

The Counter-Reformation of the Security Council

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In September 2003, United Nations Secretary General Kofi Annan launched a major initiative toward reforming the United Nations.¹ A central focus of the initiative was Security Council reform, encompassing both the Council's structure and the principles under which it operates. By October 2005, the most recent attempt to reform the Security Council appeared to be over and many concluded with no results. But there were results, and possibly more important results than simply adding more seats to the Council. One result of the months of reports, proposals and talks, is that the United Nations Charter principles regulating the use of force have been saved from destruction. The Secretary General, his experts, and the vast majority of UN members have endorsed a return to orthodoxy. They have renewed their commitment to banning the use of force except in self-defense to an armed attack or with the authorization of the Security Council. The reform process has also highlighted the need for the Council to respect international legal principles when it does authorize force. These results should translate into greater caution by the Council, and, as I will argue below, better protection of human rights. Finally, re-committing to the Charter is a start toward repairing the damage to the international legal system generally wrought by the 1999 Kosovo intervention and the 2003 Iraq invasion.

One notable heretic remains. The United States may have come away from the reform debate with an even stronger sense of its own exceptionalism. The United States continues to assert the right to interpret the Charter as it sees fit. According to the *San Francisco Chronicle*, the United States refused to endorse criteria to guide Security Council authorizations of force—criteria mandated by existing international law—because the United States refuses “to give the United Nations a

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¹ See High-level Panel, *Terms of Reference*, online: The United Nations News Service <<http://www.un.org/News/dh/hlpanel/terms-of-reference-re-hl-panel.pdf>>; see also *Annual Report of the Secretary-General on the Work of the Organization*, UN Doc. A/58/1 (2003), online: United Nations <<http://daccessdds.un.org/doc/UNDOC/GEN/N03/476/09/PDF/N0347609.pdf?OpenElement>> [*Annual Report*]; and the High Level Panel's resulting report, *Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, UN GAOR, 59th Sess., Supp. No. 565, UN Doc. A/59 (2004), online: United Nations <<http://www.un.org/secureworld/report.pdf>>.

veto over use of its armed forces.”² The United Nations Charter and general international law, however, do restrict the right of states—all states—to use armed force. The renewal of respect for the Charter through the reform process should make it harder for the United States to argue that it is somehow not bound.

This article examines the 2003-2005 reform initiative relative to the Security Council’s authority over the use of force. It looks at why the reform discussion began, what proposals grew out of the discussion, and the legal situation following the 2005 World Summit. The conclusion here is that the reform process has had positive results for the international legal regulation of the use of force, human rights protection, and international law generally. International law scholars are in a position to build on these results, supporting the revival and renewal of Charter law, explaining what exactly that law requires and why, and attempting to bring the United States back into the fold.

THE REFORM MOVEMENT AND ITS MOTIVATIONS

Discussions about Security Council reform are not new. The end of the Cold War gave rise to a lively and hopeful period when it seemed everyone had a plan for expanding the Security Council and modifying the veto. Much of the 2003-2005 debate has simply revisited that earlier discussion, but there has been something new. The more recent proposals have called for substantive legal changes as well as institutional change.

When the Cold War ended in 1989-1990, the Security Council began a period of activism starting with the successful liberation of Kuwait in 1991 and lasting until 1994. Proposals for reforming the Security Council began to pour in, mostly focused on modifying the veto and increasing the Council’s membership.³ In the early 1990s, it was standard in lectures on the use of force to talk about the role of the Security Council and how the Council could be reformed. In lectures at the George C. Marshall European Centre for Security Studies and at the North Atlantic Treaty Organization (NATO) School, both in Germany, I regularly included the following proposal:

At a minimum, a reformed Security Council should increase in size and representativeness probably to twenty-one, with seven permanent members. The permanent members would be the United States, Russia, and China and a representative from Europe, Africa, Asia, and South America, to be decided as those regions wish. Any permanent member could still veto resolutions,

² “Mend the cracks in U.N.” *The San Francisco Chronicle* (13 September 2005) B6.

³ See e.g., Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Hague: Kluwer Law International, 1998); Razali Ismail, “The United Nations in the 21st Century: Prospects for Reform” (1998) 14 *Med. Confl. Surviv.* 97.

but a veto must be explained and could be overridden by seventeen affirmative votes.⁴

By 1994, with the crises in Somalia, Bosnia, Rwanda, and Haiti, the focus was already off the great new ideas for reforming the Security Council.

The Secretary-General revived the idea of Security Council reform in 2003. He did so apparently out of fear of losing any more U.S. commitment to the UN following two failures by the Security Council to authorize U.S. uses of force. The Secretary-General was also responding to persistent and vehement American accusations of mismanagement and corruption at the United Nations, especially in connection with the Oil for Food Program for Iraq.⁵ The Secretary-General convened a group of prominent individuals to propose reforms:

Seeking to save the United Nations from irrelevance, Secretary-General Kofi Annan will launch plans for “radical reforms” of the world body at the annual opening debate of the General Assembly today.

Since the United States sidestepped the UN to invade Iraq this year, the institution has been looking for a way to recover its global standing. Now, Annan says, the UN must change markedly to revive its legitimacy...

We have come to a fork in the road. This may be a moment, no less decisive than 1945 itself, when the United Nations was founded.⁶

It is not entirely clear why the Secretary-General believed the UN lost legitimacy, when it was the United States and its partners who side-stepped the Security Council. Plus, the United States’ criticism of the UN’s Oil for Food Program ignored the U.S.’s own oversight role on the Council and its active role in enforcing sanctions on Iraq. Surely in the eyes of the vast majority of the world’s citizens, it was the United States, Britain, Australia, and Poland that lost legitimacy when they unlawfully invaded Iraq? And when no weapons of mass destruction were found, we

⁴ See J. Fischer, Minister of Foreign Affairs of the Federal Republic of Germany, “Address” (Address at the 54th Session of the UN General Assembly, 22 September 1999), online: German Embassy <http://www.Germany-info.org/UN/un_state_09_22.htm>, cited in Mary Ellen O’Connell, “The UN, NATO and International Law After Kosovo,” (2000) 22 Hum. Rts. Q. 57 at 87. See also Fassbender, *supra* note 3.

⁵ It is not at all clear that the UN was ever going to lose the United States, which seems to need the UN as much as the UN needs it. See Ian Johnstone, “US-UN Relations after Iraq: The End of the World (Order) as We Know It?” (2004) 15 E.J.I.L. 813.

⁶ Maggie Farley, “Annan to propose overhaul of UN: The Secretary-General envisions expanding the Security Council as part of reforms meant to revive the legitimacy of the world today” *Los Angeles Times* (23 September 2003) A1.

had proof that the embargo had worked to control Saddam's weapons program, if not his lethal greed. The Security Council was vindicated. The Council had refused to authorize what a clear majority of members agreed was an unnecessary war. The multilateral deliberative process reached the correct conclusion, and great tragedy would have been avoided if the four interveners had respected the Council's authority. Yet, the Secretary-General's terms of reference to his panel of experts did not indicate concern about law-violating members of the organization. Rather, he implied that the UN had fallen down:

The aim of the High-Level Panel is to recommend clear and practical measures for ensuring effective collective action, based upon a rigorous analysis of future threats to peace and security, an appraisal of the contribution that collective action can make, and a thorough assessment of existing approaches, instruments and mechanisms, including the principal organs of the United Nations.⁷

REFORM PROPOSALS

The Panel reported back largely in support of the substantive rules of the Charter on the use of force as written. The Secretary General had been concerned about the two major uses of force involving the United States which required Security Council authorization: Kosovo (1999) and Iraq (2003). The United States had spoken of a humanitarian crisis in attempting to justify Kosovo. It tried to justify Iraq by citing Security Council resolutions of 1990-1991 authorizing the liberation of Kuwait and by claiming to act in self-defense—pre-emptive self-defense—to prevent Saddam Hussein from acquiring weapons of mass destruction that could be used against the United States in the future.⁸ The High Level Panel addressed the claims behind both wars: both so-called humanitarian intervention and pre-emptive self-defense.

