to the responsibility to protect, the entire perspective shifted from blame and threat, to opportunity and support - and from states to peoples. Such a positive approach completely challenged the dichotomy of intervention and protection. The terminology also focused on preventive aspects and protection of human rights, rather than a strict military intervention.

## 5.4 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’.<sup>91</sup>

---

<sup>87</sup> ICISS, 2001, basic principles, see Annex.

<sup>88</sup> ICISS, 2001, paras 1.39-1.41.

<sup>89</sup> ICISS, 2001, para 2.28.

<sup>90</sup> ICISS, 2001, para 2.29.

<sup>91</sup> The 2005 World Summit: An Overview, 2005. Retrieved 24 August 2014.  
<http://www.un.org/ga/documents/overview2005summit.pdf>

#### 5.4.1 Endorsing an ‘emerging norm’

The Secretary-General established a High-Level Panel on Threats, Challenges and Change, which published the report *A more secure world* in 2004. Sovereignty is mentioned mainly in two chapters. First under ‘Toward a new security consensus - Sovereignty and responsibility’,<sup>92</sup> and then under ‘Collective security and the use of force - Chapter VII of the Charter of the United Nations, internal threats and the responsibility to protect’.<sup>93</sup> Both chapters relate to the notion of responsibility.

In the first part, on sovereignty and responsibility, the Panel emphasizes that a state signing the charter accepts not only privileges, but also responsibilities. Such a phrase would suggest that the panel sees inherent responsibilities in sovereignty, and not opposing sovereignty and responsibility. However, the next sentence says that the ‘Westphalian system’ gave rise to the notion of ‘state sovereignty’ and once again the discourse is based on an undefined notion of sovereignty. The panel continues saying that ‘today’ sovereignty includes the duty of a state to protect its people, i.e. protection is presented as a novelty, and that sovereignty includes obligations to the wider international community. The duty to protect its people includes *jus cogens* principles and the international responsibility is *erga omnes* obligations, although not mentioned as such.

The panel does acknowledge the fact that not all states are able or willing to protect its peoples or avoid harming its neighbors. In such a situation, the principles of collective security would include a responsibility by the international community to act in accordance with the Charter and the Universal Declaration of Human Rights, i.e. to support capacity or protection. Again, such a responsibility would be *erga omnes*.

The Panel is quite critical of the Charter, saying that it is reaffirming human rights, without providing means for implementation. Instead, the Charter applies the non-intervention principle, not to authorize coercive action against a sovereign state for its internal affairs. However, the Panel also says that genocide is agreed as a crime under international law, a crime that states have agreed to prevent and punish, and a crime, which is understood as ‘a threat to the security of all’. Again, the wording *of all* would be *erga omnes*. The Panel does recognize that the principle of non-intervention is not to be used to protect genocide or other atrocities, and that such crimes, also within state borders, can indeed be posing a threat to international peace and security. The Panel says that both the Council and the international community have accepted an authorized military intervention into a state in such a case. It should not, according to the Panel, be difficult in case of breaches of international law, such as genocide.

Furthermore, the Panel said that there was ‘a growing recognition that the issue is not the ‘right to intervene’ of any state, but the ‘responsibility to protect’ of every State’, and thus it endorsed the Responsibility to Protect. The Panel also recognized a growing acceptance of both the primary responsibility with every single state to protect its people, and the secondary responsibility with the international community to assist states and peoples.

In Article 203, the Panel endorses the ‘emerging norm’ of responsibility to protect:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.<sup>94</sup>

---

<sup>92</sup> *A more secure world*, 2004, p 17 paras 29-30.

<sup>93</sup> *A more secure world*, 2004, p 65 ff paras 199-203.

<sup>94</sup> *A more secure world*, 2004, para 203.

#### 5.4.2 'From an era of legislation to an era of implementation'

In March 2005, the Secretary-General presented his report *In larger freedom: towards development, security and human rights for all*. Also this report is fluctuating in its interpretation of sovereignty, however, not as overtly as sovereignty is barely mentioned in relation to responsibility. One of the first paragraphs on sovereignty says that 'no legal principle - not even sovereignty' is ever to be allowed to shield mass atrocities.<sup>95</sup> Such a wording refers to, and challenges, the 'traditional' interpretation of sovereignty.

