jilir | journal of & international law international relations

Volume 2, Number 1 Winter 2005

 ISSN: 1712-2988

jilir | journal of & international law international relations

Printed in Canada by the University of Toronto Press

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The *Journal of International Law & International Relations* gratefully acknowledges the financial and institutional support of the Faculty of Law and the Munk Centre for International Studies at the University of Toronto.

Subscriptions: Each volume of the *JILIR* consists of two issues, published in the Winter and the Spring.

The subscription cost is C$64 per volume (2 issues).

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Citation: (2005) 2 J. Int'l L. & Int'l Rel.

jilir | journal of international law & international relations

Symposium Issue: The UN at Sixty: Celebration or Wake?
Volume 2, Number 1
Winter 2005

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Preventing State Failure and Rebuilding Societies

The UN at Sixty: Celebration or Wake?

Editors' Note

This issue consists of papers based on contributions to "The UN at Sixty: Celebration or Wake?", a conference organized by the *Journal of International Law and International Relations* at the University of Toronto Faculty of Law on October 6 and 7, 2005. Grouped around four main themes (development, disease, and environmental degradation; failed states; use of force; and reform prospects), this collection gives a flavour of the ongoing debate on UN reform.

The 2005 General Assembly session was widely regarded as a failure, an opportunity missed. However, as these papers make clear, many important reforms were enacted and crucial conversations have begun. Moreover, the passionate debate at the conference, reflected in the contributions to this issue, indicates that on a range of issues, from the Millennium Development Goals to humanitarian intervention, consensus remains elusive.

The editors wish to thank the conference panellists and participants for their insightful contributions, the Faculty of Law for its generous financial support and, particularly, Professors Jutta Brunnée and Stephen Toope for their ongoing collaboration.

Ioana Bala and Paul Martin
Editors-in-Chief
Journal of International Law and International Relations, 2005-2006

Development, Disease and
Environmental Degradation

The High-level Summit, International Institutional Reform and International Law

ELLEN HEY*

I INTRODUCTION

"Is it plausible to imagine a UN dealing effectively with these interlinked crises?"[1]; crises in which, as stressed by the High-level Panel on Threats, Challenges and Change (High-level Panel), "[p]overty, infectious disease, environmental degradation and war feed on one another in a deadly cycle."[2] A slight rephrasing of the question, I suggest, is helpful. Is it plausible to imagine international institutions, including the United Nations, meaningfully contributing to dealing with the interlinked crises in which "[p]overty infectious disease, environmental degradation and war feed upon each other"? Two considerations prompt this re-characterization of the topic. First, a point made by the High-level Panel regarding institutional reform in the area of economic policy highlights the reasons why our horizon should extend beyond the United Nations:

> The institutional problem we face is twofold: first, decision-making on international economic matters, particularly in the areas of finance and trade, has long left the United Nations and no amount of institutional reform will bring it back; and second, the Charter allowed the creation of specialized agencies independent of principle United Nations organs, reducing the role of the Economic and Social Council to one of coordination[3]

Second, the primary responsibility for dealing with these inter-linked crises rests with states. Moreover, their cooperation is crucial if the United Nations and other international institutions are to be in a position to address these issues, hence the terms "meaningfully contributing to".

Can I imagine international institutions, including the United Nations, meaningfully contributing to dealing with these interlinked crises? Probably, provided, among other things, the agenda for institutional reform focuses more closely on the legitimacy of international decision-making processes and on the relationship between substantive policy content and "good process". This article

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1 Announcement for the conference *The UN at Sixty: Celebration or Wake?*, hosted by the *Journal of International Law & International Relations*, at the Faculty of Law of the University of Toronto, 6 October 2005.

2 *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) at para 22, online: United Nations ‹http://www.un.org/secureworld/ report.pdf› [High-level Panel Report].

3 *Ibid.* at para. 274.

develops the argument that to date the agenda for international institutional reform has devoted insufficient consideration to the link between the legitimacy of decisions taken and the decision-making processes utilized in international institutions. It makes the point that the relationship between participatory, transparent and accountable decision-making—good process—and decisions that are perceived of as legitimate has been neglected and that neglecting this relationship harbours the danger of undermining the legitimacy of the institutions involved.

The nature of the analysis is informed by legal scholarship that treats these two aspects of policy as intimately interrelated. Such scholarship emphasizes the importance of "good process" in developing substantive outcomes regarded as legitimate by those affected by these outcomes, including decisions that are intended to govern their behaviour.[4] The analysis conducted, moreover, draws on concepts that are familiar from national public and, in particular, administrative law, which even if not directly transplantable to the international legal system, facilitate the conceptualization of the exercise of public power constrained by the rule of law.[5]

This article first considers the decisions taken at the High-Level Summit in follow-up to the Millennium Goals (the Summit), as evidenced by the Summit Report,[6] and characterizes these decisions in terms of their possible effects on the manner in which international institutions, including the United Nations, might address the interlinked crises. It thereafter addresses the relationship between international institutional reform, international law and legitimacy.

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4 Of particular relevance is the work of Jutta Brunnée and Stephen Toope on an interactional theory of international law, see, Jutta Brunnée & Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law", (2000) 39 Colum. J. Transnat'l L. 19. Other relevant scholarship is that of Phillip Allot, *Eunomia, A New Order for a New World* (Oxford, Oxford University Press, 1990) [Allot, "Eunomia"]; Philip Allot, "The Concept of International Law," (1999) 10 E.J.I.L. 31.- [Allot, "The Concept"] and Thomas Franck, *Fairness in International Law and Institutions* (Oxford, Clarendon Press, 1995).

5 Also see Benedict Kingsbury, Nico Kirsch & Richard Stewart, "The Emergence of Global Administrative Law", Global Administrative Law Series, International Law and Justice Working Papers, IILJ Working Paper 2004/1; and Ruth W. Grant & Robert O. Keohane, "Accountability and Abuses of Power", Global Administrative Law Series, International Law and Justice Working Papers, IILJ Working Paper 2004/7, both online: Institute for International Law and Justice ‹http://www.iilj.org/publications/wp_globadminlaw.htm›. See also Martin Loughlin, *The Idea of Public Law* (Oxford, Oxford University Press, 2003).

6 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›. (reference in this article is to the text of the resolution dated 24 October 2005)[Summit Report].

II INSTITUTIONAL REFORM AND THE SUMMIT

The High-level Panel Report, *In Larger Freedom*, which is the report prepared by the United Nations Secretary-General in preparation for the Summit meeting[7] and the Summit Report published pursuant to the meeting focus on a number of institutions and their need for reform, the most important of which are the United Nations Security Council, institutions operating in the area of social and economic policy including the Economic and Social Council (ECOSOC), United Nations human rights institutions, and the United Nations Secretariat. This article focuses on the first two institutions and refers to the latter two as relevant to the former. Reform of the General Assembly was addressed in the documents in terms of streamlining decision-making, better coordination, and enhancing its contacts with civil society.[8] While a weak version of these three elements was included in the Summit Report,[9] the Summit did adopt the Secretary-General's proposal that the General Assembly develop a comprehensive convention on terrorism.[10]

United Nations Security Council Reform

Even an inattentive follower of the United Nations Millennium process and the outcome of the Summit might at this stage ask why one should address United Nations Security Council reform, given that what was decided in this respect might be summarized as states resolving to remain concerned.[11] Moreover, why discuss the Security Council in an article that was supposed to focus on development, disease, and environmental degradation—the latter in particular—with other contributions addressing peace and security matters? Although it is true that nothing much was decided at the Summit meeting in terms of Security Council institutional reform, I submit that a further broadening of the mandate of the Security Council has taken place as a result of the run-up to and decisions taken at the Summit. Moreover, this development is likely to determine where decisions about development, disease and environmental degradation will be taken in future. Ultimately, it also will affect the allocation of competences between United Nations institutions.

