I. Introduction

How best to articulate and promote collective concerns of the global community in a decentralized legal order that has grown around the rights and obligations of sovereign States? States’ sovereign equality and autonomy must be preserved, but sometimes sovereignty must be limited if collective concerns are to be addressed. Yet, how to ensure that such concerns are genuinely collective, and that they are not abused by powerful States precisely to undermine the sovereign equality and autonomy of weaker States? International law continues to struggle with these fundamental questions. Perhaps by professional disposition, international lawyers have tended to be optimistic about law’s potential to mediate effectively between sovereign and collective concerns. In the 1960s, Wolfgang Friedmann famously observed that an emerging international law of cooperation had begun to significantly modify the classical law of co-existence of States. 1 Three decades later, Bruno Simma traced the shifts in international law from bilateralism to community interest. 2 More recently, Ellen Hey posited the emergence of an “international public law”, through which “common-interest


2 See B. Simma, “From Bilateralism to Community Interest in International Law”, (1994 VI) 250 Rdc 217.
normative patterns” are woven across the traditional “inter-state normative patterns”.3

This chapter explores the remarkable rise of the responsibility to protect vulnerable populations from grave human rights abuses. In brief, while States are first and foremost responsible for the protection of their own populations, an international responsibility to step in arises when individual States are unwilling or unable to meet their protective duties. The idea that animates the norm is that extreme human rights abuses are no longer within the sovereign domain, but are matters of international concern. Therefore, the concept implicates an array of crucial, but also highly sensitive matters: the fundamental rights of human beings, State sovereignty, the principle of non-intervention, and the rules on international use of force. Perhaps surprisingly, given that the responsibility to protect norm has the potential to reshape foundational elements of the international legal order,4 it was unanimously adopted in the United Nation’s 2005 World Summit Outcome document.5

It is too early to predict whether or not the responsibility to protect norm will live up to its transformative potential.6 But it is timely to reflect on its rise to prominence and to assess its legal characteristics. Because the norm is so intimately linked to the controversy surrounding humanitarian intervention, it has been embroiled in the debates about the legality of individual or collective recourse to military force. Its potentially significant impact in that particular context has rightly attracted close attention in governmental and scholarly circles. This chapter, however, places the responsibility to protect in a wider legal context. The discussion begins with a brief review of the concepts of jus cogens and norms erga omnes, and of the law of State responsibility as it pertains to these collective interest categories. Against this backdrop, it then traces the emergence of the responsibility to protect and examines its key features. It suggests that, when the elements of the norm are mapped onto the general structure of international law, its trajectory can be understood as part of a broader, albeit still fragile, normative evolution towards a better balance between sovereignty and collective concerns.

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5 UNGA, 2005 World Summit Outcome, UN Doc. A/RES/60/1 (24 October 2005) [hereinafter 2005 Outcome].
II. Collective Concerns and the General Structure of International Law

One of the ways in which the collective concerns of States, or of the global community, have come to be embedded in the general structure of international law is through the concepts of *jus cogens* and norms *erga omnes*. Yet, if the interests protected by these norms are not merely those of individual States but are collective interests of all States, what are the legal implications? Most notably, under what circumstances, and through what means should States be able to demand compliance with collective interest norms or hold violators responsible for breaches?

1. *Jus Cogens* and *Norms Erga Omnes*

There is general agreement on the existence of a category of peremptory norms, also referred to as *jus cogens*, from which no derogation is permissible. Individual States cannot exempt themselves from these norms or make contradictory treaty arrangements. The modification of such norms, like their initial creation, is a matter for “the international community of States as a whole”. However, notwithstanding the acceptance of the existence of a category of peremptory norms, it is difficult to say which norms are encompassed. To date, the International Court of Justice (ICJ) has been exceedingly cautious in its approach to peremptory norms and has confirmed the *jus cogens* status of only one norm, the prohibition of genocide.