In contrast to previous articles and reports on the matter, this report is strongly emphasizing implementation of already existing legal documents. The report defines a 'stark and deadly' gap in international humanitarian law between 'rhetoric and reality - between declarations and deeds' and reiterates the question if the UN can stand by as the international community is faced with mass atrocities. The report calls for a strengthening of the rule of law and an enhancement of the human rights structure of the UN, through institutional and democratic support.<sup>96</sup>

The report refers to the High-Level Panel endorsement of the 'emerging norm' of responsibility to protect. The Secretary-General acknowledged the sensitivity of the concept, however, strongly agreed and said it had to be embraced and acted upon.<sup>97</sup>

'The time has come for Governments to be held to account, both to their citizens and to each other, for respect of the dignity of the individual [...] We must move from an era of legislation to an era of implementation.'<sup>98</sup>

The Secretary-General speaks of the *primary responsibility* with a state to protect its people, and in case the state is 'unable or unwilling' to protect its people, the shift to the *secondary responsibility* of the international community.<sup>99</sup> The report emphasizes the need to strengthen rule of law by universal participation in multilateral conventions, and the importance of confronting impunity.<sup>100</sup>

### 5.5 Consensus and implementation

At the World Summit in 2005 the world leaders endorsed the concept of RtoP 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.<sup>101</sup>

#### 5.5.1 Consensus at the World Summit in 2005

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

<sup>95</sup> *In Larger Freedom*, A/59/2005, 2005, para 129.

<sup>96</sup> *In Larger Freedom*, A/59/2005, 2005, para 132-134.

<sup>97</sup> *In Larger Freedom*, A/59/2005, 2005, para 135.

<sup>98</sup> *In Larger Freedom*, A/59/2005, 2005, para 132.

<sup>99</sup> *In Larger Freedom*, A/59/2005, 2005, para 135.

<sup>100</sup> *In Larger Freedom*, A/59/2005, 2005, para 136-138.

<sup>101</sup> World Summit Outcome, 2005.

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’.

The paragraph is urging the General Assembly to continue consideration of the responsibility to protect, ‘bearing in mind the principles of the Charter and international law’. The world leaders also agree to help states build capacity in order to protect their populations ‘before crises and conflicts break out’, i.e. a strong support for preventive capacity-building and appropriate measures.

### 5.5.2 The consensus version

The concept of responsibility to protect as agreed in the two articles in 2005 was very much reduced in comparison with the concept introduced by ICISS in 2001. In his book on Responsibility to protect, Bellamy refers to an email from Thomas G Weiss calling it R2P Lite.<sup>102</sup> The Outcome paragraphs did indeed endorse the primary responsibility of states to protect its people, however, as Carsten Stahn stated, it does reflect ‘the traditional bond of duty between a state and its people.’<sup>103</sup>

Amnéus points out several differences between the paragraphs and the ICISS report. The Outcome Document does not affirm the responsibility to protect as an ‘emerging norm’ of prevention, reaction and rebuilding. It does not include criteria or principles for intervention. Instead, the criteria were to be discussed further in the General Assembly. Amnéus underlines that paragraph 139, as the High-Level Panel Report refers to already legally defined crimes, and asks if this legal rather than political approach will help build consensus for collective action.<sup>104</sup>

Stahn, however, finds the paragraphs discursive like ‘political resolutions’ - in mixing political and legal considerations. The secondary responsibility is, according to Stahn, written cautiously dividing the three responsibilities - prevent, react and rebuild - into varying degrees of support. Such a compromise reflects strongly conflicting interests and thus ends up in division and confusion of the meaning of the concept. Stahn reacts on two specific parts of paragraph 139, firstly the need for the General Assembly to continue considering the concept, as if the states were not ready for implementation. The second part was the reminder of the principles of the Charter and international law, as if the states doubted that the concept was consistent with international law. Altogether, Stahn finds the Outcome Document confusing as the concept is on one hand presented under a separate heading, although on the other hand written in a rather unclear manner.<sup>105</sup>

The primary responsibility is part of a non-traditional and inclusive state sovereignty, thus the first paragraph is part of existing international law. The crimes to be protected are all considered to be *jus cogens* in customary law, thus part of existing international law. The secondary responsibility in the second paragraph refers to a responsibility of the whole international community to react to violations of *jus cogens*, and is thus an *erga omnes* responsibility, an obligation owed to the entire international community with corresponding universal jurisdiction and is also part of existing international law. The principles for intervention are not clearly specified in the paragraphs; however, the Charter does have provisions for a collective action and the possible use of force in case

---

<sup>102</sup> Bellamy, Responsibility to protect, p 67, note 2.