The substantive mandate of the Security Council over the years, especially during the past decades, has significantly expanded to include, for example, the establishment of international criminal tribunals for the former Yugoslavia and

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7 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), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement›. [*In Larger Freedom*]

8 High-Level Panel Report, *supra* note 2 at paras. 240-243; *In Larger Freedom*, ibid. at 158-164.

9 Summit Report, *supra* note 6 at paras. 149-151.

10 *In Larger Freedom*, *supra* note 7 at para. 161; and Summit Report, *supra.* note 6 at para. 83.

11 Summit Report, *supra* note 6 at para. 153.

Rwanda, the administration of territory in Kosovo and East Timor, and terrorism.[12] Significantly, the High-level Panel Report calls on the Security Council to host a second special session on HIV/AIDS as a threat to international peace and security and "to explore the future effects of HIV/AIDS on States and societies".[13] While this suggestion was not taken up in *In Larger Freedom* or in the Summit Report, the earlier 2000 special session of the Security Council indicates that HIV/AIDS, at the time, was conceived of as a potential threat to collective security. Though the then adopted Security Council resolution in its operative part focuses on HIV/AIDS as a threat to the health of international peacekeeping personnel, including support staff, the Resolution in its preamble states that "the HIV/AIDS pandemic, if unchecked, may pose a risk to stability and security."[14]

The two resolutions adopted at the Security Council session held in conjunction with the Summit and hence at the level of Heads of State and Government, also illustrate the contemporary broad understanding of collective security. Resolution 1624 (2005) concerns terrorism, while Resolution 1625 (2005) in the annexed declaration addresses the Security Council's role in conflict prevention, particularly in Africa.

Resolution 1624, among other things, calls upon all states to "[p]rohibit by law the incitement to commit a terrorist act or acts".[15] Remarkably, it does so without indicating what *incitement* to commit a terrorist act or acts might mean and with a universally agreed definition of terrorism still in dispute.[16] Such an unspecified obligation, which is binding on states, raises questions regarding the appropriate manner of designing provisions of criminal law and in particular the principle of legality, *nullum crimen sine lege*, in criminal law. This manner of proceeding also raises questions concerning the role of democratically elected parliaments in co-determining the content of criminal law. Resolution 1624, as well as other Security Council resolutions on terrorism,[17] thus goes to the heart of national criminal law

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12 Nico Krisch, "Introduction to Chapter VII" in Brunno Simma, ed., *The Charter of the United Nations*, 2nd ed. (Oxford: Oxford University Press, 2002).

13 High-Level Panel Report, *supra* note 2 at para 67.

14 UNSC Res. 1308, UN SCOR, UN Doc. S/RES/1308 (2000), at para. 11, Preamble.

15 UNSC Res. 1624, UN SCOR, UN Doc S/RES/1624 (2005), at para. 1(a).

16 Robert Kolb, "The Exercise of Criminal Jurisdiction over International Terrorists", in Andrea Bianchi, ed., *Enforcement of International Law Norms Against Terrorism*, (Oxford: Hart Publishing, 2004) 227-281 (Commenting on the many definitions available in international treaties and in national laws and the problems that arise as a result). Also see Antonio Cassese, "Terrorism as an International Crime" in *Enforcement of International Law Norms against Terrorism* 213 (making the point that a definition of terrorism does exist in international customary law); and Georges Abi-Saab, "The Proper Role of International Law in Combating Terrorism" in *Enforcement of International Law Norms Against Terrorism* xiii (pointing to the importance of adopting a comprehensive convention against terrorism that would include a definition of terrorism).

17 See *e.g.* UNSC Res. 1373, UN SCOR, 2001, UN Doc. S/RES/1373 (2001).

systems and raises fundamental concerns regarding its compatibility with international human rights law—concerns that equally arise with respect to the implementing legislation adopted by states.[18] The accompanying caution that states should comply with "international law, in particular international human rights law, refugee law, and humanitarian law",[19] while adopting counter-terrorism measures, does not alleviate the expressed concerns. The resolution, furthermore, exemplifies the broad powers exercised by the Security Council and its Counter-Terrorism Committee, which monitors implementation of relevant Security Council resolutions,[20] but, whose chairman has stated, is not mandated to monitor the compatibility of counter-terrorism with human rights law.[21] In this respect, it is worthy of note that the Secretary-General's proposal, to appoint a special rapporteur on the compatibility of counter-terrorism measures with international human rights law,[22] which was followed up by the Human Rights Commission in April 2005[23] and

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18 See *e.g.* Kent Roach & Gary Trotter, "Miscarriages of Justice and the War Against Terrorism" (2005) 109 Penn State L. Rev. 967. The discussions and court cases regarding the United Kingdom's *Anti-Terrorism, Crime and Security Act*, 2001 c. 24 [ATCSA] are illustrative of the problems at hand. The British Government in response to a ruling of the House of Lords, critiquing in particular the discriminatory nature of the detention powers of the ATCSA and finding them contrary to Articles 5 (right to liberty and security) and 14 (prohibition of discrimination) of the European Convention on Human Rights, introduced the Prevention on Terrorism Bill earlier this year, which was adopted on 11 March 2005 (See Oonagh Sands, "British Prevention of Terrorist Act 2005" *ASIL Insight* (April 27, 2005), online: American Society of International Law ‹http://www.asil.org/insights/2005/04/insights050427.html›). Meanwhile discussion has already started on the compatibility of United Kingdom's Terrorism Bill submitted to Parliament on 12 October 2005 (see Amnesty International, *United Kingdom Amnesty's International briefing on the draft Terrorism Bill 2005* (1 October 2005), online: Amnesty Internationl ‹www.web.amnesty.org›. One of the points on which the law is critiqued by Amnesty International is the manner in which "encouragement of terrorism" is criminalized in the Bill. Amnesty argues that the provision fails to meet the criterion of being prescribed by law, i.e. the legality principle, see Amnesty International at 12. (See also Reuters, "Blair Unveils tough anti-terrorism laws" (12 October 2005), online: Reuters Today ‹today.reuters.co.uk›. In The Netherlands a similar debate is ongoing, particularly with respect to a government proposal to criminalize "incitement" to commit a terrorist act. Another point of criticism against the Bill relates to the ninety-day period during which suspects of terrorism could be held in detention without being charged—a period that Parliament brought back to twenty-eight days (See "Blair defeat over terror laws" *BBC* (9 November 2005) online: BBC ‹http://news.bbc.co.uk/1/hi/uk_politics/442086.stm›.

19 UNSC Res. 1624 (2005), at para. 4.

20 UNSC Res. 1373 (2001), at paras. 6 and 7.

21 See website of the Counter Terrorism Committee, online: ‹http://www.un.org/Docs/sc/committees/1373/human_rights.html›.

22 *In Larger Freedom*, *supra* note 7 at para. 94.