The categories of *jus cogens* and *erga omnes* norms overlap to a significant extent, but whereas the former focuses “on the scope and priority to be given to a certain number of fundamental obligations”, the latter is concerned with “the
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legal interest of all States in compliance”. Since the obiter dictum of the ICJ in the 1970 Barcelona Traction case it is has come to be accepted that States owe certain obligations to “the international community as a whole”. These obligations, “by their very nature ... are the concern of all States” and “all States can be held to have a legal interest in their protection”. Over the years, the ICJ has deemed the prohibition of genocide,12 the “principles and rules concerning the basic rights of the human person”,13 and the right of peoples to self-determination to have erga omnes effect. Generally, as with jus cogens, it remains difficult to identify erga omnes norms with certainty.15

2. The Law of State Responsibility

The most authoritative and comprehensive articulation of the law of State responsibility is found in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles), completed by the International Law Commission (ILC) after decades of work on the topic. The work of the ILC was complicated not least by the search for an appropriate approach to collective interest norms. In this area, given the continuing debates on which norms have jus cogens character or erga omnes effects, and given the scarcity of relevant State practice, the Draft Articles had to tread carefully between codification of international law and progressive development.

Whether the relevant obligation is owed to an individual State, to several States, or to the international community as a whole, the Draft Articles make clear that the legal consequences of a breach for the responsible State are the

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12 Most recently in Armed Activities case, supra, note 9.
13 Barcelona Traction case, supra, note 11, at 32, para. 34.
14 East Timor (Portugal v. Australia), ICJ Reports 1995, 90, at 102, para. 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 139, at 172, para. 88, and at 199 para. 155 (concluding also that “certain of its obligations under international humanitarian law” have erga omnes effect) [hereinafter Wall case].
15 For detailed assessments, see e.g. M. Ragazzi, The Concept of International Obligations Erga Omnes (Oxford: Clarendon Press, 1997); C.J. Tams, Enforcing Obligations Erga Omnes in International Law (Cambridge: Cambridge University Press, 2005), Ch. 4.
same.\textsuperscript{17} It must cease the violation,\textsuperscript{18} must offer necessary assurances of non-repetition,\textsuperscript{19} and must make full reparation for the injury caused.\textsuperscript{20} However, for all other matters – the invocation of responsibility by other States, the remedies available, and the countermeasures they may take to induce the responsible State’s compliance – the collective interest question looms large.

The distinction between injured and non-injured States is at the core of the ILC’s effort to strike a delicate balance between the need to anchor the Draft Articles in the bilateralist practice of States and the desire to allow for a maturing of international law’s collective interest traits.\textsuperscript{21} The ILC also sought to mediate between concerns that a wider conception of injury might expose States to excessive claims for violations of collective interests, and the desire to ensure that violations of norms that protect important collective interests are accorded appropriate significance in the responsibility regime.\textsuperscript{22} In the resulting regime, a State has standing to invoke another’s responsibility as an “injured” State for the breach of an obligation that was owed to it individually.\textsuperscript{23} Injury can also result from the breach of an obligation owed to a group of States of which it is part (obligations \textit{erga omnes partes}), or owed to the international community (obligations \textit{erga omnes}), but only when a State is specially affected by the breach or the breach radically changes the position of the States to which the obligation is owed.\textsuperscript{24} By contrast, when a violation affects only a State’s legal interest in the upholding of collective concern obligations, it must invoke another’s responsibility as a non-injured State, with attendant limitations upon what it can claim from the responsible State and what measures it can take to ensure compliance.\textsuperscript{25}

Non-injured States may only claim cessation of the breach and assurances of non-repetition.\textsuperscript{26} In addition, they may claim reparation “in the interest of

\begin{thebibliography}{99}
\bibitem{17} Ibid. article 33(1).
\bibitem{18} Ibid. article 30(a).
\bibitem{19} Ibid. article 30(b).
\bibitem{20} Ibid. article 31. Reparation encompasses restitution (the re-establishment of the situation that existed prior to the act), compensation for damage, and satisfaction. See ibid. articles 34-37.
\bibitem{23} ILC Draft Articles, supra, note 16, article 42(a).
\bibitem{24} Ibid. article 42(b).
\bibitem{25} Ibid. articles 48, 54.
\bibitem{26} Ibid. article 48(2)(a).
\end{thebibliography}
the injured State or of the beneficiaries of the obligation breached”. The latter option is noteworthy insofar as it is intended to “provide a means of protecting the community or collective interest at stake”. The separate reference to “beneficiaries of the obligation” implies the possibility of claims for reparation on behalf of non-nationals, for example for violations of their human rights. However, the ILC acknowledges that these collective interest remedies involve “a measure of progressive development”. The uncertainty regarding such claims underscores the importance of the fact that the responsible State is under an independent duty to cease the violation and to make reparation for damage, including damage suffered by non-State actors whose rights were violated.