<sup>103</sup> Stahn, Notes and Comments Responsibility to Protect, 2007.

<sup>104</sup> Amnéus, 2008, pp 16-17.

<sup>105</sup> Stahn, Notes and Comments Responsibility to Protect, 2007.

of a threat to international peace and security. There are also applicable legal principles such as the principle of proportionality.

In other words, the Outcome Document was truly R2P Lite and not in itself introducing any novelties. Bellamy captures it well saying that decisions on intervention will continue to be made ‘in an ad hoc fashion by political leaders balancing national interests, legal considerations, world opinion, perceived costs and humanitarian impulses - much as they were prior to the advent of R2P’.<sup>106</sup> So many historical, geo-political and economical reasons are feeding the conflicts and hampering a joint response for protection. The reason for passivity and inaction in a time of humanitarian crises does not depend on the lack of legal provisions, but the lack of an *implementation* of the legal provisions.

### 5.5.3 Implementation in 2009

The Secretary-General’s report *Implementing the responsibility to protect in 2009*,<sup>107</sup> focused on the implementation of the concept rather than the meaning. The report responded to the articles 138 and 139 of the World Summit Outcome and aimed to operationalize the responsibility to protect.<sup>108</sup>

The Secretary General reiterated how the heads of states ‘unanimously affirmed’ that states have a ‘responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity’. It was agreed that the international community should support states in exercising the responsibility, and when a state was ‘manifestly failing’ to protect its population, the international community was prepared to take collective action in accordance with the Charter and via the Council.<sup>109</sup>

The report defined three pillars of the responsibility to protect. Firstly, responsibility to protect was an ally and not an adversary of sovereignty; secondly, the concept of responsibility to protect should remain narrow and focus on the four crimes of grave violations of human rights - genocide, war crimes, crimes against humanity and ethnic cleansing; and thirdly, while the scope of the responsibility to protect is narrow, the response is broad with an array of support measures.

The report used a vocabulary such as ‘based on *existing* international law’, ‘*agreed* at the highest level’ and ‘*endorsed* by both the General Assembly and the Security Council’ in stating that the three provisions in the Summit Outcome is an ‘authoritative framework’ for the responsibility to protect. The Secretary General defines the aim ‘not to reinterpret or renegotiate the conclusions of the World Summit but to find ways of implementing its decisions in a fully faithful and consistent manner’.<sup>110</sup> The report further underlined that the provisions in the Summit Outcome were ‘firmly anchored in well-established principles of international law’, and that ‘under conventional and customary international law’ states have ‘obligations’ to prevent and punish ‘genocide, war crimes and crimes against humanity’.<sup>111</sup> Again, the legal terminology is vague as ‘conventional law’ is not defined and the both *jus cogens* and *erga omnes* are omitted.

The Secretary General emphasized that the provisions of the Summit Outcome ‘are to be undertaken only in conformity with the provisions, purposes and principles of the Charter of the United Nations’. ‘In that regard, the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force

---

<sup>106</sup> Bellamy, Responsibility to Protect, p 3.

<sup>107</sup> Implementing the responsibility to protect, A/63/677, 12 January 2009.

<sup>108</sup> Implementing the responsibility to protect, A/63/677, 12 January 2009, summary.

<sup>109</sup> Implementing the responsibility to protect, A/63/677, 12 January 2009, summary.

<sup>110</sup> Implementing the responsibility to protect, A/63/677, 12 January 2009, para 2.

<sup>111</sup> Implementing the responsibility to protect, A/63/677, 12 January 2009, para 3.

except in conformity with the Charter.’<sup>112</sup>

In explaining how the world community failed to take responsibility, the report suggests that part of the problem was ‘conceptual and doctrinal’ and stated that at the end of the twentieth century the concept of humanitarian ‘posed a false choice between the two extremes’ - either stand by atrocities or deploy coercive force, a choice leaving states reluctant to act.<sup>113</sup> Then the Secretary General turns to the opposite concept of Deng and Cohen, the ‘sovereignty as responsibility,’<sup>114</sup> emphasizing that ‘sovereignty entailed enduring obligations towards one’s people, as well as certain international privileges’.<sup>115</sup>