23 Commission on Human Rights, Resolution 2005/80, (21 April 2005), at para. 14.

approved by ECOSOC in July 2005,[24] is not referred to in Security Council Resolution 1624. Nor was the Secretary-General's proposal taken up at the Summit meeting, even if the commitment to human rights law, refugee law, and international humanitarian law was reiterated in relationship to counter-terrorism measures.[25]

Resolution 1625 is also telling. In terms of conflict prevention, it refers to security, economic, social, and humanitarian sectors, as well as governance and human rights, when asserting the need to develop effective comprehensive strategies for conflict prevention.[26] This resolution resounds the comprehensive concept of collective security developed by the High-level Panel,[27] embraced by the Secretary-General,[28] reflected in the so-called Sachs Report,[29] and which also resounds in the Summit report.[30] The comprehensive collective security concept entails that threats to peace and security "include not just international war and conflict but [also] civil violence, organized crime, terrorism and weapons of mass destruction" as well as "poverty, deadly infectious disease and environmental degradation".[31] Such an understanding of peace and security, regardless of how pertinent it may be, amounts to a further broadening of the Security Council's mandate. It, thus, should come as no surprise if the Security Council in future were to concern itself with policies regarding poverty and the environment, for example.

The broad understanding of collective security raises yet another point of concern. The High-level Panel Report and the Sachs Report establish a causal link between poverty and security. For example, the High-level Panel, in developing the comprehensive collective security concept, provides that "[p]overty … is strongly associated with the outbreak of civil war".[32] The Sachs Report characterizes poverty as "[a] linchpin of global security" and provides that "[a]chieving the Millennium Development Goals should therefore be placed centrally in international efforts to end violent conflict, instability and terrorism".[33] While these assertions most probably are correct, linking poverty, which in turn is linked to environmental degradation, to global security provides a substantive basis for Security Council involvement in these issues and for an expansion of its mandate, as suggested above.

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24 ECOSOC, Decision 2005/279, 25 July 2005.

25 Summit Report, *supra* note 6 at para. 85.

26 Annex to UNSC Res. 1625, UN SCOR, UN Doc. S. /RES/1625 (2005). , at para. 4.

27 High-Level Panel Report, *supra* note 2; see especially paras. 17-43.

28 *In Larger Freedom*, *supra* note 7. See especially at para. 77, and see generally paras. 76-86.

29 *Investment in Development, A Practical Plan to Achieve the Millennium Development Goals, An Overview*, UN Millennium Project, directed by Jeffrey D. Sachs, UNDP, 2005, online: UN Millenium Project ‹http://www.unmillenniumproject.org/reports/fullreport.htm› [Sachs Report].

30 See *e.g.* Summit Report, *supra* note 6 at .paras. 72 and 79.

31 *In Larger Freedom*, *supra* note 7 at para. 78.

32 High-Level Panel Report, *supra* note 2 at para 22.

33 Sachs Report, *supra* note 29 at 6.

The focus on poverty, however, implies that developing, instead of developed, states will be the main addressees of decisions taken in this respect. In terms of sustainable development, it is noteworthy that the link that Principle 8 of the Rio Declaration makes between environmental degradation and affluence, in terms of unsustainable patterns of production and consumption, is not reiterated in the Summit documents.[34] These considerations make it all the more worrisome that the Summit did not take-up the Secretary-General's proposal on Security Council reform, which would have made the Security Council more representative of the global community. Echoing an earlier statement the Secretary-General in *In Large Freedom* states that "no reform of the United Nations would be complete without reform of the Security Council", and "[t]he Security Council must be broadly representative of the realities of power in today's world".[35]

The point made in this section is not that the Security Council should not, as a matter of principle, be involved in policies regarding, poverty or the environment, for example, or that the links established between various policy areas are irrelevant.[36] The point is rather that first, given the membership and the decision-making procedure of the Council,[37] Its resolutions on these and other matters run the risk of increasingly being regarded as lacking legitimacy for lack of "good process". Second, if the Security Council exercises broad powers in specific areas of law, such as criminal law, it should be subject to the safeguards associated with that area of law and the rule of law in particular, even if these safeguards may have to be adapted the problems addressed.[38] Relevant in this context is also the fact that the Secretary-General's proposal to appoint a rapporteur on the compatibility of counter-terrorism measures with international human rights law[39] was not referred to in the Summit Report. This proposal and the steps subsequently taken by the Human Rights Commission and ECOSOC[40] are important since the appointed rapporteur, in reviewing national counter-terrorism laws, will be able to indirectly assess the compatibility of Security Council resolutions with human rights law.

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34 1992 Rio Declaration on Environment and Development, 31 ILM (1992) at 874.

35 *In Larger Freedom*, *supra* note 7 at para 169.

36 See e.g. George Abi-Saab, *supra* note 16 (making the link between terrorism and "deep feeling of injustice and oppression, of loss of hope and prospects, resulting from misery, exploitation, denials of human rights, and great inequalities between and within peoples"), at xxi-xxii.

37 See articles 23 and 27 of the United Nations Charter.

38 See Thomas M. Franck, "Criminal Combatants, Or What? An Examination of the Role of Law in Responding to the Threat of Terror" (2004) 98 A.J.I.L. 686.

39 *In Larger Freedom*, *supra* note 7 at para. 94.

40 See text at notes 23 and 24.

Moreover, the rapporteur, as other human rights rapporteurs, is able to scrutinize practice in both developed and developing states.[41]

Interesting and somewhat worrisome in the context of the lack of Security Council reform are two recent decisions of the Court of First Instance of the European Community, pertaining to the freezing of assets in view of the counter-terrorism measures adopted by the European Community on the basis of Security Council resolutions.[42] The Court held that while it is not entitled to review the legality of Security Council resolutions,[43] it is entitled to review such resolutions indirectly, based on its competence to review relevant Community instruments in the light of *jus cogens*, which, it asserts, also binds the Security Council.[44] It is worthy of note that the Court considers fundamental human rights, *in casu*, including the right to property, the right to a fair hearing and the right to an effective judicial remedy, to belong to the body of *jus cogens* that also binds the Security Council.[45] The Court ultimately held that the Community instruments, as well as the Security Council resolutions and the practice of the Sanctions Committee regarding the de-listing of natural and legal persons suspected of terrorism, are not contrary to *jus cogens*.[46] It would go beyond the scope of this article to dwell on the role of the Sanctions Committee; it suffices to say that it is a subsidiary body of the Security Council, made up of all Members of the Council that decides upon de-listing by consensus, unless the state that originally proposed the listing submits a request for de-listing. In the latter case, a non-objection procedure applies.[47] Moreover, individual cases are brought before the Committee by the state of citizenship or residence of the individual concerned,[48] which is problematic because international law does not grant individuals a right to diplomatic protection.

However, before we read too much into the decisions of the Court of First Instance, two points of caution are in order. First, the decisions of the Court of First Instance are subject to appeal to the Court of Justice of the European Community on

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41 On the importance of international supervisory mechanisms see, Andrew Clapham, "Terrorism, National Measures and International Supervision" in Bianchi, ed., *Enforcement of International Law Norms against Terrorism*, *supra* note 16 at 283.

42 Case T-306/01(Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities) and Case T-315/01 (Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities), both 21 September 2005.