As to self-defense, the Panel rejected the right to use military force against vague future threats without Security Council authorization. It called for no changes to the text or interpretation of Article 51, the Charter provision on unilateral self-defense.⁹

With regard to humanitarian intervention, it rejected the right of states to use military force for such purposes without Security Council authorization:

⁷ *Terms of Reference*, *supra* note 1; see also *Annual Report*, *supra* note 1.

⁸ See the United States letter to the Security Council reporting on its use of force against Iraq. John Bolton, "Letter from the Permanent Representative of the United States of America to the United Nations, to the President of the Security Council", UN Doc. S/2003/351 (21 March 2003).

⁹ *A More Secure World*, *supra* note 1 at 63.

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 international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.¹⁰

Thus, with respect to both challenges to the Charter posed by Kosovo and Iraq, the High Level Panel largely endorsed the Charter regime. But it did more. It looked into general international law on the use of force and found the criteria that should regulate any use of force, even that by the Security Council.¹¹ In recommending that the Council be guided by these principles, the Panel showed the way for the Council to demonstrate it is not a lawless body, acting only in response to political expedience. Its decisions can be guided by legal principle. In identifying these guiding criteria, the Panel allayed fears that in incorporating the terminology of “responsibility to protect”,¹² it was endorsing greater use of force in international affairs, not less. Given the very real limitations on the benefit of military force to be of any positive use in human rights crises, if these principles are respected, the Security Council will find itself turning to non-lethal responses.¹³ Before authorizing force, the Council must consider the following criteria:

- (a) seriousness of threat
- (b) proper purpose
- (c) last resort
- (d) proportional means

¹⁰ *Ibid.* at 57.

¹¹ For the law governing the use of force generally, see Mary Ellen O’Connell, *International Law and the Use of Force* (New York: Foundation Press, 2005).

¹² The phrase ‘responsibility to protect’ comes from a report commissioned by Canada following the Kosovo intervention. Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Commission on Intervention and State Sovereignty, 2001). It is discussed in more detail in the articles by Ian Johnstone and Nicholas Wheeler also in this volume. The report proposes that in certain humanitarian crises states be allowed to use military force without Security Council authorization. Apparently, some viewed the inclusion of criteria for authorizing force by the High Level Panel as having the result of compelling the Council to authorize force in certain situations when the criteria were met. As is explained in the text, in the real world of military force, respect for these criteria is more likely to result in greater Council caution in authorizing force.

¹³ In the overemphasis on military force, measures short of force are often overlooked, such as the delivery of aid with heightened security; carefully targeted sanctions; monitors, mediators, and the use of positive incentives to bolster non-violent responses, to win concessions, or to induce participation in talks.

(e) balance of consequences¹⁴

These principles arguably amount to the need to respect principles of proportionality, necessity, and proper purpose—all principles already binding on states using force.¹⁵ *Necessity* refers to military necessity, and the obligation that force is used only if necessary to accomplish a reasonable military objective.¹⁶ *Proportionality* prohibits that “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage

¹⁴ A *More Secure World*, *supra* note 1 at 67. The Report includes the following description of each principle:

- (a) *Seriousness of threat*. Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?
- (b) *Proper purpose*. Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?
- (c) *Last resort*. Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?
- (d) *Proportional means*. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?
- (e) *Balance of consequences*. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

¹⁵ The principles of necessity, proportionality are the central customary law principles of international humanitarian law. (Some would add humanity and distinction though these are arguably included in necessity and proportionality.) The three concepts are closely related and not always listed individually. API, art. 51(5): “In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.” Judith Gardam, “Proportionality and Force in International Law” (1993) 87 A.J.I.L. 391. The International Court of Justice (ICJ) confirmed the status of necessity and proportionality as customary international law in the Nuclear Weapons Case, the Nicaragua Case, and Oil Platforms. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. 2, at paras. 240-246; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Merits, 1986 I.C.J. Rep. 14, at para. 237 [Nicaragua]; and *Oil Platforms Case (Iran v. U.S.)* 2003 I.C.J. Rep. 43, at para. 74; see also, Theodor Meron, “The Continuing Role of Custom in the Formation of International Humanitarian Law”, (1996) 90 Am. J. Intl L. 238, 240; Michael Reisman & Douglas Stevick, “The Applicability of International Law Standards to United Nations Economic Sanctions Programmes” (1998) 9 E.J.I.L. 86, at 94-95.

¹⁶ Reisman & Stevick, *ibid.* at 94.

anticipated.”¹⁷ These customary principles also influence the legality of a resort to force. In the Nicaragua Case decided in 1986, the International Court of Justice (ICJ) said, “Even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however, they were not, this may constitute an additional ground of wrongfulness.”¹⁸ Similarly, in 2003, the ICJ said the following regarding necessity and proportionality: “whether the response to the [armed] attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.”¹⁹

Greenwood, too, argues that the legal basis on which force is initiated is linked to how a conflict is conducted. If the basis for using force is the right of self-defense,

[t]his right permits only the use of such force as is reasonably necessary and proportionate to the danger. This requirement of proportionality... means that it is not enough for a state to show that its initial recourse to force was a justifiable act of self-defense and that its subsequent acts have complied with the *ius in bello*. It must also show that all its measures involving the use of force, throughout the conflict, are reasonable, proportionate acts of self-defense. Once its response ceases to be reasonably proportionate then it is itself guilty of a violation of the *ius ad bellum*.²⁰

In short, any decision to resort to war, whether in self-defense or by Security Council authorization,²¹ requires that the decision be consistent with the principles of necessity and proportionality.

The Panel emphasized that fulfilling these principles requires the commitment of states to send sufficient troops and other resources to do missions right. The Panel warned that in the “absence of a commensurate increase in available

¹⁷ API, art. 51(5). According to Gardam: “The legitimate resort to force under the United Nations system is regarded by most commentators as restricted to the use of force in self-defense under Article 51 and collective security action under chapter VII of the UN Charter. The resort to force in both these situations is limited by the customary law requirement that it be proportionate to the unlawful aggression that gave rise to the right. In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.” Gardam, *supra* note 15 at 391.

¹⁸ *Nicaragua* *supra* note 15 at para. 237.

¹⁹ *Oil Platforms*, *supra* note 15 at para. 74, citing *Nicaragua*, *supra* note 15 at para. 194.

²⁰ Greenwood, *supra* note 17 at 221, 223.

²¹ For a discussion of the humanitarian law binding on the Security Council, see Mary Ellen O’Connell, “Debating the Law of Sanctions” (2002) 13 E.J.I.L. 63.

personnel, United Nations peacekeeping risks repeating some of its worst failures of the 1990s.”²²

The Secretary General largely endorsed the High-level Panel report. He restated and supported the Panel's criteria for Council authorization of the use of force. Unlike the Panel, he did make a specific reference to Article 51's restriction of the right of self-defense to response to an 'armed attack.' The need to show evidence of the objective fact of armed attack is expressly required by the Charter.²³ Restricting unilateral resort to force in this way is a lynch pin of the proper working of the Charter regime.²⁴ The 2005 World Summit Outcome states simply,

We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.²⁵

And with regard to humanitarian intervention, while the Outcome document uses the word *responsibility*, it is consistent with the Charter in requiring Security Council authorization of force in cases other than self-defense:

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 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... should peaceful means be inadequate and national authorities manifestly fail to protect their populations.²⁶

²² *A More Secure World*, *supra* note 1 at 59.

²³ Report of the Secretary General, *In Larger Freedom: Toward Development, Security and Human Rights for All*, UN GAOR, 59th Sess., UN Doc. A/59/2005 (21 March 2005) at 13.

²⁴ O'Connell, "Lawful Self-Defense", *supra* note 14 at 890-93.

²⁵ UN General Assembly, 2005 *World Summit Outcome*, GA Res 60/1, UN GAOR, 60th Sess., UN Doc. A/RES/60/1 (2005), online: United Nations <<http://daccessdds.un.org/doc/UNDOC/LTD/N05/511/30/PDF/N0551130.pdf?OpenElement>> at 22.

²⁶ *Ibid.* at 30.