As agreed during the World Summit Outcome, ‘the responsibility to protect is an ally of sovereignty, not an adversary’. ‘It grows from the positive and affirmative notion of sovereignty as responsibility, rather than from the narrower idea of humanitarian intervention.’ ‘By helping States to meet their core protection responsibilities, the responsibility to protect seeks to strengthen sovereignty, not weaken it.’<sup>116</sup> ‘The responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity.’<sup>117</sup>

The many quotes above show a shift in the terminology and the discourse. There is a greater understanding of the ‘false choice’ between non-intervention and protection, and a recognition of sovereignty as responsibility. Even more so, there is an awakening understanding that Responsibility to Protect is actually a part of existing law, however, the report is still lacking the proper legal vocabulary. There is a need for a distinct legal approach to the concept in order to move from discussions to implementation. However, the idea that the reason for the world’s reluctance to act to prevent mass atrocities would be ‘conceptual and doctrinal’ is of course far from the truth. The legal aspect is indeed important, not to say crucial, in order to determine who is acting legally and who is not. However, the reason for non-interference is rather out of the legal scope and depending on geo-political interests, historical ties between states and the current heads of states.

## 5.6 Summary

After the 1990s discourse on sovereignty as non-intervention vs. protection, accompanied by the failure of the international community to act in response to the genocide in Rwanda and later the un-authorized intervention in Kosovo - there was a dire need for a new approach. Kofi Annan called for international consensus on the protection against mass atrocities, which led to the ICISS launching of the concept of R2P in 2001.

The main aim of ICISS was to shift focus from intervention by the international community to responsibility with the state concerned. An aim achieved through a comprehensive palette of principles and guidelines and mainly through a genuine shift of terminology. The origin of the concept is generally agreed to be twofold - humanitarian intervention and sovereignty as responsibility. The Commission decided to steer away from the widely criticized wording of humanitarian intervention, which in itself had become a hindrance to action, and found a platform in the sovereignty as responsibility.

---

<sup>112</sup> Implementing the responsibility to protect, A/63/677, 12 January 2009, para 3.

<sup>113</sup> Implementing the responsibility to protect, A/63/677, 12 January 2009, para 7.

<sup>114</sup> Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa*, 1996.

<sup>115</sup> Implementing the responsibility to protect, A/63/677, 12 January 2009, para 7.

<sup>116</sup> Implementing the responsibility to protect, A/63/677, 12 January 2009, para 10 (a).

<sup>117</sup> SG report on implementing R2P, para 10 (b).

Like the scholars of the 1800s nation-state, the 1900s Cold War and the 1990s quest for responsibility - the Commission referred to 'Westphalia' when explaining a narrow concept of sovereignty, almost only as a principle of non-intervention. The Commission however challenged the reality of such an approach, in saying that sovereignty must never be used as a right for the state to act willfully against its people. Instead, the Commission opened up for another understanding of sovereignty, arguing that protection of human rights must not be opposed to sovereignty, but included in sovereignty. There must be a dual responsibility for the state towards both other states and its own people. In such a way the Commission more or less let go of the opposing and dividing notion of *sovereignty versus responsibility* altogether. The shortage of the report, however, is that the Commission is not fully clear on this matter - not truly understanding Westphalia and the history and context of sovereignty, nor using the proper legal terminology.

The Commission claimed that the conditions for sovereignty had changed remarkably since 1945 and had included not only more states but also more constraints. Indeed new states had emerged, however, these new states had succeeded former states and signed the same Charter. The constraints had not changed legally, although the Courts had had time to process more decisions. The implementation of human rights had grown increasingly stronger, but the provisions were already included in both the Charter and the Universal Declaration of Human Rights. Human rights and international responsibility for peace and progress were enshrined in the Charter and, as the Commission so clearly states, when signing the UN Charter the state accepts the responsibilities enshrined therein.

One main difference between 1945 and 1990s was the end of a bloody and incomprehensible war in 1945 and the end of a static Cold War in 1990. Naturally, the notion of human rights was more tangible in 1945, while the influence from the Cold War with a mythical and non-interventionist sovereignty more tangible in 1990.