43 Case T-306/01 at paras. 270-276; Case T-315/01 at paras. 219-225.

44 Case T-306/01 at paras. 277-282; Case T-315/01 at paras. 226-231.

45 Case T-306/01 at para. 284 ff.; see also Case T-315/01 at para. 233 ff.

46 Case T-306/01 at para. 347; Case T-315/01 at para. 292.

47 Security Council Committee established pursuant to Resolution 1267 UN Doc. S/RES/1267 (1999), at para. 7, Guidelines of the Committee for its work, 7 November 2002 and amended 10 April 2003, online: United Nations ‹http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf›

48 Ibid.

points of law.[49] Second, I have serious doubts whether the approach adopted by the Court of First Instance, regarding in particular its findings on the content of *jus cogens*, will meet with the approval of the Court of Justice. However, I also add that this development, in which a regional court indirectly reviews Security Council resolutions and which may have destabilizing effects on the international legal system, might be inevitable if the United Nations does not itself adopt proper accountability procedures.[50] Approaches rightly adopted in a different context specifically that of the compatibility of European Community law with the European Convention on Human Rights (ECHR), by the European Court of Human Rights (ECrtHR) in *Mathews*[51] or in the more recent *Bosphorous* case,[52] might provide a source of inspiration for other courts, whether national or regional.

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49 At the time of writing, Case T-315/01 had been appealed to the Court of Justice and was registered as Case C-402/05, online: ‹http://curia.eu.int/en/plan/index.htm›. Given that several cases were listed on the website, without further reference to names or documents, it is unclear whether case T-306/01 has been appealed. The deadline for lodging an appeal closed on 21 November 2005.

50 Such processes are at present limited to dialogue between the Security Council and its Counter-Terrorism Committee and human rights bodies, including the United Nations High Commissioner for Human Rights and the rapporteur on the compatibility of counter-terrorism measures with human rights law (see UNGA, *Protection of human rights and fundamental freedoms while countering terrorism*, GA Res 59/191, UN GAOR, 59th Sess., UN Doc. A/RES/59/191 (2005), and para 14(e) of Resolution 2005/80 adopted by the Human Rights Commission). Also see André Nollkaemper, "Internationalisering van Nationale Rechtspraak" ("Internationalization of the Decisions of National Courts") (2005) 131 *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* (*Communication of the Netherlands Society of International Law*) 1 at 62.

51 *Matthews v. United Kingdom*[1999] ECHR 12 In *Matthews* the ECrtHR held that the United Kingdom remained responsible for a violation of article 3 (the right to free elections) of Protocol 1 to the ECHR even if it had transferred certain competences to the European Community by way of "international instruments which were freely entered into by the United Kingdom" (at para. 33; see also paras. 34 and 35). *In casu* the relevant instruments were the Maastricht Treaty on European Union of 7 February 1992, in conjunction with Council Decision 76/787 and the Act concerning the Election of Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976. These instruments are all treaties, as opposed to Community instruments, under European law.

52 *Bosphorus Airlines v. Ireland*, Applicant no. 45036/98, 30 June 2005. In *Bosphorus*, instead of international instruments voluntarily entered into, a European Community instrument (*in casu* EC Regulation 990/93) was at stake and, in particular, whether the interpretation and application of that Regulation by Ireland was in violation of article 1 (the right to property) of Protocol 1 to the ECHR. EC Regulation 990/93 was one of the regulations adopted in the European Community to implement United Nations Security Council resolutions regarding sanctions against former Yugoslavia (*in casu* UNSC Resolution 820 (1993)). The ECrtHR distinguished the case from the previously discussed *Matthews* case (*supra* note 51), based on the finding that European Community instruments were at stake (para. 157). This prompted the Court to engage in an extensive consideration of

I suggest that it would be good process to establish an entity, independent of the Security Council, that could review the consistency of Security Council resolutions with human rights norms *ex ante* and a mechanism that could review the implementation of these resolutions by states. The work of the rapporteur on the compatibility of counter-terrorism measures with human rights law will focus mainly on the latter. The dialogue that the rapporteur is to engage in with the Counter-Terrorism Committee of the Security Council, however, may provide some scope for *ex ante* review.[53] The to-be-established Human Rights Council, in theory, could play a role in both respects. However, given the rather vague text in the Summit Report, its mandate and position remain unclear. Yet, the reference to "mainstreaming of human rights within the United Nations system"[54] provides scope for arguing that the Human Rights Council could and should play a role in this respect and, in particular, in considering whether Security Council resolutions meet human right standards. Such a development might also go a long way towards preventing national and European courts from coming to a variety of conclusions about the compatibility of Security Council resolutions and procedures with *jus cogens*.

Institutional Reform and Social and Economic Policy

As the quotation at the beginning of this article illustrates,[55] the High-level Panel made the point that UN reform can only partially, if not marginally, address reform in the area of international economic policy. In particular, it means that reform of the WTO, International Monetary Fund (IMF) and the World Bank cannot be addressed in this process. It is of course well understood that that the United Nations reform process, as such, and the United Nations Secretary-General cannot address reform of these institutions in a comprehensive manner. In the case of the Secretary-General, specifically, addressing such reform would clearly extend beyond his mandate. The Summit, however, as a meeting of the United Nations General Assembly attended by Heads of State and Government, is competent to

relevant EC law and practice in the area of human rights, to eventually come to the conclusion that "[i]f such equivalent protection [equivalent to the ECHR] is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the Convention [ECHR] when it does no more than implement legal obligations flowing from its membership of the organization. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient." (para. 156). The ECrtHR, while in general terms approving of the manner in which human rights are protected in the European Community, thus reserves its position to consider whether in an individual case such protection was manifestly deficient. In *Bosphorus* the ECrtHR rejects the claim.

53 See First Report of the Special Rapporteur, UN Doc. A/60/370 (2005).

54 Summit Report, *supra* note 6 at para. 159.

55 See text at *supra* note 3.

address such issues. While the General Assembly, as such, cannot amend the terms of reference or mandates of United Nations specialized agencies—let alone of the WTO, which is not a United Nations specialized agency—it frequently requests United Nations specialized agencies, other United Nations bodies, or member states of such agencies or bodies to undertake certain tasks.[56] Moreover, as the reference to the need for reform of the Bretton Woods institutions illustrates, the Summit did not remain totally silent on this point.[57]

In *In Larger Freedom*, the Secretary-General acknowledges the point made by the High-level Panel regarding the limited possibilities for the United Nations in addressing institutional reform in the area of economic policy.[58] The proposals included in *In Larger Freedom* and the decisions contained in the Summit Report accordingly are limited to strengthening the coordinating role of ECOSOC. The measures envisaged call for more dialogue and partnerships with the financial institutions, the private sector, and civil society and high-level meetings with the aim of better coordinating the work of the United Nations in the area of social and economic policies. They also acknowledge that the working methods of ECOSOC should be adapted to achieve these aims.[59] The bottom line is that ECOSOC was envisaged as a coordinating body in 1945 and remains just that. It remains to be seen whether the fact that some ECOSOC members will be members of the Organizational Committee of the Peacebuilding Commission will enhance ECOSOC's position.[60] Relevant considerations in this respect are that the Peacebuilding Commission is no longer envisaged as a joint venture of the Security Council and ECOSOC, as proposed in *In Larger Freedom*[61] and that it will report to the General Assembly, instead of to the Security Council and ECOSOC in sequence, depending on the phase of the conflict.[62]

Significantly, *In Larger Freedom* acknowledges that, in the medium and longer term, "much more radical reforms" will be required to streamline activities of the many institutions working on development, environment, and humanitarian

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56 Exemplary are the annual resolutions of the General Assembly regarding oceans and the law of the sea, for example GA Res 58/240, UN GAOR, 58th Sess., Un Doc. A/RES/58/240 (2004), in which a number of United Nations specialized agencies and their member states as well as other United Nations bodies are requested to consider and act on issues regarding ocean policy and law. See Ellen Hey, "Reviewing Implementation of the LOS Convention and Emerging International *Public* Law", in Alex Oude Elferink, ed., *Stability and Change in the Law of the Sea: Selected Issues* (Leiden: Martinus Nijhoff, 2005)73.