The ILC’s efforts to strengthen the collective interest elements of the State responsibility regime are also visible in the Draft Articles’ treatment of “serious breaches” of peremptory norms of international law. Absent State practice on punitive or otherwise elevated legal consequences of a *jus cogens* violation for the responsible State, the Draft Articles confine themselves to declaring the ordinary consequences of a breach of international law to be applicable. However, the Articles do sketch out special obligations for other States in the face of such violations. Third States must cooperate to end a serious breach through lawful means, and they may not recognize a situation created by a serious breach or assist in maintaining that situation.

As noted earlier, it is difficult to identify State practice that explicitly relies upon the peremptory character of legal norms and the ICJ, while it has on several occasions invoked the *erga omnes* effect of certain norms, has until very recently avoided pronouncing itself on peremptory norms. Interestingly, in

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28 *ILC Commentary, supra,* note 10, at 323.
30 In other words, these secondary obligations are not contingent upon invocation of a State’s responsibility by another. For example, in its Advisory Opinion in the *Wall* case, the ICJ concluded that Israel had violated the right of the Palestinian people to self-determination. It held that Israel not only had an obligation to end the violation but also to make reparation for the damage caused, either by “returning the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory”, or by compensating “all natural or legal persons having suffered any form of material damage as a result of the wall’s construction”. See the *Wall case,* supra, note 14, paras 122, 150-153.
31 *ILC Draft Articles, supra,* note 16, articles 40 & 41. A serious violation “involves a gross or systematic” breach. See *ibid.* article 40(2).
33 *Ibid.* article 41(1) & (2).
34 The 2006 decision on its jurisdiction over the *Armed Activities* case, supra, note 9, marked the first time that the Court as a whole affirmed the *jus cogens* character of a norm.
its Advisory Opinion in the case on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court concluded that “all States are under an obligation not to recognize the illegal situation”, “not to render aid or assistance in maintaining the situation created” by the construction of the wall, and “to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end”. These third State obligations echo the legal consequences that the Draft Articles attach to breaches of peremptory norms. However, the ICJ instead tied these consequences to the *erga omnes* nature of the right to self-determination, an approach for which it was criticized by some of its members. As for the Draft Articles, the ILC acknowledged that the stipulation of a duty to cooperate to counteract serious violations of peremptory norms may reach beyond what “general international law at present prescribes”. The Commission’s goal was “to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response” to serious breaches of peremptory norms. The reactions from government and scholarly circles have been mixed.

The Draft Articles’ approach to countermeasures also builds on the distinction between injured and non-injured States, and only the former may take such measures. According to the ILC, countermeasures violate the obligations owed by the injured State to the responsible State; their wrongfulness is precluded only by the fact that they respond to a prior violation by the responsible State. Of course, countermeasures may not involve the violation of the prohibition on the threat or use of force, fundamental human rights obligations, or other obligations of peremptory character. Under the Draft Articles, the purpose of countermeasures is not to punish violations of international law but to induce

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35 *Wall* case, supra, note 14, para. 159.
37 See Separate Opinion of Judge Higgins, *Wall* case, *ibid.* para. 37 (noting that she did not “think that the specified consequence [sic] of the identified violations of international law have anything to do with the concept of *erga omnes*”); Separate Opinion of Judge Kooijmans, *Wall* case, *ibid.* para. 40 (admitting “considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States”).
38 ILC Commentary, supra, note 10, at 287.
41 ILC Draft Articles, supra, note 16, article 49.
42 *Ibid.* article 22; see also ILC Commentary, supra, note 10, at 324.
43 ILC Draft Articles, supra, note 16, article 50(1).
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the responsible State to comply with the secondary obligations (i.e. cessation, non-repetition, and reparation) that flow from its internationally wrongful act.\textsuperscript{44} When the responsible State fails to comply, countermeasures bring an element of enforcement into the State responsibility regime.\textsuperscript{45}