THE COUNTER-REFORMATION

The experiences of Kosovo and Iraq very likely lie behind this return to the Charter.²⁷ These two tragic cases remind us of why the use of military force has been regulated as it was in the Charter.²⁸ These cases show that military intervention inevitably results in the deaths and injury of innocent men, women and children; it results in the destruction of homes, livelihoods and irreplaceable cultural heritage; it ravages the natural environment. These facts rarely come up in discussions of humanitarian intervention. Rather, proponents continue to cite the Srebrenica and Rwanda tragedies as requiring new rules or as justification for ignoring existing ones.²⁹ The argument is that if Western countries had used military force while the killing in those cases was in progress, it could have been stopped. This argument fails to acknowledge that it was the presence of inadequate military forces in the first place that helped set the conditions for both massacres. In both Bosnia and Rwanda, lightly-armed UN peacekeepers were present. They had mandates to do more than they could. Their presence gave people a false sense of security. If the peacekeepers had not been there, people may well have done more to protect themselves. In Srebrenica, Bosnians may not have remained in the vicinity of Serb militias if the UN had not promised to protect them. In Rwanda, Tutsis might have been less trusting of their Hutu neighbours while Tutsi rebels were advancing on the country. The presence of military forces prepared only to carry out classical peacekeeping in conditions of on-going armed conflict, abetted the killing. Sending inadequate forces in the wrong conditions into future humanitarian crises will likely have similar outcomes.

When the poor record of military force to protect human rights is reviewed, some try to counter it by arguing that states have simply failed to commit the requisite resources. Committing resources is surely part of the problem. Since states are unlikely, however, *ever* to commit the massive resources that may be necessary for successful humanitarian intervention, this factor weighs against allowing such intervention. Simply stating there is a responsibility to protect is not going to overcome the important reasons governments have been unwilling to commit adequate personnel and materiel. Again, Srebrenica and Rwanda indicate how using

²⁷ See Wheeler regarding the impact of the Iraq invasion on support of arguments favoring humanitarian intervention. Nicholas Wheeler, "A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit" (Paper presented to the Journal of International Law and International Relations Conference 'The UN at Sixty: Celebration or Wake?' (6 October 2005) at 6.

²⁸ Adapted from Mary Ellen O'Connell, *Challenging the Claims for Humanitarian Intervention* [forthcoming in a volume edited by Gerd Haenkel.]

²⁹ See *Report of the Secretary-General Pursuant to General Assembly Resolution 53/55: The Fall of Srebrenica*, UN Doc. A/54/549 (1999); *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, U.N. Doc S/1999/1257 (1999).

inadequate military force can result in more harm than good. Those places are often cited by scholars arguing for more military force; they should be cited for using less.

Even if massive resources are committed, resources alone cannot overcome the need for communities to develop their own leadership—leaders who are identified with the community they will lead and not with a foreign power. The United States has committed hundreds of billions of dollars and massive numbers of troops in Iraq and yet violence and chaos continued as insurgents fought the foreign invader. International law recognizes the human right of self-determination and that right is violated when outside powers put local leaders in place.

The problems of resources and building successful societies are only the second and third objections to humanitarian intervention. The first problem is that inherent in the idea of humanitarian intervention is the argument that it is legitimate to kill, maim, and destroy to preserve human rights. Such thinking can only undermine the very idea of human dignity at the core of respect for human rights. Already in 1971, Ian Brownlie warned us about the inhumanity of humanitarian intervention:

What is the price in human terms of intervention? What were the casualty ratios in the Stanleyville [Congo] operation in 1964, the Dominican Republic in 1965, and other possible examples? How many were killed in order to “save lives”? To what extent does the typical intervention cause collateral harms by exacerbating a civil war, introducing indiscriminate use of air power in support operations, and so on?³⁰

We should be asking these same questions today about Kosovo, the one intervention that was affirmatively justified on humanitarian grounds. U.S. Secretary of State Albright had been warned by military and intelligence officials that a bombing campaign would not meet her stated goals regarding Kosovo—protecting human rights, getting Serb forces out of the province, and removing Slobodan Milosevic from power. In fact, bombing accomplished the opposite. It continued for 78 days, triggering a mass exodus of refugees and widespread killing of civilians by Yugoslav regular forces, militias and by NATO bombs. Human rights groups charge that NATO killed approximately 500 civilians in violation of the laws of war.³¹ The bombing only ended when the Russians intervened with Milosevic to persuade him to pull his forces from Kosovo. Milosevic himself was in office for another year because even his strongest opponents rallied around him when their country was attacked. When Serb forces left Kosovo, Serb residents fled as Kosovo Albanians

³⁰ Ian Brownlie, “Humanitarian Law” in John Norton Moore, ed., *Law and Civil War in the Modern World* (Baltimore: John Hopkins Press, 1974).

³¹ See the detailed facts provided in *Bankovic v. Belgium* (2001) Eur. Ct. H.R. reprinted in 123 I.L.R. 94.

began the systematic murder of Serbs and other minorities. Five years after the NATO bombing, the province remained part of Serbia but almost no Serbs lived there. The few who did remain survived only through the protection of a large and costly U.N. peacekeeping effort.³² Kosovo is a case study of the military's advice to political leaders that using force to protect human rights is fraught with difficulty.³³ Despite the laudable motives of many advocating for military force in Kosovo, the results show more harm than good.

The Kosovo intervention is also linked to weakened respect for international law. Those who advocated for the intervention in violation of the law called into question not just the prohibition on the use of force, but, ironically, the very treaties and rules of customary international law that set out what human rights are.³⁴ These advocates of war failed to take into account the corrosive impact of championing law violation. U.S. Secretary of State Colin Powell said on 20 October 2002, that the United States had the same authority to use force in Iraq that it had in Kosovo.³⁵ Some have tried to distinguish the two law violations—but why is it any less illegal to intervene in Kosovo in violation of the Charter, but on moral grounds as determined by the fifteen NATO members, than to intervene in Iraq, again in violation of the Charter but on moral grounds as decided by the almost 30 states that supported that invasion?

In the aftermath of the Kosovo failure and the Iraq tragedy, it only made sense to return to the Charter. The people who drafted the U.N. Charter had a much clearer understanding of the nature of war and what it can accomplish and what it cannot. The Charter prohibition on humanitarian intervention is built on well-considered moral and pragmatic underpinnings. For that reason, it has withstood the arguments in favour of radical departure. Governments at the 2005 World Summit generally seemed to understand that damage had been done to the Charter and the rule of law; the 2005 World Summit outcome returns to the Charter. Indeed, the Summit did not even embrace the addition to the Charter of criteria for

³² Human Rights Watch, "Human Rights Overview: Serbia and Montenegro" (2005), online: Human Rights Watch <<http://hrw.org/english/docs/2005/01/13/serbia9859.htm>>; Timothy Kenny, "Poverty and violence are still commonplace in Kosovo", *Chicago Tribune* (September 25, 2005) section 2, p. 1.

³³ See e.g. Michael O'Hanlon, *Saving Lives with Force: Military Criteria for Humanitarian Intervention* (Washington: Brookings Institution Press, 1997) at 49-52.

³⁴ In addition to those who advocate for humanitarian intervention even in violation of the law, Anne-Marie Slaughter and Lee Feinstein have advocated for using force to eliminate weapons of mass destruction without necessarily having Security Council authorization. See Lee Feinstein and Anne-Marie Slaughter, "A Duty to Prevent" (Jan./Feb. 2004) 83 *Foreign Aff.* 136.

³⁵ Interview of Secretary of State Colin L. Powell (20 October 2002) on *This Week with George Stephanopoulos*, ABC Television; U.S. State Department, Press Releases & Documents (20 October 2002).

governing Security Council authorization of force—as urged by the High Level Panel. Nevertheless, it is my position that the Panel's criteria are already part of general international law. Scholars of international law are in a position to explain this and to follow-up the momentum of the reform process by calling for ever-greater respect for governing legal principle. In this way, they can remedy the damage done by scholarship promoting ever-greater flexibility in interpreting the Charter.

We need to turn our attention not just to states, but to the Security Council as well. Since the end of the Cold War, the Council has not adhered strictly to the provisions of the Charter or general international law either.³⁶ The Council's failure to strictly adhere to the law may have influenced the failure of members, in turn, to comply. It may well be the case that if we want to see law compliance by UN members, we need to press for it by UN organs.