57 See text at *infra* note 76.

58 *In Larger Freedom*, *supra* note 7 at para. 172.

59 *In Larger Freedom*, *supra* note 7 at paras. 175-180, and Annex at para. 8(d); see also Summit Report, *supra* note 6 at paras. 155-156.

60 Summit Report, *supra* note 6 at paras. 97-105.

61 *In Larger Freedom*, *supra* note 7 at paras. 114-117.

62 Compare *In Larger Freedom*, *supra* note 7 at para. 116, and Summit Report, *supra* note 6 at para. 99.

action. The Secretary-General, in fact, points to the need to regroup agencies, funds, and programs "into tightly managed entities" and asserts that this "might involve eliminating or merging those funds, programmes and agencies which have complementary or overlapping mandates and expertise".[63] However, in the meantime, emphasis is to be placed on improving coordination of United Nations activities at the country level.[64] The Summit Report reflects these considerations in terms of a business-as-usual attitude without the urge for radical reform.[65]

The paragraphs on environmental policy in the various reports are telling. With respect to global environmental governance, *In Larger Freedom* points out that "the number and complexity of international agreements and agencies", with "more than 400 regional and universal multilateral environmental treaties in force" would have the following implication:

> It is now high time to consider a more integrated structure for environmental standard setting, scientific discussion and monitoring treaty compliance. This should be built on existing institutions, such as the United Nations Environment Programme, as well as the treaty based bodies and specialized agencies. Meanwhile, environmental activities at the country level should benefit from improved synergies, on both normative and operational aspects, making use of their comparative advantages, so that we have an integrated approach to sustainable development, in which both halves of that term are given their due weight.[66]

Note that the quoted passage follows the sense of the paragraphs on social and economic reform: significant restructuring is required, albeit with a focus on better coordination at the country level in the meantime. Yet, it is also worthy of note that this paragraph reflects concerns that were already expressed in Agenda 21, and in particular Chapter 38, on international institutional arrangements.[67]

The Summit Report is exemplary of the "business-as-usual" attitude of United Nations member states when it comes to environmental policy. It expresses agreement "*to explore* the possibility of a more coherent institutional framework" to address "enhanced coordination, improved policy advice and guidance, strengthened scientific knowledge, assessment and cooperation, better treaty compliance, *while respecting the legal autonomy of the treaties*, and better integration of environmental activities in the broader sustainable development framework at the operational

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63 *In Larger Freedom*, *supra* note 7 at para. 197.

64 *In Larger Freedom*, *supra* note 7 at para. 198.

65 Summit Report, *supra* note 6 at paras 168 and 169.

66 *In Larger Freedom*, *supra* note 7 at para. 212, *In Larger Freedom*.

67 See especially Agenda 21: Programme of Action for Sustainable Development, United Nations Publication, online: United Nations ‹http://www.un.org/esa/sustdev/documents/agenda21/index.htm›, at para 38.7.

level".[68] This is a far cry from developing an integrated structure for global environmental governance and from a response to the findings of the High-level Panel that "[e]xisting global economic and social governance structures are woefully inadequate to address the challenges ahead"[69] and that "[m]ost attempts to create governance structures to tackle the problems of global environmental degradation have not effectively addressed climate change, deforestation and desertification" with multilateral environmental treaties being undermined by inadequate implementation and enforcement by the states parties.[70]

What can one make of the above in terms of decision-making and legitimacy in international social and economic policy? I suggest that the agenda is set for business-as-usual with one important difference: the comprehensive collective security concept discussed above.[71] It will in the future provide a basis for the Security Council expanding its mandate in the area of social and economic policy, including human rights policy, unless the Human Rights Council is vested with an appropriate mandate. If the Security Council expands its mandate as suggested, the already weak position of ECOSOC and the institutions operating under ECOSOC might weaken even further. This would entail a further shift in the institutional balance within the United Nations, with the Security Council attaining increased importance and the importance of ECOSOC declining further.

But, what, subject to the above, does "business as usual" mean? In order to explore the answer to this query, I submit, with all due respect, that the United Nations Secretary-General missed a point when he refers to the need for "much more radical reforms" being required to streamline the activities of institutions active in the social and economic field and for an "integrated structure for" global environmental governance.[72] A system for streamlining activities in the social and economic field and an integrated structure for global environmental governance has been under construction for a while. It involves standard-setting and monitoring compliance with those standards. However, it only involves standards for a part of the world, that is the South, and, to a lesser degree, economy-in-transition states. The World Bank, in particular, streamlines activities and provides such a structure. With regard to global environmental governance, it does so through, in particular, the renegotiated Global Environment Facility (GEF), which is the implementing agency for most of the financial mechanisms established by Multilateral Environmental Agreements (MEAs) and through its own initiatives like the Prototype Carbon Fund (PCF) and the original GEF.[73] The World Bank and the IMF, as is well-documented, also play an important role in addressing other social

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68 Summit Report, *supra* note 6 at para. 169, last bullet [emphasis added].

69 High-Level Panel Report, *supra* note 2 at para. 56.

70 High-Level Panel Report, *supra* note 2 at para. 54.

71 See especially text following *supra* note 26.

72 See text at *supra* note 66.

73 See Ellen Hey, "Sustainable Development, Normative Development and the Legitimacy of Decisions-Making" (2003) 34 Neth. Y. I.l L. 3 [Hey, "Sustainable Development"].

and economic concerns, including human rights, especially though Structural Adjustment Programs.[74] The World Bank, for example, has a host of internal regulations for projects that it engages in and that are targeted at various issues from environmental impact assessment to indigenous peoples.[75] The point, once again, is not that the World Bank or the IMF should not adopt such regulations and apply them to projects that they engage in. It is rather that the decision-making processes and procedures through which such instruments are developed are not characterized by "good process", given that participation of developing and economy-in-transition states in decision-making is relatively limited, when compared to developed states. The following paragraph in the Summit report is telling:

> We reaffirm the commitment to broaden and strengthen the participation of developing countries and countries with economies in transition in international economic decision-making and norm-setting, and to that end stress the importance of continuing efforts to reform the international financial architecture, noting that enhancing the voice and participation of developing countries and countries with economies in transition in the Bretton Woods institutions remains a continuous concern.[76]

Such concerns are not new. While Agenda 21 voiced similar concerns only with respect to the GEF in its original form,[77] the 1990 Report of the South Commission made the point with respect to the international institutions in general and the Bretton Woods institutions in particular.[78] In addition, the Johannesburg Declaration on Sustainable Development also makes the point that "[t]o achieve our goals of sustainable development, we need more effective, democratic and accountable international and multilateral institutions." [79]

With the emergence of the comprehensive collective security concept, the absence of Security Council reform, little by way of reform of the institutions that

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74 See Mac Darrow, *Between Light and Shadow, The World Bank, The International Monetary Fund and International Human Rights Law* (Oxford: Hart Publishing, 2003).

75 See *e.g.* World Bank Operational Policy/Bank Procedures (OP/BP) 4.01 on environmental assessment policy and OP/BP 4.10 on indigenous peoples.