The countermeasures regime operates against the background of a largely decentralized legal system, where self-help may be the only available means of enforcement.\textsuperscript{46} Yet, their purpose to induce compliance with secondary obligations also entails limitations on the self-help options available to an injured State. Most notably, once the responsible State has complied with its obligations, countermeasures must be terminated.\textsuperscript{47} Thus, countermeasures must by definition be temporary and reversible,\textsuperscript{48} and they must be “commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question”.\textsuperscript{49} These features of the countermeasures regime are part of the Draft Articles’ effort to balance the need for self-help against the risk of abuse and escalation of countermeasures.\textsuperscript{50}

Along with the unsettled practice of States, concerns about abuse also help explain the Draft Articles’ even more cautious approach to self-help in the face of violations of collective or community obligations. Rather than a rule that purports to govern response action by non-injured States, the Draft Articles provide merely a savings clause. Article 54 stipulates that the provisions on countermeasures do “not prejudice the right of any State, entitled under Article 48, paragraph 1, to invoke the responsibility of another State” and “to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached”.\textsuperscript{51}

Article 54, then, builds on the tentative attempt in article 48 to provide a remedy for violations of collective or community obligations. But just as the existence in international law of a non-injured State’s right to seek a remedy on behalf of another State or the beneficiaries of the obligation is uncertain, so is the existence of a right of non-injured States to take countermeasures.\textsuperscript{52} The

\textsuperscript{44} Ibid. article 49(1).

\textsuperscript{45} Note that resort to countermeasures must be preceded not only by a prior appeal to the responsible State for compliance, but also its prior notification of pending countermeasures and an offer to negotiate. See ibid. article 52(1).

\textsuperscript{46} ILC Commentary, supra, note 10, at 324.

\textsuperscript{47} ILC Draft Articles, supra, note 16, article 53.

\textsuperscript{48} Ibid. articles 49 (2) & (3), 53.

\textsuperscript{49} Ibid. article 51.

\textsuperscript{50} See generally, ILC Commentary, supra, note 10, at 324-328.

\textsuperscript{51} ILC Draft Articles, supra, note 16, article 54.

\textsuperscript{52} See ILC Commentary, supra, note 10, at 355 (observing that “there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the
opinions of States and academic observers alike remain divided. For some the very importance of the collective interests at issue demands that States be able to induce compliance through countermeasures. 53 For others, the fact that it is individual States that would decide whether or not to take countermeasures, combined with the inequalities among States, raise the specter of abuse and even “vigilantism” by powerful States. 54 The ILC concluded that it was premature to permit non-injured States to take countermeasures in response to violations of collective interests. Since “practice is sparse and involves a limited number of States”, it opted for a provision that “reserves the position and leaves the resolution of the matter to the further development international law”. 55