There are those, however, who would argue that under a classic interpretation of the Charter, the Council is not bound by general international law as I maintain here.³⁷ They argue that Article 24(2) of the Charter requires only that the Security Council conform to the Charter, and they cite a statement of the Secretary-General, repeated in the International Court of Justice Advisory Opinion on Namibia: “[T]he Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.”³⁸ Yet, Chapter I, Article 1(1) does refer to international law, stating that a purpose of the UN is “to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes.” And as Judge *ad hoc* Sir Elihu Lauterpacht stated in the *Genocide Case*, “[O]ne only has to state the proposition thus—that a Security Council Resolution may even require participation in genocide—for its unacceptability to be apparent.”³⁹ Judge Weeramantry expressed a similar view in the *Lockerbie Case*: “The history of the United Nations Charter corroborates the view that a clear limitation on the plenitude of the Security

³⁶ See e.g., Mary Ellen O'Connell, “Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy” (1997) 36 Colum. J. Transnat'l L. 473; Jose Alvarez, “The Once and Future Security Council” (1995) 18 Wash. Quart. 3.

³⁷ For a discussion of this position and refutation, see Mary Ellen O'Connell, “Debating the Law of Sanctions” (2002) 13 E.J.I.L. 63.

³⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep. 16 at 52.

³⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Provisional Measures, [1993] ICJ Rep. 325 at 440 (separate opinion of Judge Lauterpacht).

Council's powers is that those powers must be exercised in accordance with well-established principles of international law."⁴⁰ The *Reparations Case* also emphasizes that the UN has both rights as well as responsibilities beyond the specific provisions of the Charter. It stated that rights and responsibilities would evolve with time, influenced by the UN's "purposes and functions as specified or implied in its constituent documents and developed in practice."⁴¹

Perhaps more significantly, in the area of use of force, the United Nations has committed itself to respect for customary principles of international humanitarian law, although this law is not specifically referenced in the Charter.⁴² Even before the explicit acknowledgement, Dietrich Schindler never doubted that customary humanitarian law applied to the UN.⁴³ Judith Gardam, too, argued before the acknowledgement that the Security Council must respect the customary principles of international humanitarian law, such as necessity and proportionality, both in the decision to authorize force and in the way force is used when authorized.⁴⁴ For her, the inclusion in Article 24 of the Security Council's need to observe international law, mentioned in Chapter I of the Charter, could only be interpreted as mandating Council commitment to humanitarian law.

Thus, any decision to resort to force, must be consistent with the principles of necessity and proportionality.⁴⁵ If force is in self-defense or for restoring peace, it cannot be used for a different purpose. Lawful armed force today is for the purpose of law enforcement. It is force to counter a previous unlawful use of force or threat of unlawful force. Lawful resort to force can be compared to the force of the police countering the force of the criminal. Such exceptional uses of force must arguably be as limited as possible.

The 2005 World Summit is a good first step back, back to the view that the Charter is a binding treaty and that legal obligations—whether treaty, custom, or general principle—require respect by states, international organizations, and

⁴⁰ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. U.S.)*, Provisional Measures, [1992] ICJ Rep. 114 at 175 (Judge Weeramantry dissenting).

⁴¹ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174 at 180.

⁴² Daphne Shrager, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage" (2000) 94 A.J.I.L. 406.

⁴³ Dietrich Schindler & Jiri Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents* (Boston: Martinus Nijhoff Publishers, 1988).

⁴⁴ Judith Gardam, "Legal Restraints on Security Council Military Enforcement Action" (1996) 17 Mich. J. Int'l L. 285 at 318.

⁴⁵ For a discussion of the humanitarian law and other principles binding on the Security Council, see O'Connell, "Debating the Law of Sanctions", *supra* note 30.

individuals alike. International law is not open to any subjective interpretation; its meaning is not endlessly flexible.

CONCLUSION

In October 2005 none of the advocates of greater use of military force in international relations were pleased by the results of the UN reform process. Advocates of military force in humanitarian causes and advocates of pre-emptive force in self-defense all concluded that the Charter regime for peace had been re-enforced and not re-written – as they hoped it would be. Rather, the process amounted to something closer to counter-reformation than reformation. For the protection of human rights and the prospects for peace this is a promising development. A strong set of clear definite principles on the use of force is essential to the goals of ending the scourge of war and protecting human rights. Such rules are essential if the United States, in particular, is to be constrained. Given the U.S.'s extraordinary position in the world with its unparalleled military and economic power, the best appeal is to America's commitment to the rule of law. That was difficult by the time of the Iraq invasion when the Charter rules had been so undermined, so subjected to differing interpretation. Prominent American international law scholars even stated there were no rules on the use of force.⁴⁶ The reform process has answered that charge. We have a new global commitment to the prohibition on the use of force as found in the U.N. Charter. The reform process has created a new opportunity to seek again a world order under the rule of law—an opportunity where scholars can make a fundamental difference by treating international law as real law—binding and determinate.

⁴⁶ See Michael Glennon, "How war left the law behind" *New York Times* (21 November 2002) A33.

Norms, Institutions and UN Reform: The Responsibility to Protect

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Our problems are not beyond our power to meet them. But we cannot be content with incomplete successes and we cannot make do with incremental responses to the shortcomings that have been revealed. Instead, we must come together to bring about far-reaching change.¹

INTRODUCTION

“Reform” is an ambiguous term. In the mouths of diverse proponents it can mean radically different things. The only common denominator is a call for change, and by definition not a revolutionary change. But change in what? Change in which direction? The mantra of UN reform is a striking case in point. For US Ambassador John Bolton, “reform” seems to mean change and shrinkage in the internal structure of the UN Secretariat, change in financial management, change in hiring practices, and an increase in “accountability”. For many interlocutors from the developing world “reform” means change in the decision-making processes of the Security Council, the Human Rights Commission and the international financial institutions, and change to promote “responsiveness” to the interests of sovereign states. For some international relations scholars, primarily from the North, “reform” means a significant reshaping of the UN bureaucracy to promote greater competency, efficiency and transparency. For many international lawyers, “reform” is shorthand for normative evolution in the key areas of global concern such as human rights and the use of force. The Secretary-General set the bar for reform very high, suggesting that the UN might slip into irrelevance if there was no agreement on normative, institutional and bureaucratic change. In this assessment he was clearly picking up the gauntlet thrown down by the US administration, which has been warning of the UN’s possible irrelevance for a number of years.

The various UN reform initiatives are not mutually exclusive. Some may even be mutually reinforcing. Others, however, may tend to cancel each other out if pursued on parallel but uncoordinated tracks. The Outcome Document produced at the 2005 UN World Summit reveals both the promise and the potential incoherence

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¹ United Nations Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All—Report of the Secretary-General*, UN GAOR, 59th Sess., UN Doc. A/59/2005 (2005) at para. 11, online: United Nations <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement>> [In Larger Freedom].

of reform in the UN.² Although the member states were not able to agree on how to treat such fundamental questions as nuclear proliferation and representation on the Security Council, they did agree in principle on key structural changes to the UN system such as the creation of a Peacebuilding Commission and the metamorphosis of the Human Rights Commission into a Human Rights Council. While the Peacebuilding Commission was established in December 2005 through parallel resolutions of the General Assembly and Security Council,³ the design of the Human Rights Council was left for future negotiations which have already proven to be exceedingly difficult.

Although the member states could not agree on a definition of terrorism or on a set of criteria for the authorization of military force by the Security Council, they did agree on one normative innovation that has the potential for transformative impact in international law and politics: the responsibility to protect. In this essay, we assess the reform potential of the responsibility to protect. We place that assessment in a context of failure to agree on institutional reform initiatives. We ask why states were able to articulate the responsibility to protect, but we also ask whether or not that articulation is likely to have any meaning when institutional reforms seem stuck.