76 Summit Report, *supra* note 6 at para. 35.

77 Agenda 21, *supra* note 57 at para. 33.14, (A)(iii). The GEF was established as a pilot project of the World Bank in 1991 and was administered solely by the World Bank. Agenda 21 required that the GEF be restructured so as to be more transparent and more open to participation by developing states, but also giving due weight to the funding efforts of donor states (par. 33.14(A)(iii)). The GEF was established in its present form in 1994. For further information see Hey, "Sustainable Development", *supra* note 73 at 32-35.

78 The South Commission, *The Challenge to the South, The Report of the South Commission* (Oxford, Oxford University Press 1990). See especially 263-265.

79 UN Doc.A/Conf.199/20 at para.31, reproduced in (2002) 2 International Environmental Agreements: Politics, Law and Economics 43.

operate in the area of social and economic policy, and the uncertainty in the mandate of the Human Rights Council, questions arise regarding the legitimacy of the decisions taken, the decision-making processes employed and, ultimately, the institutions involved. These questions are especially relevant in the light of the above analysis, which illustrates that institutions in which developed states dominate decision-making—the Security Council, the World Bank, and IMF—occupy crucial positions in international decision-making, both where security as well as social and economic policy are at stake. Add to that the fact that the decisions taken by these institutions affect developing states more significantly than developed states and we are at the core of the North-South debate. I suggest that in this respect, the Summit meeting was a missed opportunity to address inequities in international decision-making. That brings me to the question of how such inequities might be conceptualized in terms of international law, which could introduce some measure of legitimacy into the decision-making processes and procedures by introducing notions related to the rule of law.

III INTERNATIONAL INSTITUTIONAL REFORM, INTERNATIONAL LAW AND LEGITIMACY

In addition to democracy,[80] the concept of the rule of law[81] is central to the conceptualization of legitimacy in terms of law in contemporary national society. While this concept is not directly transplantable from the national to the international level of governance, the concept of the rule of law does offer relevant anchoring points for conceptualizing how legitimacy might be enhanced at the international level of decision-making. Moreover, the importance of the rule of law is also addressed in the various documents related to the Summit.

The Rule of Law and the Summit Documents

The Summit Report refers to the need to strengthen the rule of law at national and international levels. The report, in focusing on the steps to be taken at the national level, emphasizes the role of the United Nations in promoting the rule of law and democracy at that level.[82] Noteworthy is the establishment of a rule of law assistance unit within the United Nations Secretariat.[83] While in *In Larger Freedom*,

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80 Translation of the notion of democracy to the international level of decision-making is particularly difficult, if not impossible, because there is no *demos*, at least at present and probably a long way into the future. Consequently, legitimacy has to be grounded on other concepts, as suggested, the concept of the rule of law can be helpful in this respect. Also see and Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 A.J.I.L. 596; see especially at 615-616; see also Grant & Keohane, *supra* note 5 see especially at 11-14.

81 See David M. Beaty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004); Martin Loughlin, *supra* note 5.

82 Summit Report, *supra* note 6 at paras. 134-137.

83 Summit Report, *supra* note 6 at para. 134(e).

its role is linked to peacebuilding and the (re)introduction of the rule of law in conflict or post-conflict societies,[84] its role is left unspecified in the Summit Report and is referred to in terms of technical assistance and capacity-building only.[85] It is still unclear if the unit could play a role in ensuring that counter-terrorist measures are implemented in accordance with the rule of law. Moreover, if it is to play a role in this respect, as opposed to the rapporteur on the compatibility of counter-terrorism measures with human rights law,[86] its focus would most likely be exclusively on developing states. It is important to note, however, that the rapporteur may provide advisory services and technical assistance to states at their request only, even if the rapporteur is entitled "to make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism."[87]

As mentioned above, the Summit Report also addresses the rule of law at the level of international governance. A conceptualization of what the introduction of the rule of law at the international level might entail, however, is lacking. First, at various places in the document the importance of the rule of law at all levels for "sustained economic growth, sustainable development and the eradication of poverty and hunger"[88] as well as "peaceful coexistence and cooperation among States"[89] is asserted. Notably, the section entitled "Systemic Issues and Global Economic Decision-making" contains the above quoted paragraph about the need to reform the Bretton Woods institutions[90] as well as a commitment to "equitable, rule-based, predictable and non-discriminatory trading and financial systems"[91] and the assertion that "[g]ood governance at the international level is fundamental for achieving sustainable development".[92] Essentially, these assertions amount to a summary of what was already agreed in the Monterrey Consensus, adopted in March 2002.[93] Perhaps more importantly, a reference to the significance of the International Criminal Court in implementing the rule of law at the international level, as contained in *In Larger Freedom*,[94] is not to be found in the Summit Report.

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84 *In Larger Freedom*, *supra* note 7 at para. 137.

85 Summit Report, *supra* note 6 at para. 134(e).

86 See text at *supra* note 41.

87 Human Rights Commission, Resolution 2005/80 at para. 14(a).

88 Summit Report, *supra* note 6 at para. 11; see also paras. 21, 24(b).

89 Summit Report, *supra* note 6 at para. 134(a)

90 See text at *supra* note 76.

91 Summit Report, *supra* note 6 at para, 36.

92 Summit Report, *supra* note 6 at para. 39.

93 Monterrey Consensus of the International Conference on Financing for Development, Mexico, 2002, UN Doc. A/CONF.198/11, see in particular section F of the Consensus and UN Doc. A/59/822, 1 June 2005, The Monterrey Consensus: status and implementation and tasks ahead, Report of the Secretary-General.

94 *In Larger Freedom*, *supra* note 7 at para 138.

Beyond broadened and strengthened participation of developing and economy-in-transition states in decision-making in the Bretton Woods institutions and equity and transparency in decision-making, there is not much to be found in the Summit Report in terms of what the rule of law might entail at the international level of decision-making. Admittedly, the concrete reference to the Bretton Woods institutions and to participation in decision-making and norm-setting are a step beyond what has to date been included in similar international policy instruments.[95] However, the absence of a call for more accountable international institutions is conspicuous by its absence in the Summit report— a requirement that was included in, for example, the Johannesburg Declaration.[96]

Most importantly, the Summit document shows no trace of the proposals for Security Council reform, as proposed by both the High-level Panel and by the Secretary-General in *In Larger Freedom*. As the High-level Panel asserted, Security Council reform is necessary to enhance the effectiveness of that body, but also to enhance its legitimacy and credibility. While the former refers to the need for more substantively coherent decision-making by the Security Council, the latter refers to the need to broaden its composition.[97] The Secretary-General in *In Larger Freedom* adopted a similar position, both in terms of substance[98] and institutional reform.[99]

The gradual broadening of the concept of collective security and Security Council practice, without concomitant Security Council reform, and the central role played by the Bretton Woods institutions in international social and economic policy, give rise to the question about how the role of international law may be understood. This query is discussed in the following section of this article.

Globalization, International Institutions and International Law

Globalization, whether understood narrowly as economic globalization or more broadly as a process by which social relationships, including those of individuals and groups, extend across the globe, has resulted in decision-making at the international level becoming more important as means of addressing ensuing relationships of interdependence.[100] Moreover, enhanced interdependence has resulted in the perception that the decision-making processes and the ensuing decisions are of concern to the international community, as such. Armed conflict, terrorism, human rights violations, environmental degradation, and poverty are pertinent examples. International institutions play an important role in decision-making in these policy

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95 See text at *supra* notes 77 to 79.