III. The Responsibility to Protect

1. Evolution of the Concept

The surprisingly rapid evolution of the concept of responsibility to protect over the last fifteen years or so was driven in large part by grave human rights crises within certain countries, and by the failure of the world community to intervene to prevent further atrocities from being perpetrated upon civilian populations. The Rwandan genocide encapsulates this failure, 56 but it is not a unique case, as the horrors of Cambodia, Zaire/Congo, Liberia, Sierra Leone and, most recently, Darfur attest. The immediate impetus for concerted efforts to elaborate the concept of responsibility to protect was provided by the NATO intervention in Kosovo in 1999. Kosovo raised again the fundamental questions whether or not a norm of humanitarian intervention existed and, if so, who could invoke it, only the Security Council or individual States? 57 In justifying the intervention, most of the NATO States (with the exception of Belgium) side-stepped these thorny issues and refused to posit any general norm of humanitarian intervention. Instead, the NATO partners argued a “moral duty” to act, or a “necessity” to act. 58
Shortly after Kosovo, Canada, one of the participants in the NATO intervention, promoted the creation of an independent International Commission on Intervention and State Sovereignty (ICISS).\(^59\) In its articulation of the responsibility to protect,\(^60\) the ICISS sought to transcend the intractable debates surrounding rights to humanitarian intervention.\(^61\) The responsibility to protect was not about rights at all, but about duties. The primary duty holder was the sovereign State, which should offer security and protection to its own citizens. The report emphasized the overriding importance of a wide spectrum of proactive measures and assistance to local governments in discharging their responsibility to protect, as well as the importance of non-military forms of pressure.\(^62\) But it also offered a set of carefully crafted threshold criteria for recourse to collective military action where there was “serious and irreparable harm occurring to human beings, or imminently likely to occur”. The triggering events were “large scale loss of life ... with genocidal intent or not, which [was] the product either of deliberate State action, or State neglect, or inability to act, or a failed State situation”, or “large scale ethnic cleansing”.\(^63\) In cases where a State failed in its protective obligation, or where it was the perpetrator of massive human rights violations, collective military action could be authorized internationally to protect victims within a sovereign State.\(^64\)


\(^{60}\) Of course, the idea of a responsibility to protect can be traced further back. See e.g., O. Corten and P. Klein, *Droit d’ingérence ou obligation de réaction? Les possibilités d’action visant à assurer le respect des droits de la personne face au principe de non-intervention* (Brussels: Bruylant, 1992). Then UN Secretary-General Perez de Cuellar asserted already in 1991 that sovereignty could not be a shield behind which human rights could be systematically violated. He argued that there was a “collective obligation of States to bring relief and redress in human rights emergencies”. He added that any international protective action had to be taken in accordance with the UN Charter and could not be unilateral. United Nations Secretary-General, *Report of the Secretary-General on the work of the Organization*, UN GAOR, 46th Sess., Supp. No. 1; UN Doc. A/46/1 (6 September 1991).


\(^{62}\) ICISS, supra, note 59, at 19-31.

\(^{63}\) Ibid. at XII, and 32.

\(^{64}\) ICISS envisaged that this authorization should be sought first through the Security Council, and in case of an inability or refusal to act, through a revitalization of the “Uniting for Peace” resolution of the General Assembly or through a reference to a regional organization. See ICISS, *ibid.* at XII-XIII, and 47-51.
a “just cause threshold”, a set of “precautionary principles”, and criteria for “right authority”.  

The ICISS report was released shortly after the attacks of September 11th, 2001. The sensitivity of its recommendations was further increased by the intervention in Iraq, led by the United States and Britain without authorization by the Security Council. By November 2003, the worry over the “lack of agreement amongst Member States on the proper role of the United Nations in providing collective security” prompted the UN Secretary-General to create the High-level Panel on Threats, Challenges and Change. The panel’s report was published in December 2004. With respect to the use of force for the protection of people, the report drew extensively on the ICISS recommendations. The panel specifically endorsed “the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort”. The High-level Panel’s invocation of triggering events for collective military action was similar to that of ICISS: “genocide and other large scale killing, ethnic cleansing or serious violation of international humanitarian law”. In addition, the panel emphasized that guidelines on the use of force could “maximize the possibility of achieving Security Council consensus” and “minimize the possibility of individual Member States bypassing the Security Council”. 

In his response to the High-level Panel report, the Secretary-General highlighted the question whether States have the right, or even obligation, to use force protectively to rescue citizens from genocide or comparable crimes against humanity. This move from a list of grave human rights violations to the concept of international crime as the trigger for action represented a crucial shift in emphasis. Another shift was equally important. Whereas both ICISS and the High-level Panel had left open the possibility for unilateral action in a case where