THE RESPONSIBILITY TO PROTECT

Agreement on the responsibility to protect is a central element of the 2005 Summit Outcome Document, inasmuch as it is the only fundamental normative innovation agreed upon by the member states during this round of UN reform.⁴ What is more, we believe that the responsibility to protect carries the potential for significant change in a key, but notoriously difficult, area of international law and politics: the use of force to address massive human right violations in member states. For at least a generation, theorists and state leaders were caught in the quagmire of

² UN General Assembly, 2005 *World Summit Outcome*, GA Res 60/1, UN GAOR, 60th Sess., UN Doc. A/RES/60/1 (2005), online: United Nations <http://daccessdds.un.org/doc/UNDOC/LTD/N05/511/30/PDF/N0551130.pdf?OpenElement> [2005 Outcome].

³ See General Assembly Resolution 60/180, UN Doc. A/RES/60/180 (30 December 2005); and Security Council Resolutions 1645 and 1646, UN Doc. S/RES/1645 (2005) and S/RES/1646 (2005).

⁴ Of course, the evolution of any idea can be traced to earlier ideas. Fragments of the concept of responsibility to protect were collected in French and Belgian writings in the late 1980s. See e.g. Olivier Corten and Pierre 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). UN Secretary-General Perez de Cuellar argued in 1991 that sovereignty could not be a shield behind which human rights could be massively and systematically violated. He suggested 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 to the General Assembly*, U.N. GAOR, 46th Sess., Supp. No. I; DOC A/46/1 (6 September 1991).

“humanitarian intervention”. Debates swirled around whether or not such a right existed in any configuration. If it did, a question then arose whether the right was purely collective, or if it could be exercised unilaterally. If it was collective, which collectivity was empowered to act? Only the Security Council? Regional political organizations such as the African Union? Regional military alliances such as NATO? If individual states or ad hoc alliances could act, what were the legal pre-conditions for such action?⁵

The questions surrounding who could intervene to stop or prevent a humanitarian crisis took on great urgency in 1999 with the NATO intervention in Kosovo.⁶ What Kosovo brought to the fore was a dual dilemma. First, was the fundamental issue of whether or not a norm of humanitarian intervention existed. Second, was the question of who could invoke the norm, only the Security Council or individual states? The latter issue was crystallized when a threatened Russian veto precluded any Security Council authorization to use force. In a failed attempt to avoid the dilemma, most of the NATO states refused to posit any general norm of humanitarian intervention. The exception was Belgium.⁷ Instead, the NATO partners argued a “moral duty” to act, or a “necessity” to act.⁸

It is likely no accident that shortly after Kosovo the Canadian government promoted the creation of an independent International Commission on Intervention and State Sovereignty (ICISS). As set out by the ICISS, the responsibility to protect was a conscious attempt to cut through what had become the Gordian knot of humanitarian intervention.⁹ 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 of non-

⁵ See e.g. J. L. Holzgrefe & R. O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003); Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001); Antonio Cassese, “Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” (1999) 10 E.J.I.L. 23.

⁶ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000).

⁷ *Legality of Use of Force* (Yugo. v. Belg.), Translation of Oral Pleadings of Belgium (May 10, 1999) <<http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm>> (“This is a case of a lawful armed humanitarian intervention for which there is a compelling necessity”).

⁸ See e.g. Javier Solana, Secretary-General of NATO, Press Statement, NATO Press Release 040 (1990), reprinted in Jeffrey L. Dunoff, et al., *International Law[.] Norms, Actors, Process* (New York: Aspen Law & Business, 2002) 892.

⁹ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (December 2001), online: Report of the ICISS <www.dfaif-maeci.gc.ca/iciss-ciise/report-en.asp> [ICISS Report]

forcible forms of pressure. 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.”¹⁰

In cases where a state abjectly failed in its protective obligation, or where the state was itself the perpetrator of massive human rights violations, collective military action could be authorized internationally to protect victims within a sovereign state. 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 moribund “Uniting for Peace” resolution of the General Assembly or through a reference to a regional organization.¹¹ In the latter case, the Security Council would have to be asked to approve the intervention retroactively. The ICISS also charged the Security Council to take its power and responsibility seriously. The permanent five were encouraged not to use the veto in cases “where their vital interests are not involved” to prevent action where the majority would be supportive.¹² It also suggested that if the Council failed to protect in “conscience shocking situations crying out for action” the credibility of the UN would suffer, in part because concerned states might feel compelled to act unilaterally.¹³

This debate was made more complex and more divisive by the unilateral military action taken against Iraq in the wake of the attacks of 11 September 2001. 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”¹⁴ prompted the UN Secretary-General to create the High-level Panel on Threats, Challenges and Change. The panel was mandated: (i) to examine contemporary global threats and future challenges to international peace and security, including the connections between them; (ii) to identify the contribution that collective action could make in addressing these challenges; and (iii) to recommend the changes necessary to ensure effective collective action, including a review of the principal UN organs.¹⁵

The panel’s report was published in December 2004.¹⁶ With respect to the use of force for the protection of people, the report of the UN High Level Panel drew

¹⁰ *Ibid.* at XII, 32.

¹¹ *Ibid.* at XIII.

¹² *Ibid.* at XIII, 51.

¹³ *Ibid.* at XIII.

¹⁴ In Larger Freedom, *supra* note 1 at para. 76.

¹⁵ See UN Press Release SG/A/857, “Secretary General Names High-Level Panel to Study Global Security Threats, and Recommend Necessary Changes” (4 November 2003), online: United Nations <www.un.org/News/Press/docs/2003/sga857.doc.htm>.

¹⁶ See *Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, UN GAOR, 59th Sess., Supp. No. 565, UN Doc. A/59

extensively on 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."¹⁷ Building on the ICISS criteria, the panel outlined "five basic criteria of legitimacy" for the Council to consider in making decisions on the use of military force, be it to deal with external threats to states' security or to address grave humanitarian crises within states. These criteria, which the panel suggested should be "embodied in declaratory resolutions of the Security Council and the General Assembly," were: seriousness of threat, proper purpose, last resort, proportional means and balance of consequences.¹⁸ The panel also took up the ICISS suggestions regarding self-discipline of the permanent members in exercising the veto.¹⁹

The High-level Panel's invocation of triggering criteria 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."²⁰ In addition, the High-level Panel emphasized that criteria or 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."²¹ Their preoccupation was not purely legal, but also addressed the related concept of legitimacy. They proposed that the Council should concern itself not only with "whether force *can* legally be used", which the Panel assumed the Council could, but whether, "as a matter of good conscience and good sense, it *should* be."²²

In his response to the report of the High-level Panel, the Secretary-General highlighted the question whether states have the right, or even an obligation, to use force protectively to rescue citizens from genocide or comparable crimes against humanity.²³ Note the important shift in emphasis, from a list of grave human rights violations, to the concept of international crime as the trigger for action. Another

(2004), online: United Nations <<http://www.un.org/secureworld/report.pdf>> [HLP Report].

¹⁷ *Ibid.* at para. 203.

¹⁸ *Ibid.* at paras. 207-208. For a discussion of the idea of over-arching criteria for decisions on the use of military force, see Gareth Evans, "When Is It Right to Fight?" (2004) 46 *Survival* 59. Of course, these criteria are derived from traditional just war theory. See Jutta Brunnée and Stephen J. Toope, "Slouching Towards New 'Just Wars': International Law and the Use of Force After September 11th" (2004) 11 *Netherlands International Law Review* 363.

¹⁹ HLP Report, *ibid.* at para. 256.

²⁰ *Ibid.* at para. 203. Arguably the reference to "serious violations of international humanitarian law" widened the scope of triggering events for intervention that ICISS had envisaged.

²¹ *Ibid.* at para. 206.

²² *Ibid.* at para. 205.