96 See text at *supra* note 79.

97 High-Level Panel Report, *supra* note 2; see respectively paras. 204-209 and 244-260.

98 *In Larger Freedom*, *supra* note 7 at para. 126.

99 *In Larger Freedom*, *supra* note 7 at paras. 167-170.

100 Ellen Hey, *Teaching International Law, State-Consent as Consent to a Process of Normative Development and Ensuing Problems*, inaugural lecture, (The Hague: Kluwer Law International, 2003), 2 [Hey, *Teaching International Law*].

areas. The United Nations Security Council, the various treaty based human rights bodies, conferences of the parties (COPs) to MEAs, and the World Bank provide relevant examples. While many, if not most, of the decisions taken by these institutions are not legally binding in terms of the traditional doctrine of international law, such decisions, as resolutions of the Security Council, which are legally binding when it acts under Chapter VII of the United Nations Charter, may exert considerable influence on states as well as on individuals and groups. Relevant examples are the draft decisions on the content of the flexible mechanisms under the Kyoto Protocol adopted within the framework of the climate change regime,[101] decisions of the Human Rights Committee on the legality of reservations to the International Covenant on Civil and Political Rights[102] and the aforementioned Operational Policies/Bank Procedures of the World Bank.[103]

In terms of traditional doctrine, the legally non-binding character of such decisions can be explained by the fact that states did not formally consent to the decisions at stake. As opposed to the situation regarding the Security Council acting under Chapter VII of the United Nations Charter, states also did not formally consent to the institution in question adopting legally binding decisions. However, what all these institutions, including the Security Council, have in common is that questions regarding the legitimacy of the decision-making process and the resulting decisions have arisen. I submit that, in terms of law, this is because state-consent, the fact that states in all these cases consented to the treaty establishing the

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101 COP 7 adopted decisions amongst other things, on the implementation of articles 6, 12 and 17 of the Kyoto Protocol, in view of the entry into force of the Protocol. It is envisaged that these decisions will be adopted in November 2005, at the first meeting of the COP/MOP of the Kyoto Protocol, which entered into force on 16 February 2005. For the text of the decisions, see UN Doc. FCCC/CP/2001/13 Add. 1 to 3. For information on the flexible mechanisms of the Kyoto Protocol see David Freestone, "The UN Framework Convention on Climate Change, the Kyoto Protocol and the Kyoto Mechanisms" in David Freestone & Charlotte Streck, eds., *Legal Aspects of Implementing the Kyoto Mechanisms: Making Kyoto Work* (Oxford: Oxford University Press, 2005) 3.

102 See General Comment 24, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, adopted by the Human Rights Committee at its fifty-second session, 1994, online: Office of the High Commissioner for Human Rights ‹http://www.unhchr.ch› . Also see comments Human Rights Committee on the reservation made by the United States to art 6 (death penalty). Furthermore, see Human Rights Committee, Communication No. 845/1999: Trinidad and Tobago, UN Doc CCPR/C/67/D/845/1999, 31 December 1999. In this Communication the Human Rights Committee proceeded to determine that a reservation made by Trinidad and Tobago to the Optional Protocol to the effect that the Human Rights Committee would not be entitled to receive and consider communications relating to any prisoner under sentence of death was contrary to the object and purpose of the Optional Protocol and thus did not preclude the Committee from considering the communication in question.

103 See *supra* note 75.

institution in question, no longer serves to legitimize the decisions taken by these institutions.

I will retrace a few steps. In traditional international legal doctrine, state-consent serves the dual purpose of bringing into existence a binding rule of law and of legitimizing that rule. Traditional doctrine thus first assumes that a state is bound by a rule or set of rules in the form of a treaty, if that state formally consents to the rule or set of rules in question in accordance with an agreed procedure.[104] Second, traditional doctrine also assumes that a decision so adopted is legitimate. Traditional doctrine, thus, adopts a normative, instead of a legal-sociological, approach to the legitimacy of a rule or set of rules adopted.[105] Moreover, in traditional doctrine, the two functions of state-consent coincide. This approach can be explained in terms of the original conception of the international law as a purely inter-state legal system, in which international institutions play a minor role. However, with the increasingly important role played by international institutions in international decision-making, a different perception of legitimacy is required—one that is grounded in legal-sociological approaches and which can be found in national public or administrative law.

As mentioned above, formal state-consent, with the exception of the Security Council acting under Chapter VII of the UN Charter, is absent in most of the decisions taken by the institutions referred to above. Furthermore, also in those cases where the Security Council acts under Chapter VII of the UN Charter, all states bound by the Security Council resolution do not consent to it. I suggest, that in all these cases it is appropriate to regard the consent of states to the treaty establishing the international institution in question as consent to a process of normative development, the outcome of which is unknown at the time when consent is given. However, from this perspective, state consent to the treaty establishing the institution, no longer serves to legitimize the decisions taken by the institution at some future point in time. The legitimacy of the decision in question, I suggest, instead depends on the nature of the decision-making processes and procedures used to adopt the decision. It is at this stage that "good process" comes into play and that an alternative approach to legitimacy needs to be developed.[106]

Developing an alternative approach to legitimacy, however, involves stepping outside the confines of traditional international legal doctrine. It involves acknowledging that we are using a legal system that is similar to national contract law to address common interest or public law type problems.[107] As in national public and administrative law, in particular, consent to a rule or set of rules is not a proper source of legitimacy. Instead, legitimacy is grounded in other factors such as the

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104 That is, in accordance with the relevant rules in the Vienna Convention on the Law of Treaties.

105 Bodansky, *supra* note 80 at 600-603.

106 Also see Hey, *Teaching International Law*, *supra* note 100.

107 Also see Ellen Hey, "International *Public* Law" (2004) 6 International Law FORUM du Droit International 149.

attribution and delegation of decision-making powers, reasoned decisions, proportionality in decision-making, the right of interested parties to have their interests accounted for, respecting basic rights, and access to review procedures.[108] The decision-making processes and procedures employed by international institutions, thus, should be the focus of attention if these institutions and the ensuing decisions are to be regarded as legitimate.

Such a conceptualization of the rule of law at the international level of decision-making is absent from the Summit Report, while *In Large Freedom* contains elements of such an approach. Relevant examples are the human rights rapporteur for determining the compatibility of counter-terrorism measures with human rights law and the proposals on Security Council reform. Such an approach, however, also requires that due consideration be given to the central role played by the World Bank and the IMF in developing integrated approaches to social and economic policies as applicable to developing states, in particular.

IV FINAL REMARKS

The conceptualization of legitimacy and international law as presented in this article is twofold. First, it is based on the idea that law is about process and relationships before it is about rules and that relevant actors in interaction constitute and reconstitute these relationships and thus themselves and their interests.[109] In this view, the law at any given time also reconstitutes relevant actors. The resulting conceptualization is one of a continuous interactive process in which individuals and groups, law and society reconstitute themselves and each other. Second, it is based on the idea that the public domain is a domain in which all power exercised is public power and thus subject to the requirement of accountability.[110] This conceptualization is familiar to lawyers based on their knowledge of international administrative law. However, it has not resounded in the international public realm, as the Summit report illustrates. This is not to say that elements of

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[108] See Kingsbury et al., *supra* note 5 and Grant & Keohane, *supra* note 5.

[109] Also see Brunée & Toope, *supra* note 4 at 51-52; Allot, "The Concept", *supra* note 4 at 36.