68 HLP Report, ibid. at para. 203.
69 Ibid. arguably the reference to “serious violations of international humanitarian law” widened the scope of triggering events for intervention that ICISS had envisaged.
70 Ibid. at para. 206.
71 In Larger Freedom, supra, note 66, at paras 122 and 125.
The concept of the responsibility to protect survived the difficult negotiations that preceded the adoption of the 2005 World Summit Outcome document, but a number of further shifts in emphasis occurred. The document describes the responsibility to protect as primarily a responsibility of individual States to protect their own populations. In addition, the link to international crimes is solidified. States are only called upon to protect their populations from “genocide, war crimes, ethnic cleansing and crimes against humanity”.74 A role is posited for international society, but this role is first to “encourage and help States” to exercise their responsibility to protect their own people, and secondly to “use appropriate diplomatic, humanitarian and other peaceful means...to help protect populations”.75 The Security Council is authorized to take collective protection action under Chapter VII of the UN Charter on a “case by case basis” and “should peaceful means be inadequate and national authorities manifestly fail to protect their populations” from the listed international crimes.76 The member States did not take up the earlier recommendations to develop more specific criteria for military intervention.77 The document contains only a charge to the General Assembly to “continue consideration of the responsibility to protect ... and its implications, bearing in mind the principles of the Charter and international law”.78

Nonetheless, given the history of debates around humanitarian intervention and the potential implications of the concept of responsibility to protect for State sovereignty and the principle of non-intervention, its inclusion in the summit’s Outcome document is remarkable. The norm, which has now been at least formally endorsed, represents fundamental challenges to the conceptual structures that have long underpinned international law and politics. Granted, these challenges are not entirely unprecedented. Since the creation of the United Nations, steady
efforts have been made to shrink the sovereign domain and to recognize the imperatives of collective action. But the responsibility to protect could well be of a different order. It posits a generalized set of interlocking obligations owed to States and to persons. It represents not simply a carving out of specialized regimes through treaty commitments, but could prompt what Anne-Marie Slaughter has called a “tectonic shift” in the very definition of sovereignty.79 To illustrate, if the idea of the responsibility to protect is taken seriously, Sudan owes obligations of protection to its own people. But Sudan is also accountable to other States if it fails to protect its people. Importantly, third parties are not merely entitled to invoke Sudan’s responsibility: they also have a responsibility of their own to intervene, whether collectively or unilaterally remains uncertain.

Given the potential impact on sovereignty, it is not surprising that, in agreeing to its inclusion in the Outcome document, many States sought to limit the potential impact of the responsibility to protect, especially in comparison to the way it had been cast by ICISS. As noted, for ICISS, the responsibility to protect encompassed a broad spectrum of measures focused upon the prevention of humanitarian crises. It created a clear “responsibility continuum” that comprised action to prevent, to react, and to rebuild.80 The use of force was a final step, taken only in extremis. Although the Outcome document retains some flavour of prevention, its language in this respect is extremely cautious. There are only general statements that the “international community should … encourage and help States to exercise [their] responsibility”, “support the United Nations in establishing an early warning capability”, “use … peaceful means … under Chapters VI and VIII … to help protect populations”, and to help “States build capacity to protect their populations”.81 Presumably, the move away from early warning and prevention was designed to assuage the concerns of many developing countries that the responsibility to protect could lead to an overly active and interventionist United Nations or even to interventions by individual States without Security Council approval.82 Article 2(7) of the UN Charter limits any intervention in the internal affairs of member States to “enforcement measures under Chapter VII”. Certain States likely recognized that there was no turning back from the idea of intervention as set out in Chapter VII, but they wanted to contain further possibilities for outside intervention.

79 Slaughter, supra, note 4, at 627.
81 2005 Outcome, supra, note 5, paras 138-139.
Many of the same States seem to have negotiated other limitations on the concept of the responsibility to protect as well. As indicated above, the key limitation is that all responsibilities are triggered only in relation to international crimes.83 This limitation has at least three significant implications. First, while great emphasis is placed upon the primary responsibility of individual States to protect their populations, this responsibility applies only to the limited class of international crimes, though it must be added that here “protection” includes prevention.84 Second, the possibility for collective intervention also exists only in the relatively narrow circumstances of international crime. This effect was probably intended, at least from the perspective of developing States, to prevent a resurrection of the “civilizing mission” of 19th century international law.85 Third, if the duty of potential intervenors to act is limited to cases of “international crime”, it is left open whether there is any duty to act collectively in situations where massive human rights violations do not reach that threshold. It is worth remembering that the ICISS proposal had described the triggering events for military intervention to be “serious and irreparable harm” involving “large scale loss of life, actual or apprehended, with genocidal intent or not”, or “large scale ethnic cleansing, actual or apprehended”. Not only does the Outcome document limit the trigger to international crimes, but it also requires the actual commission of the crimes, not the threat.86