²³ In *Larger Freedom*, *supra*, note 1, at paras. 122 and 125.

shift is equally important. Whereas both ICISS and the High-level Panel had left open the possibility for unilateral action in a case where the Security Council could not act, the Secretary-General's response emphasized that: "The task is not to find alternatives to the Security Council as a source of authority but to make it work better."²⁴

The Secretary-General then endorsed ICISS' and the High-level Panel's call for criteria. He suggested that the "Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success."²⁵ He stressed that the effort to articulate and apply criteria for authorizing the use of force for protective purposes was essential to achieve legitimacy amongst states and global public opinion for any Council action.²⁶

The concept of the responsibility to protect survived the difficult negotiations leading to the adoption of the 2005 Summit Outcome Document, but not-so-subtle shifts in emphasis occurred. The responsibility to protect is now described as primarily a responsibility of individual states to protect their own populations. In addition, the link to international crime is solidified. States are only called upon to protect their populations from "genocide, war crimes, ethnic cleansing and crimes against humanity."²⁷ 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."²⁸ The Security Council is authorized to take collective protection action under Chapter VII on a "case by case basis" and "should peaceful means be inadequate and national authorities manifestly fail to protect their populations",²⁹ from the listed international crimes.²⁹

The member states did not take up the consistent recommendations of ICISS, the High-level Panel and the Secretary-General to develop criteria for intervention. The only charge is 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."³⁰ Presumably, this was intended as a reference

²⁴ *Ibid.* at para 126.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ 2005 Outcome, *supra* note 2 at para.138.

²⁸ *Ibid.* at paras 138 and 139.

²⁹ *Ibid.*, at para 139.

³⁰ *Ibid.*

back to sovereignty and the principle of non-intervention. Difficult negotiations lie ahead.

THE POTENTIAL IMPACT OF THE RESPONSIBILITY TO PROTECT

Given the history of debates around humanitarian intervention, and the possible implications of the concept of responsibility to protect for sovereignty, non-intervention and so-called “friendly relations”, its inclusion in the Outcome Document from the 2005 Summit is astonishing.

The norm of responsibility to protect has now been articulated, and at least formally endorsed. It presents a fundamental challenge to structural imperatives that have long shaped international law and politics. It goes without saying that the principal institution of international relations since the Westphalian compact has been anarchic sovereignty. Anarchy may not have been inevitable, and may even have been intentionally constructed, but it has been determinative nonetheless.³¹ This reality was codified in the United Nations *Charter*’s recognition of the “sovereign equality” of states in Art. 2(1), and in the principle of “non-intervention in the internal affairs of states” in Art. 2(7). However, the *Charter* also contained provisions that allowed for challenges to sovereignty. The ambition of the drafters was to subject sovereignty both to human rights norms and to the constraints of collective security. In large measure, for at least forty years, this ambition remained unfulfilled. The continuing influence of statism and the imperatives of power politics, especially as constructed in the Cold War, made any incursion on the principles of sovereignty and non-intervention extraordinarily difficult.

Since the creation of the United Nations, despite the resilience of sovereignty and the principle of non-intervention, slow but continuing efforts have been made to shrink the sovereign domain and to recognize the imperatives of collective action. Examples are numerous, especially in human rights, the environment, and trade. The 1503 procedure in the Human Rights Commission allowed states to investigate the internal human rights abuses of other states, at least in extreme cases.³² In international environmental law, the concept of sustainable development captures the desire to fix parameters against which to test the environmental performance of individual states even in the absence of

³¹ Hedley Bull, *The Anarchical Society* (NY: Columbia U. Press, 1977); Alexander Wendt, “Anarchy Is What States Make of It: The Social Construction of Power Politics” (1992) 46 *Int’l Org.* 391. See also A. Wendt, “Collective Identity Formation and the International State” (1994) 88 *Am. Pol. Sci. Rev.* 384.

³² UN Economic and Social Council, *Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms*, ECOSOC Resolution 1503 (XLVIII) of 27 May 1970, as revised by ECOSOC Resolution 2000/3 of 16 June 2000; online: UN High Commissioner for Human Rights <<http://www.unhchr.ch/html/menu2/8/1503.htm>>.

transboundary effects.³³ States' domestic regulatory freedom is now routinely limited by the disciplines of international trade law.³⁴

Yet the "responsibility to protect" could well be of a different order. It could entail a fundamental conceptual shift, rooted in prior developments, but going much further and calling upon states to re-consider the essentials of their role and powers. Unlike trading regimes rooted in reciprocity, and unlike environmental regimes based on imperatives of collective action, the responsibility to protect creates a generalized set of interlocking obligations owed to states and to persons. We confront not simply a carving out of specialized regimes through treaty commitments, but what Anne-Marie Slaughter has called a "tectonic shift" in the very definition of sovereignty.³⁵ For example, if the responsibility to protect is fully implemented, Sudan owes obligations of protection to its own people. But the responsibility to protect also implies that Sudan is accountable to other states if it fails to protect its people. The accountability is not simply at the level of state responsibility; it can actually trigger the duty of third parties to intervene. This implies as well an *erga omnes* obligation on the part of other states to act—whether collectively or unilaterally remains uncertain—in the face of a limited category of massive human rights abuses.

Given the potential for transformative change in the deep structures of sovereignty, and hence of international law and politics, it is not surprising that, although they agreed to its inclusion in the Outcome Document of the 2005 Summit, many states have sought to limit the potential impact of the responsibility to protect. Indeed, at this stage it is not at all clear that the concept will fulfill its promise. It may prove to be a mere rhetorical flourish. We will return to this issue below. For now, our discussion will turn to the specific means through which the concept could be made operative and to the means already employed to limit its scope and to circumscribe its implications.

Even as it was articulated in the Outcome Document the responsibility to protect was being limited in comparison to the way it had been cast by ICISS. For ICISS, the responsibility to protect encompassed a broad spectrum of measures focused upon the prevention of humanitarian crises.³⁶ It created a clear "*responsibility continuum*" that envisaged action to prevent, to react, and to rebuild.³⁷ The use of

³³ See Daniel B. Magraw, "Sustainable Development," forthcoming in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds., *Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2006) Ch. 27.

³⁴ See e.g. David A. Wirth, "Some Reflections on Turtles, Tuna, Dolphin and Shrimp" (1998) 9 Y.B. Int'l Env. L. 40.

³⁵ Anne-Marie Slaughter, "Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform" (2005) 99 A.J.I.L. 619, at 627.

³⁶ ICISS Report, *supra* note 9 at pp. 19-31.

³⁷ Joelle Tanguy, "Redefining Sovereignty and Intervention" (2003) 17 Ethics & Int'l Affs 141 at 144. The High-level Panel also picked up on the idea of a responsibility continuum,

force was a final step, taken only *in extremis*. Although the Outcome Document retains some flavour of prevention, the various aspects are not explicitly staged. Nor are they forcefully worded. In the sections of the Outcome Document dealing with the responsibility to protect 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.”³⁸ Moreover, and here the interplay between institutions and norms becomes important, the role of the Peacebuilding Commission is expressly limited to post-conflict situations.³⁹ It is given no mandate for early warning and early intervention. How then will the preventive aspect of the responsibility to protect play itself out? It seems that the locus for discussion would have to be the new Human Rights Council, but the design of that Council, and its mandate, remain completely unspecified.⁴⁰ Alternatively, the Security Council could be the place where early warning and prevention are discussed. But again, given the lack of any change in the structure or methods of work of the Council, there is nothing to indicate that prevention will take on a higher profile than it has in the past.

The move away from early warning and prevention was likely designed to assuage the concerns of many developing countries that the responsibility to protect could lead to an overly active and interventionist United Nations. As currently understood, 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 did not want to see any expansion of the possibilities for intervention through the new Peacebuilding Commission.

Many of the same states seem to have negotiated other limitations on the concept of the responsibility to protect as well. The key limitation is that all

but in the context of the potential role of the Peacebuilding Commission. HLP Report, *supra* note 16, at para. 263.

³⁸ 2005 Outcome, *supra* note 2 at paras 138-139.

³⁹ *Ibid.* at paras 97-98. The High-Level Panel had specifically suggested that among the core functions of the proposed Peacebuilding Commission should be “to identify countries which are under stress and risk sliding towards State collapse”. HLP Report, *supra* note 16 at para. 264. However, the Secretary-General’s response threw cold water on this proposal: “I do not believe that such a body should have an early warning or monitoring function.” In Larger Freedom, *supra* note 1 at para. 115. It seems likely that the Secretary-General had concluded that the proposal for an early warning mandate would prove unacceptable to the majority of states.