By shifting terminology, ICISS managed to strengthen the responsibility, rather than weakening it. Although the Commission continuously refers to old and new sovereignty, the real difference is in the actual reframing and renaming of the possibility to protect. The threatening 'right to intervene' changed into the much more constructive and supportive 'responsibility to protect'. A concrete primary responsibility with the state and a less concrete, although existent, secondary responsibility with the international community. The primary responsibility is to protect people against four specified crimes under *jus cogens*, and a secondary responsibility among the international community is to react under *erga omnes*. These two legal principles are entailed in both customary law and treaty law. As the Commission so rightly points out, the Charter itself reconciled the foundational principles of the maintenance of international peace and security - 'to save succeeding generations from the scourge of war' - with the compelling aim to respect human rights for the peoples of the states - 'we the peoples of the United Nations'.

In 2004 the concept of responsibility to protect was endorsed in *A more secure world*. Although the wording of sovereignty is far from the dichotomy of the early nineties, it is still not stringent along the lines of sovereignty as responsibility. The panel recognizes the responsibilities in the Charter, which supports the sovereignty as responsibility. Still, the Panel refers to the 'Westphalian system' as traditional or absolute sovereignty. Furthermore, the panel refers to sovereignty of 'today' as including the responsibility of a state to protect its people. However, the four crimes, which should be prevented, have been part of *jus cogens* since long, and so has the *erga omnes* obligations of the international community to react. The fact that the different elements are not legally defined may be due to the political sensitivity and the fact that a legal definition does not leave as much room for interpretation. Sovereignty is after all mainly used as a bat in times of conflict and crises.



The panel does endorse the concept of responsibility to protect and recognizes the primary responsibility with states to prevent mass atrocities, which is still not referred to as *jus cogens*, and the secondary responsibility with the international community to react to the mass atrocities, which still is not referred to as *erga omnes*.

The key aspect for the continued debate was that the panel recognized the responsibilities in the Charter, however lacking the means for implementation. The following endorsement of the principles of responsibility to protect in the World Summit Outcome and in the 2009 implementation of responsibility to protect - focus is no longer on the elaborate debate and meaning of legal quiddities, but on the actual implementation. The concept is now moving from 'rhetoric to reality'.

Also the Secretary-General's report *In larger freedom* is fluctuating in its language on sovereignty. According to the report is not even sovereignty allowed to shield mass atrocities, i.e. a 'traditional' sovereignty. An interesting aspect, is that the report refers to the High-Level Panel endorsement of an 'emerging norm' of responsibility to protect. An 'emerging norm' implies a consistent state practice and expressed *opinio juris*, where the responsibility to protect will only truly fulfill the latter. The question is, however, if R2P should really be viewed as a novelty considering the Panel's reasoning on sovereignty.

At the World Summit in 2005, the world leaders endorsed a remarkably reduced version of the responsibility to protect, where the first paragraph of a primary responsibility of a state to protect its people against four crimes under *jus cogens*, are part of already existing international law. The views on the second paragraph may diverge, however, it is widely agreed that there are *erga omnes* obligations with the international community to react on certain crimes. Moreover, the collective action mentioned in article 139 is already defined in the Charter, and so is a threat to international peace and security, which can very well be constituted by an internal conflict. Article 139 is also referring to the principles of 'the Charter and international law' - which in itself is an odd phrasing, as the Charter is indeed a part of international law.

The Secretary-General's report on the implementation of responsibility to protect in 2009 reaffirmed the articles 138 and 139 and focused on implementation rather than the meaning of the concept. The report underlines that the provisions are 'firmly anchored in well-established principles of international law', which is at least some kind of recognition, although not clearly defining the exact legal principles. However, the provisions are to be undertaken only in conformity with the provisions, purposes and principles of the Charter. The responsibility to protect does not alter the legal obligation to refrain from the use of force, except in conformity with the Charter.

The report recognizes the issue during the 1990s of posing non-intervention and protection against each other, 'as a false choice between the two extremes', and embraces the Francis Deng approach to sovereignty as responsibility. The report even says that responsibility to protect is an ally and not an adversary of sovereignty, and stems from a positive and affirmative notion of sovereignty as responsibility.

## 6 Conclusions

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*, albeit shifting in appearance.

In order to assess the interpretation, it was necessary to define the legal framework and the relevant sources of international law. The primary sources of international law are treaty law and customary law, where the latter is built on state practice and *opinio juris*. State practice summarizes the actions by states over time and *opinio juris* is the notion of a legal obligation. Customary law is built on norms, where an emerging norm has to fulfill the criteria of state practice and *opinio juris*. A controversial subject will need more time to become a full-fledged norm of customary law, than a conventional one.