2. The Responsibility to Protect and the Law of State Responsibility

The concept of the responsibility to protect attempts to strike a delicate balance between two potentially competing collective concerns: maintaining strict limits on the use of military force and protecting human rights against grave of

83 In the Outcome document responsibility is linked to “genocide, war crimes, ethnic cleansing and crimes against humanity”. Although “ethnic cleansing” is not established as a distinct international crime, it is arguably included in the concepts of “genocide”, “extermination”, “deportation or forcible transfer of population” and “enforced disappearance” as set out inter alia in articles 6 and 7 of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998). Depending upon factual circumstances, it might also be a “war crime”.

84 Of course, States are also subject to other human rights obligations derived from custom and treaty, but these obligations do not explicitly give rise to a potential collective obligation to protect.


86 See 2005 Outcome, supra, note 5, at para. 139 (providing that collective action under Chapter VII can follow only after “national authorities manifestly fail to protect their populations” from the listed crimes). This shift from the possibility of preventive military intervention to reactive intervention had already taken place in the Report of the High-level Panel. See HLP Report, supra, note 67, at para. 203.
abuses. In turn, both of these concerns must be balanced against the protection of State sovereignty from undue external intervention, military or otherwise. As noted at the outset, the potential impact of the responsibility to protect on the rules governing the international use of force has garnered significant attention, and rightly so. But, to fully appreciate the balance struck by the concept, an analysis against the backdrop of the categories of *jus cogens* and norms *erga omnes* and of the attendant rules of State responsibility is equally important. It reveals the extent to which the responsibility to protect, at least as articulated in the 2005 *Outcome* document, maps onto these general legal structures. This fact is important for at least two reasons. First, and leaving aside the use of force dimension for a moment, to the extent that the responsibility to protect focuses on firmly entrenched collective concerns, its encroachment on State sovereignty is revealed to be not novel but actually solidly grounded in international law. It is significant, therefore, that in limiting the responsibility to protect to “genocide, war crimes, ethnic cleansing and crimes against humanity”, the *Outcome* document tied it not only to international crimes, but also to norms that, arguably, have both *erga omnes* effect and *jus cogens* status. Second, to the extent that the responsibility to protect tracks the consequences that the law of State responsibility attaches to breaches of *erga omnes* norms or *jus cogens*, it should be strengthened by the fact that it is merely a specific articulation of general precepts of international law.

Specifically, by virtue of their *erga omnes* effect, States already owe the human rights obligations underlying the responsibility to protect not only to persons under their jurisdiction, but also to all States. By the same token, all States already have a legal interest in the protection of individual States’ populations against these grave human rights abuses. In the face of such abuses, all States could invoke the responsibility of the perpetrating State, could demand that the abuses stop, and, possibly, could demand that victims be compensated. If the State perpetrating the abuses refuses to comply, all States are further entitled to take “lawful measures” to compel compliance. General international law underscores, then, that third States’ preoccupation with extreme human rights abuses within an individual State are not unwarranted interventions in that State’s affairs, but legitimate pursuit of established collective legal interests. The responsibility to protect merely builds upon the balance already struck by international law through the concept of *erga omnes* effect. In turn, in doing so, it reinforces the foundation of primary norms with *erga omnes* effect upon which the operation of the attendant State responsibility rules depends. Further, to the extent that third States pursue the responsibility to protect by seeking the remedies that the Draft Articles make available to non-injured States or by taking “lawful measures” to induce compliance, those secondary rules that are not currently based upon clear State practice might be solidified.
I. International Law: Rules and Principles