⁴⁰ The Outcome Document merely states the “resolve to create a Human Rights Council” and requests “the President of the General Assembly to conduct open, transparent and inclusive negotiations to be completely as soon as possible during the sixtieth session.” 2005 Outcome, *ibid.* at paras. 157 and 160.

responsibilities are triggered only in relation to international crimes.⁴¹ This limitation has potential effects in three different ways. First, while great emphasis is placed upon the primary responsibility of individual states to protect their populations, the responsibility applies only to the limited class of international crimes, though it must be added that “protection” includes prevention.⁴² Second, the possibility for collective intervention also exists only in the 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 nineteenth century international law.⁴³ Third, but as the reverse side of the coin, if the duty of potential intervenors to act is limited to cases of “international crime”, there may no longer be any duty to act collectively in situations where massive human rights violations do not reach that threshold. Such a duty may currently exist under *erga omnes* human rights obligations, read with Chapter VII of the Charter.⁴⁴ 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 merely the threat.⁴⁵

Leaving aside the issue of limitations on the scope of the responsibility to protect, the very creation of any set category of offences that might justify collective military action can have both positive and negative effects. On the positive side of the ledger, reliance on a fixed category of relatively well established international crimes could prevent sterile definitional debates. The focus on widely accepted categories of offences might also have broader normative implications. Read in

⁴¹ 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”.

⁴² 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.

⁴³ See generally Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002).

⁴⁴ See Stephen J. Toope, “Does International Law Impose a Duty upon the United Nations to Prevent Genocide?” (2000) 46 McGill L.J. 187.

⁴⁵ See 2005 Outcome, *supra*, note 2, 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 16, at para. 203.

conjunction with the accountability regime envisaged in the Statute of the International Criminal Court, the linkage between a responsibility to protect and specific triggering offences could lead to a clarification and consolidation of the concept and content of international crimes, and import substance into the heretofore rather vague construct of *erga omnes* obligations.⁴⁶

On the negative side of the ledger, the mere existence of accepted categories justifying collective action may not pre-empt definitional debates. Such debates may simply be displaced to the next level of specificity. Does a particular set of circumstances amount to “genocide” or to “war crimes”? In other words, 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. And as is well known, recognition that a crime exists will not necessarily lead to action, as the Rwanda case so sadly demonstrated.

In negotiating the Outcome Document member states also adopted a process for further deliberation that could limit the potential impact of their endorsement of the responsibility to protect. The High-level Panel had specifically charged the Security Council and the General Assembly to adopt “declaratory resolutions” to embody the guidelines for authorizing the use of force that the Panel had recommended.⁴⁷ The Secretary-General, in his response, took a different tack, suggesting that it was for the Security Council alone to adopt “a resolution setting out these [criteria]...and expressing its intention to be guided by them when deciding when to authorize or mandate the use of force.”⁴⁸ The 2005 Summit Outcome Document reversed the position of the Secretary-General and excluded the Security Council from this process, merely stressing the “need for the General Assembly to continue consideration of the responsibility to protect.”⁴⁹ Note that there was no specific charge to develop guidelines, let alone to adopt the ones proposed by the High-level Panel.

THE PROCESS OF PERSUASION

The responsibility to protect began as a set of ideas promoted by various norm entrepreneurs, academic and diplomatic.⁵⁰ It was then adopted and expanded by a

⁴⁶ See generally Margo Kaplan, “Using Collective Interests to Ensure Human Rights: An Analysis of the Articles on State Responsibility” (2004) 79 N.Y.U. Law Rev. 1902.

⁴⁷ HLP Report, *supra* note 16 at para. 208.

⁴⁸ In Larger Freedom, *supra* note 1 at para. 126.

⁴⁹ 2005 Outcome, *supra* note 2 at para. 139.

⁵⁰ See *supra* note 4. On the concept of “norm entrepreneurship”, see Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52 I. O.

panel of independent experts, the ICISS, albeit one sponsored by the Canadian government and by private foundations from the North. The ICISS mandate explicitly included a goal to foster normative development in relation to the use of force to protect human rights. The concept of the responsibility to protect was then adopted in modified form by another panel of eminent persons, this time appointed by the Secretary-General with the broad mandate to consider options for UN reform.⁵¹ The next step in the process of norm development was the intervention of an intergovernmental institutional actor, the Secretary-General, who charged the member states of the UN to act. At the same time, his casting of the responsibility to protect was more deferential to state sovereignty than that of either of the two previous panels. Finally, through intergovernmental negotiations, states concluded an official document that endorsed the responsibility to protect. Our point is that this decision is not the end of a process of normative evolution, but merely a further step.

The simple fact that the concept of responsibility to protect is included in the Outcome Document does not prove the existence of a norm that is genuinely embraced by international actors, therefore having the capacity to influence behaviour. Does the responsibility to protect represent a shared understanding within international society? If not, then it is likely that the so-called norm will simply be evaded or ignored because it will not generate a sense of obligation or adherence.⁵² It is also too early to tell whether or not the inclusion of the concept actually establishes a base for the further maturation of the norm. It could be argued that the inclusion of the responsibility to protect in the Outcome Document was simply the result of a trade-off, in which some states agreed to the articulation of the concept because they gained other benefits. Primary amongst these benefits would be the inclusion of many references to development assistance as a core responsibility of the United Nations and of wealthy member states. Bargaining might also have resulted in the exclusion of certain proposals, such as a definition of terrorism and details related to the new Human Rights Council, with the responsibility to protect being included because it was actually less worrisome to some member states than were other proposals. They might have been willing to go along with a rhetorical shell.

On balance, and given the potentially fundamental importance of the challenge to sovereignty contained in the responsibility to protect, it is difficult to

887; and Emanuel Adler, "Imagined (Security) Communities: Cognitive Regions in International Relations" (1997) 26 *Millennium: J. Int'l Stud.* 249 at 267, 277.

⁵¹ It is important to note the presence, and leadership role, of Gareth Evans, the former Foreign Minister of Australia, on both the ICISS and the High-level Panel. His contributions highlight the opportunities that exist for individual norm entrepreneurship in international society.

⁵² See generally Jutta Brunnée & Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 *Colum. J. Transnat'l L.* 19.

dismiss the Outcome Document as mere “cheap talk”.⁵³ The stakes were too high, and the implications fundamental. We have already noted that some states worked hard to modify and limit the concept through its various iterations. These efforts suggest that some states believe that the responsibility to protect actually means something—or at least that it could mean something if they are not careful to constrain the concept now. These states may believe that the limitations negotiated preclude the further evolution of a robust responsibility to protect. For other states, the central goal will be to strike the appropriate balance between sovereignty and intervention. These states would not want to disable the responsibility to protect completely, but they might want to further qualify and limit its application.

Our evaluation of the status of the responsibility to protect is that it remains only a candidate norm in international relations. Much work remains to be done before it can plausibly be considered a binding norm of international law. The need for a continuing commitment to norm entrepreneurship is implicit in the process that led up to the adoption of the responsibility to protect in the Outcome Document of the 2005 summit. So far, the norm has been articulated in expert reports, in the response of the UN Secretary-General, and in the final statement of an international gathering of heads of state and government. It has never been included in a binding normative instrument. Nor does state practice support the conclusion that the responsibility to protect has emerged as a rule of customary international law. Indeed, it is worrisome to note that in the most prominent cases to arise contemporaneously with the articulation of the responsibility to protect, that is the crises in Darfur and Northern Uganda, states have so far evaded any effective action to stop what is at least ethnic cleansing and may amount to genocide.

Our assessment is that the concept of the responsibility to protect, although diminished in the process of negotiation, remains strong enough to allow for future development. The language adopted by global consensus can become a touchstone for the hard work of international law: persuasion. The norm entrepreneurs who generated the concept in the first place must now direct their energies to persuading reluctant states that the responsibility to protect meets a real need in international relations. This effort will require the continuing engagement of civil society actors as well, if the experience of the ICC and the Landmines Convention is a helpful guide. The need for real commitment to the responsibility to protect is both ethical and pragmatic. Allowing states to fail in or to deny their protective obligations to their own populations produces not only moral quagmires, but also allows for some states to become breeding grounds for disaffection, frustration, and, potentially, interstate conflict.