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 Rwanda, Srebrenica, Kosovo, Iraq and now Syria, 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*.

If the R2P is not an emerging norm, is it part of already existing sovereignty? It depends on the interpretation of sovereignty as exclusive and non-interventionist, or as inclusive.

Scholars have long referred to sovereignty as ‘traditional’ or ‘Westphalian’, rendering a mythical status referring back to the 1648 Peace Treaty of Westphalia. These scholars accentuate the non-intervention aspect of sovereignty, i.e. the right of the sovereign to manage its internal affairs without interference. However, the actual peace treaty does not support the nation-state non-interventionist sovereignty as such, as the nation state was not invented until two centuries later. The view has been forfeited mainly by scholars of the 1800s during the rise of the nation-state and later during the 1900s Cold War.

Prior to the 1800s, however, the view was quite different, as both the American and French revolutions embraced sovereignty as responsibility, and as philosophers found the absolute sovereign accountable to God or nature and the popular sovereign accountable to the people. Although it may seem attractive to heads of states to have solid borders and impunity, the ‘Westphalian sovereignty’ does not exist neither historically nor legally. On the contrary, it is obvious that mass atrocities and genocide cannot be disregarded, as such an interpretation would be, according to Gareth Evans, ‘a license to kill’.

Instead, sovereignty should be treated as a legal concept among others, and assessed through international law. Sovereignty entails both rights and duties, which are enumerated in several treaties, including the prevailing Charter. At first glance, the lack of legal references throughout the post-Cold War period up until today is a conundrum.

At a second glance, however, the lack of legal references has given the international community a *carte blanche* not to interfere in genocides and other mass atrocities.

Throughout the Cold War, focus was on the nation state and its inviolable borders, with the ultimate fear of a nuclear aggression. Lasting for half a century, naturally the Cold War had an overwhelming influence on the interpretation of international law. The spirit of the Charter was no longer related to the horrors of the Second World War, but to the intent of heads of states in a world based on threats and fear.

The resolutions, reports and doctrine from the 1990s show scholars who clearly cannot rid themselves from the strong Cold War influence. These scholars do not even seem to understand that there is a contextual influence also on international law, that there is no such thing as a 'centuries-old', never-changing legal principle. Law is per definition dynamic. The debate had been much more fruitful, if scholars had used a constructivist approach to see the strong nation-state and Cold War influence on the interpretation of sovereignty, and if the discourse would have been based on legal ground. Reports and articles refer to secondary sources of 'Westphalian' or 'traditional' sovereignty, sweeping formulations of responsibilities and obligations, without defining or labeling it legally. One reason may be the fear of not fitting the political agenda. However, in retrospective, it does come across as a lack of scientific discipline.

The idea of sovereignty as strictly non-interventionist strengthened the dichotomy between a strong state with solid borders and an authoritarian sovereign on one hand, and the need for protection of human rights for the people on the other. Naturally these two ends were irreconcilable and not until 1996 did someone introduce a new approach. The highly pragmatic Francis Deng, Special Rapporteur on Internally Displaced Persons, was trying to understand how to influence heads of states on domestic issues. The answer was as simple as solid - sovereignty entailing both rights and duties, i.e. sovereignty as responsibility. Deng argued that such approach even *strengthened* sovereignty, as a sovereign fully enjoyed the privileges of non-intervention when performing its duties. A just reign is, under sovereignty, both protecting and protected. As soon as the reign fails in protecting its people, the social contract is void and the right to non-intervention is lost. The logical aspect is undeniable.

Throughout the 1990s, the discussion of the dichotomy was ongoing, and ended with Kofi Annan, then Secretary-General, calling for a world consensus on the issue of intervention to protect people suffering from negligence or atrocities by its own government. The appeal contains as many inconsistencies as the other 1990s documents, however, brings a well-needed request into the international community.

As mentioned above, the Canadian government responded by establishing a Commission, introducing the Responsibility to Protect in 2001. The concept was based on Deng's and Cohen's sovereignty as responsibility and the much-debated 'humanitarian intervention'. Quite strikingly, also this report lacks a contextual understanding and a distinct legal vocabulary; *erga omnes* is for instance not even mentioned in the report.