What, then, of the seemingly greatest innovation of the responsibility to protect, the idea that third States not only have legal interests but legal responsibilities as well? A closer look reveals that here too the responsibility to protect against “genocide, war crimes, ethnic cleansing and crimes against humanity” rests on the foundations of the law of State responsibility. In the case of jus cogens violations, the Draft Articles insist that States are not merely entitled to demand that they stop but are under an obligation to cooperate to bring them to an end. The responsibility to protect concept makes explicit what international law, arguably, already requires. That said, given the ambiguities surrounding the legal consequences of jus cogens and norms erga omnes, this articulation is still an important development. Taken together, the law of State responsibility and the concept of the responsibility to protect send a clear message: no State may stand idly by when genocide, war crimes, or crimes against humanity are being perpetrated. The law of State responsibility underscores that third States are not merely under a moral responsibility to protect; each State has a legal obligation to participate in protective efforts. To the extent that the responsibility to protect can mobilize State practice, a side-effect would once again be to strengthen the secondary rules set out in the Draft Articles on the basis of so far scant precedent.

As we have seen, the Draft Articles are careful in sketching out the measures that individual States can take in the name of collective concern, especially as far as the use of force is concerned. Here, the concept of responsibility to protect clarifies that, in cases of extreme crisis, the duty to cooperate to bring an end to grave human rights abuses does extend to military measures. All indications are that these measures must be taken collectively and under the authority of the Security Council. This result would be in keeping both with the overarching importance of limits on international use of force and with the more general effort of the Draft Articles to contain the legal space for individual State’s enforcement of community interest. With respect to the authorization of the use of force by the Security Council, it remains to be seen whether the responsibility to protect as articulated in the Outcome document marks progress or not.87 It might be argued, on the one hand, that the responsibility to protect brings progress in so far as it suggests that the States members of the Council have an obligation to cooperate to enable necessary collective measures. On the other hand, the State responsibility lens necessarily implies a reactive stance. Thus, to the extent that the articulation of the responsibility to protect in the Outcome document purports to limit the protective intervention option to situations in which international crimes have been committed, the impact on the Council’s scope for interventions to prevent extreme humanitarian crisis under Chapter VII is unclear. One might say that this limitation was the price for a

87 See the questions raised by Wheeler, supra, note 6.
measure of clarity that reliance on a fixed category of relatively well established international crimes would introduce. But definitional debates may simply be displaced to the next level. The requirement that an international crime has already taken place necessitates a legal assessment, which is likely to generate a heated and protracted debate that could actually delay response. In the case of genocide, one of the triggering crimes, we already know that disagreements over the question whether the facts fit the definition have stymied action on a number of occasions. If the ongoing crisis in Darfur and the lack of effective international response are any indication, so far neither perpetrating States nor the often invoked international community are living up to the responsibility that they so solemnly acknowledged in the Outcome document.

IV. Conclusion

The inclusion of the responsibility to protect in the Outcome document of the 2005 UN Summit has been heralded as a major breakthrough. Indeed, given the fundamental challenge to sovereignty contained in the notion of a responsibility to protect, it is difficult to dismiss the Summit’s endorsement of the concept as mere “cheap talk”.88 The stakes were too high. The efforts to modify and limit the concept through its various iterations suggest that many States believe that the responsibility to protect actually means something – or at least that it could mean something if they are not careful to limit the concept now. Perhaps ironically, by focusing the concept on a narrow category of international crimes and casting it largely as a matter of responses to breaches of international law, the drafters of the Outcome document may have given the responsibility to protect more potential meaning than they imagined. Arguably, the narrowing of the concept’s ambit to violations of jus cogens, and thus to firmly entrenched and non-derogable norms, should strengthen the concept, making it harder for States, whether perpetrators or bystanders, to evade their responsibilities. But that is not all. If the concept does shift debate and mobilize action, it might also help fill the categories of jus cogens and norms erga omnes, as well as the attendant State responsibility rules, with meaning. The flipside of all this positive potential, however, is considerable normative risk. For if it fails to affect State conduct, we must ask ourselves not only what the noble idea of the responsibility to protect is worth, but also how far international law has really come in the wider struggle to give legal weight to collective concerns.

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