If the responsibility to protect is to develop as a meaningful norm, we need to identify and exploit the most promising forums for further debate. We have already noted that these forums include bilateral discussions and conference settings

⁵³ See Thomas Risse, “Let’s Argue!” *Communicative Action in World Politics*, (2000) 54 *Int’l Org.* 1, at 8.

that include civil society actors. However, the Outcome Document makes it clear that the UN continues to play a key role. Whereas the High-level Panel had suggested that its proposed criteria for the use of military force should be adopted in declaratory resolutions of both the Security Council and the General Assembly, the Secretary-General took a different position, one rooted solely in *realpolitik*. He argued that it was only for the Security Council to consider criteria. Not surprisingly, this approach failed to garner support amongst many developing states. In the negotiated Outcome Document, as we have already noted, there is no reference at all to the need to elaborate criteria for intervention. What is more, the only UN body specifically charged to “continue consideration of the responsibility to protect” is the General Assembly.⁵⁴

Any new norm of international law, especially one that presents fundamental challenges to the core concept of sovereignty, must be grounded in a strong sense of legitimacy. Views may differ over the General Assembly’s politics and performance; there are myriad examples of dysfunctional process and disastrous policy. Nonetheless, it is inconceivable that one could effectively establish a norm promoting intervention by fiat from the Security Council without engaging the wide diversity of states against which the norm could potentially apply. For better or for worse, the General Assembly is the most likely place to encourage that engagement.

It is instructive to recall that the Definition of Aggression, another fundamental challenge to sovereignty, emerged as a resolution of the General Assembly.⁵⁵ Like the responsibility to protect, the Definition was an attempt to shape the practice of the Security Council on questions of the use of force. While it is true that the Definition did not have immediate normative impact, it was used by ICJ to define “armed attack” in the *Nicaragua* case,⁵⁶ so the Definition had at least tangential effects that are still being played out in international law. The difficulties in the area of the use of force are also pointed to clearly in this example, as the negotiators of the Rome Statute of the International Criminal Court were not able to agree on the immediate inclusion of “aggression” as a crime within the jurisdiction of the Court. It will only fall within the Court’s competence when the state parties amend the Statute and agree on a definition.⁵⁷

The central point is that one cannot consider norms separately from the institutions that shape, interpret, and apply the norms. This observation leads us back inexorably to the role of the Security Council and to deliberations over its reform. There is no need to rehearse here the complex and often bitter arguments

⁵⁴ See *supra*, note 49 and accompanying text.

⁵⁵ Resolution 3314 (XXIX) of 14 December 1974.

⁵⁶ *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v United States of America*) (Merits), [1986] I.C.J. Rep. 14.

⁵⁷ Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998) as corr. By UN Doc. PCNICC/1999/INF/3, reprinted in (1998) 37 ILM 999, arts 5(2), 121 and 123.

over how to enhance the legitimacy and effectiveness of the Council.⁵⁸ The problem that we want to emphasise is that considerations over legitimacy and effectiveness may pull in opposite directions. The desire to enhance the Council's legitimacy undergirds arguments for enlargement and greater representativeness. Yet, effectiveness may demand continuation of a limited membership and a deference to power realities.

The responsibility to protect is the crucible in which Security Council legitimacy and effectiveness must be tested against each other and some amalgam produced. For the foreseeable future this process must occur without any changes to the membership of the Council. The Outcome Document was silent on this issue and there does not seem to be sufficient political appetite to address membership issues. If global society is not able to address legitimacy through the vehicle of membership, it is all the more important that some version of the responsibility to protect is a genuine shared understanding of member states. Otherwise, any action by the Security Council based on this supposed norm will only engender resistance and further conflict. Moreover, if there are to be criteria for the authorization of the use of force on humanitarian grounds, they must be widely endorsed.

But even if a shared understanding emerges that would allow for the Security Council to apply a robust concept of the responsibility to protect, that does not address the problem of effectiveness. It has long been argued that the Security Council needs to be both constrained and enabled in taking actions for human protection. Legitimacy goes primarily to constraint. Yet experience suggests that the bigger problem may be the failure of the Security Council to act. One need only consider Cambodia under the Khmer Rouge, Uganda under Idi Amin, Rwanda, Kosovo, and most recently Darfur and again Uganda. It is by no means certain that the responsibility to protect, and any criteria that may be adopted to guide Security Council decision-making, will do more to improve the Council's performance than did the Definition of Aggression. Kosovo illustrates what can happen when the Security Council fails to act: unilateral action is at least arguably legitimated. In turn, this leads to a further erosion of the Council's own legitimacy and highlights how intricately effectiveness and legitimacy are intertwined.

CONCLUSION

International norms are built. To exist and to be effective they require the prior development of shared understandings that often result from processes of persuasion. If the responsibility to protect is to begin to shape actual decision making, the norm entrepreneurs who pushed for the inclusion of the concept in the Outcome Document of the 2005 summit must continue to work to persuade reluctant states that the norm is needed. These entrepreneurs include some state governments, individual diplomats, legal and international relations scholars, and civil society actors.

⁵⁸ See e.g. David M. Malone, "The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the UN Charter," (2003) 35 N.Y.U.J. Int'l L. & Pol. 487.

A successful norm building enterprise is one of the prerequisites for effective action in humanitarian crises. But even successful norm building does not guarantee outcomes. Norms can exist that are breached, even widely breached. Norms can also ground on the shoals of failed institutional reform. Norms and institutions interact in complex ways. They can be mutually reinforcing and mutually destructive. In the case of institutional reform in the UN, as it stands after the 2005 Summit, we are confronted with existing and potential failures. Despite the obvious interconnections between humanitarian crises and “peacebuilding”, the new Peacebuilding Commission has been given no explicit role in relation to the responsibility to protect. In particular, the idea that the Commission would fill an early warning function was rejected. This decision undercuts the emphasis previously placed upon prevention as a central aspect of the responsibility to protect. A similar problem exists with reference to the new Human Rights Council. One would have thought that the Council would be a primary locus for debates relating to humanitarian crises. However, the states negotiating the Outcome Document were not able to agree upon any of the details concerning the mandate or future modes of action of the Council. The subsequent deliberations do not provide much comfort for those who would wish to see the Council as an important vehicle for early warning or for the discussion of preventive action.

In essence, all the eggs of responsibility to protect have been thrown into the Security Council basket, a basket that has proven to be full of holes in the past. This choice increases the pressure on the Security Council to meet the burden of the world’s expectations for action in humanitarian crises. We believe that normative development is worth pursuing even in the absence of current institutional change. More robust norms may actually help institutional decision making. Norms also provide a framework for argument, and a hook on which to place demands for accountability.

But norm building must take into account institutional realities. Given the failure to locate the responsibility to protect in any UN structures apart from the Security Council, the difficulties inherent in Security Council reform could come to hinder normative progress around the responsibility to protect. If the Council continues to suffer from a legitimacy deficit, any actions it takes in furtherance of the responsibility to protect may actually undermine the norm. We are also aware that there is a potential irony in the quest for legitimacy for Security Council action in humanitarian crises. If criteria were to be agreed upon against which the decision to use force in defence of suffering populations should be justified, they would also become a test against which Security Council *inaction* could be measured. The implication is that unilateral action might well be further legitimated. This is precisely why criteria are opposed not only by some states that seek to constrain the Security Council, but also by some permanent members that do not want to be pressed into action through the Council.

We agree with the Secretary-General that the problems of the UN, at least in relation to the responsibility to protect, “are not beyond our power to meet them.”⁵⁹ But we also agree that we “cannot be content with incomplete successes.”⁶⁰ So far, the articulation of a candidate norm, the “*responsibility to protect*,” is but an incomplete success. The norm itself must be actively promoted by serious and engaged norm entrepreneurs. At the same time, the institutional framework in which the norm is to be applied needs to be buttressed. The good news is that these two tracks are potentially mutually reinforcing. If states can agree that the responsibility to protect is a norm that is truly necessary, and if it can only be made real through the operation of the Security Council, perhaps this will serve as impetus toward more creativity in institutional reform for the Council itself.

⁵⁹ See *supra* note 1 at para. 11.

⁶⁰ *Ibid.*