The R2P was reintroduced at the World Summit in 2005, to be endorsed by the entire international community, as a novelty in international law. It is of key importance, however, to understand that the 2005 R2P was a bare minimum of the concept launched in 2001, and that the concept was far from new. The first paragraph focused on *primary responsibility*, that a state is responsible to protect its people from the four crimes enlisted in the paragraph, i.e. *jus cogens*. The second paragraph focused on the *secondary responsibility*, the responsibility with the international community to use appropriate means to assist a state protecting its people, i.e. *erga omnes*. The second paragraph also

opens up for *collective action* through the right authority, which is considered to be the Security Council, i.e. provisions in the Charter. It could not have come as a surprise that the international community would endorse such a condensed and not at all novel concept. The strength of the 2005 World Summit Outcome was instead the reiterating of a strong *opinio juris* for the protection of *jus cogens* and *erga omnes*.

These two legal notions are the basis for the conclusion of this thesis. Firstly, the peremptory norms or *jus cogens* of customary law; non-derogable principles related to matters of universal importance to the entire humankind, such as certain human rights and the prohibition of aggression. The *jus cogens* principles are protected not only within a state's borders, but universally by the entire international community. Secondly, the *erga omnes* obligations; the responsibility by the international community to act upon violations of *jus cogens* - all countries have jurisdiction and any country can file charges.

Although the first R2P paragraph in the World Summit Outcome focuses on the four crimes for protection and the second paragraph focuses on the secondary responsibility by the international community, there is no reference to the former as *jus cogens* or the latter as *erga omnes*. The need is for the international community to understand the context of responsibility, to apply the correct legal terms and to find ways for implementation.

It seems that the past decades lack of understanding of sovereignty in relation to *jus cogens* and *erga omnes*, depends on the yoke of the Cold War and the ensuing 1900s politics. A new generation of scholars is, however, increasingly bringing a contextual approach and hopefully some scholar will present extensive research on the history and legal interpretation of sovereignty. It is time to leave the political discussions behind and provide a thorough legal analysis of sovereignty and responsibility to protect. Maybe the International Court of Justice could give an advisory opinion on R2P in relation to one of the ongoing crises, and provide a comprehensive legal background.

Indeed, the 2009 SG report on Implementation of R2P is a step in the right direction. The language is quite different, acknowledging the protection of human rights to be an 'ally not an adversary' of sovereignty and also the Secretary-General is emphasizing the need to leave discussions behind in order to focus on implementation. The report is still lacking reference to *erga omnes* and other relevant legal terminology, which could bring clarity.

In conclusion, the international community should define sovereignty and R2P legally, through *jus cogens* and *erga omnes*, 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.

# Annex

## Timeline for the evolution of Responsibility to Protect 1990-2009

- 1990s** A renewed debate on ‘humanitarian intervention’.
- 1991** End of the Cold War (December).
- 1994** UNDP *Human Development Report* - ‘human security’ (March).
- 1994** Genocide in Rwanda (April-July).
- 1995** Genocide in Srebrenica (July).
- 1996** Francis Deng et al - ‘sovereignty as responsibility’ (June).
- 1999** Intervention in Kosovo (February-June).
- 1999** Kofi Annan’s appeal in the General Assembly (September).
- 1999** Kosovo report - ‘legal or legitimate intervention’ (October).
- 2000** Kofi Annan reiterating his appeal in the Millennium Report (March).
- 2001** ICISS report - ‘Responsibility to protect’ (December).
- 2003** Intervention in Iraq (March-May).
- 2004** Report of the High-level Panel on Threats, Challenges and Change  
*A more secure world: Our shared responsibility* A/59/565 (December).
- 2005** SG report - *In larger freedom* A/59/2005 (March).
- 2005** World Summit Outcome A/RES/60/1 (October).
- 2006** Security Council - ‘protection of civilians in armed conflict’ SCR 1674 (April).
- 2006** Security Council on the situation in Sudan SCR 1706 (August).
- 2009** SG report - *Implementing the Responsibility to Protect* A/63/677 (January).
- 2009** GA resolution - *The Responsibility to Protect* A/RES/63/308 (October).

# The ICISS Report on the Responsibility to Protect 2001

---

## SYNOPSIS

---

### THE RESPONSIBILITY TO PROTECT: CORE PRINCIPLES

#### (1) BASIC PRINCIPLES

- A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
- B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

#### (2) FOUNDATIONS

The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in:

- A. obligations inherent in the concept of sovereignty;
- B. the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security;
- C. specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
- D. the developing practice of states, regional organizations and the Security Council itself.

#### (3) ELEMENTS

The responsibility to protect embraces three specific responsibilities:

- A. **The responsibility to prevent:** to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
- B. **The responsibility to react:** to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
- C. **The responsibility to rebuild:** to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

#### (4) PRIORITIES

- A. **Prevention is the single most important dimension of the responsibility to protect:** prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.
- B. The exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.

## **World Summit Outcome 2005 Articles 138-140**

### **Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity**

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.

# References

## Treaties

Treaty of Westphalia, 1648.

Montevideo Convention on the Rights and Duties of States, 1933.

Charter of the United Nations, 1945.

Statute of the International Court of Justice (Part of the Charter), 1945.

Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

Draft Declaration on Rights and Duties of States, with commentaries, 1949.

Vienna Convention on the Law of Treaties, 1969.

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, A/RES/25/2625, 1970.

Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001.

World Summit Outcome, A/RES/60/1, 15 September 2005.

The responsibility to protect, A/RES/63/308, 7 October 2009.

## Table of Cases

### Permanent Court of International Justice

The Case of the S.S. Lotus, PCIJ, 1927.

### International Court of Justice

Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment, 1949.

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951.

North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969.

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, ICJ Reports 1970.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986.

East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996.



Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, ICJ Reports 1996.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004.

Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006.

## UN Documents

Report of the Secretary-General on the work of the Organization, A/46/1, 13 September 1991.

Secretary-General presents his annual report to the General Assembly, press release SG/SM/7136 GA/9596, 20 September, 1999.

Report of the Secretary-General on the work of the Organization, A/54/1, 20 September 1999.

We the Peoples - the Role of the United Nations in the 21<sup>st</sup> Century, The Millennium Report, March 2000.

High Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility* (The United Nations, 2004).

Annan, Kofi, *In Larger Freedom: Towards Development, Security and Human Rights for All, 2005* (United Nations A/59/565).

2005 World Summit Outcome (UN A/RES/60/1, 24 October 2005).

Report of the Secretary General - Implementing the Responsibility to Protect (A/63/677, 12 January 2009).

## Reports

International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001.

The Kosovo Report, The Independent International Commission on Kosovo, Oxford University Press, New York, 2000.

## Literature

Deng, Francis, et al, *Sovereignty as Responsibility: Conflict Management in Africa*, 1996.

Amnéus, Diana, *The Responsibility to Protect by Military Means - Emerging Norms on Humanitarian Intervention?*, Department of Law, Stockholm university, Stockholm, 2008.

Evans, Gareth, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, Brookings Institution P, Washington, D.C., 2008.

Bellamy, Alex J., *Responsibility to Protect: The Global Effort to End Mass Atrocities*, Polity Press, Cambridge, 2009.

Evans, Malcolm D. (ed), *International law*, 3rd ed, Oxford University Press, Oxford, 2010.

Simma, Bruno (ed.), *The Charter of the United Nations - A Commentary*, 2nd ed, Oxford University Press, Oxford, 2002.

Glanville, Luke, *Sovereignty and the Responsibility to Protect - A New History*, The University of Chicago Press, Chicago, 2014.

## Articles

Gross, Leo, 'The Peace of Westphalia', *American Journal of International Law*, Vol. 42, Issue 1, January 1948, pp 20-41.

Boutros-Ghali, Boutros, 'Empowering the United Nations', *Foreign Affairs* 71 (5), 1992–93, pp. 89–102.

Annan, Kofi, 'Two Concepts of Sovereignty', *The Economist*, 18 September, 1999.

Osiander, Andreas, 'Sovereignty, International Relations, and the Westphalian Myth', *International Organization*, Vol. 55, No. 2, 2001, pp. 251-287.

Deng, Francis M., 'Idealism and Realism - Negotiating sovereignty in divided nations', *The 2010 Dag Hammarskjöld Lecture*, 2010.

Deng, Francis M., 'From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'', *Global Responsibility to Protect*, Vol. 2, No. 4, 2010, 353-370.

Glanville, Luke, 'The International Community's Responsibility to Protect', *Global Responsibility to Protect*, Vol. 2, No. 3, 2010, 287-306.

Stahn, Carsten, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *American Journal of International Law* vol. 101, nr. 1, s. 99-120, 2007.