[110] Also see Allot, "Eunomia", *supra* note 4 at 336-337; Allot, "The Concept", *supra* note 4 at 36.

such a conceptualization of international law are totally absent. Relevant examples are the reporting and complaints procedures available under human rights treaties, the International Criminal Court, the World Bank Inspection Panel,[111] the compliance procedures included in most MEAs,[112] and the renegotiated GEF with more equal participation of developing and developed states in decision-making.[113] However, such examples are few and far between and importantly, many of them do not apply universally.

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111 See Hey, "Sustainable Development", *supra* note 73 at 41-43.

112 Hey, "Sustainable Development", *supra* note 73 at 38-41.

113 Hey, "Sustainable Development", *supra* note 73 at 32-35.

Who Needs More Coordination? The United Nations and Development Assistance

NILIMA GULRAJANI, SARAH MULLEY AND NGAIRE WOODS*

INTRODUCTION

In the aftermath of the Second World War, the creation of the United Nations Specialized Agencies and the Bretton Woods institutions gave concrete life to a post-war liberal internationalist ideal concerning the benefits of multilateral cooperation for development. These benefits include enhanced efficiency by which collective goals can be achieved through central pooling of global resources and knowledge, the creation of stable, neutral and autonomous negotiating and administrative centers, and the reduction of the transaction costs of international collective action.[1]

The dream was not achieved. The creation of international organizations did not resolve the lack of coordination and cooperation in the field of international development. While the problem of lack of coordination has long been recognized,[2] the last decade has seen growing calls for greater partnership, coordination and ownership within the aid system.[3] Ambitious promises to improve have been made by the countries that originally founded the multilateral system. Using the Development Assistance Committee (DAC) of the OECD, donor countries have pledged to improve coordination in high-level ministerial fora in Rome (2003) and Paris (2005). These commitments fit with a broader global resolve to reinvigorate cooperation in development assistance.

The UN at sixty has reiterated its commitment to liberal internationalism by calling for greater resources, organizational coordination and policy coherence for the global development regime. It has also sought to reassert its central role as a *cooperation forum* within the growing community of actors embedded in this arena. Government members of the UN have declared that together they will seek to

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11 See for example Kenneth W. Abbott & Duncan Snidal, "Why States Act through Formal International Organizations" (1998) 42 J. Confl. Resolution 3; and Robert O. Keohane & Lisa L. Martin, "The Promise of Institutionalist Theory" (1995) 20 Int. Security 39.

2 Lester B. Pearson, *Partners in Development: Report of the Commission on International Development* (London: Pall Mall Press, 1969).

3 Development Assistance Committee, *Shaping the 21st Century: The Contribution of Development Co-operation* (Paris: OECD, 1996).

achieve a set of Millennium Development Goals, one of which is to develop a "global partnership for development".

This article attempts to assess critically whether the UN can and should reinvent itself as a major coordinating body within the field of development assistance. It asks whether more coordination and cooperation is possible, or indeed desirable. We argue that there are deep-seated reasons why donors find coordination in development assistance difficult to achieve. A greater role for the UN may help to overcome some of these issues, but is unlikely to resolve the fundamental tensions which often prevent coordination. We also note that coordination is not unambiguously positive—the countries which receive development assistance may sometimes have an interest in maintaining the multiplicity of institutions and donors which currently characterizes development assistance. Again, a role for the UN may make coordination more positive for the recipients of development assistance, but is unlikely to align completely the interests of donors and recipients in this area.

CHARTING A NEW DIRECTION FOR THE UNITED NATIONS

The United Nations is vested with the formal authority to promote economic and social development as enshrined in Article 55 of the UN Charter. This development function has largely been carried out by Specialized Agencies loosely accountable to the Economic and Social Council, a central organ of the United Nations system.[4] It was only in 1965 when the United Nations Development Programme was created through an amalgamation of the Expanded Programme of Technical Assistance and the Special United Nations Fund for Economic Development that the United Nations could claim a broad-based development assistance organization under its umbrella.[5]

The actual role of the United Nations is limited. While the UN has described its comparative advantage in development as deriving from its "expert advice in economic, social and cultural fields,"[6] its influence as an actor in the development field has ebbed and flowed. The UN is largely seen to be a smaller and less influential international player in development assistance than either the World Bank or the DAC bilateral donors. In 2004, net disbursements by the UN system accounted for US$3.098 billion of concessional resources to developing countries (UNDP accounted for US$374 million of this total). In contrast, World Bank (IDA)

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4 Each of these Specialized Agencies was established by separate inter-governmental treaties and is directly accountable to distinct governing bodies.

5 While the International Bank for Reconstruction and Development ("World Bank") is *de jure* a Specialized Agency, it has maintained considerable autonomy from ECOSOC, as has the International Monetary Fund.

6 *Provision of Expert Advice by the United Nations to Member States*, GA Res. 52(1), UN GAOR, 1st Sess., UN Doc. A/64/Add.2 (1946), at 79.

concessional disbursements were over US$7 billion, and bilateral ODA flows of over US$79 billion have been proffered by DAC members.[7]

Secretary-General Kofi Annan has attempted to effect renewal and reform of the UN. Upon taking up office, he aspired to a more prominent role in development and released a strategy for rejuvenating the global organization.[8] An important assumption underlining this reform initiative was that increased coherence of policies and coordination of activities across the UN at the global, regional and country levels would be the starting point for greater coordination and leadership among external partners. To this end, a United Nations Development Group was established to encourage dialogue across the UN Specialized Agencies and to oversee the roll-out of two new UN instruments at the country level: the Common Country Assessment (aiming to provide a common situation analysis of a country's development challenges) and the United Nations Development Assistance Framework (aiming to divide tasks across UN agencies).

In parallel with this in-house reform programme, the UN also aspired to become the centre of the global development assistance system. This aspiration was given life by the agreement of the time-bound and measurable Millennium Development Goals (MDGs) at the UN Millennium Summit in 2000 and the 2001 Monterrey Conference, which brought public, private and non-governmental participants together for the first time under UN auspices. At Monterrey, rich countries committed themselves to increasing aid budgets and remedying the problem of policy incoherence and uncoordinated aid.

Better global governance of development assistance, and the appropriate role of the UN, emerged again as a key issue in a special High Level Panel convened by the UN Secretary-General that reported in 2004.[9] This report advised that the UN become a "development cooperation forum" in which states could measure development progress in an open and transparent manner,[10] and it endeavoured to strengthen coordination among different UN agencies as well as between the UN and its sister institutions, the IMF and World Bank.[11] It was also recommended that the Economic and Social Council exploit its convening powers and provide a regular venue where both developed and developing country members could openly

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7 OECD, Development Assistance Committee, *Development Cooperation Report: Statistical Annex*.(Paris: OECD, 2005).

8 UN Secretary-General, *Renewing the United Nations: A Programme for Reform*, UN Doc. A/51/950 (1997).

9 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) at para 22, online: United Nations ‹http://www.un.org/secureworld/report.pdf› [High-level Panel Report].

10 *Ibid.* at para. 277.

11 *Ibid.* at para. 278.

measure and discuss their commitments to achieving the MDGs.[12] The Panel also emphasized the role of the UN as a global body that could establish coherence around "the critical interlinkages between trade, finance, the environment, the handling of pandemic diseases and economic and social development".[13] Here the Panel proposes a global leaders' group building on the experience and success in rapid and flexible responsiveness of the G8 Leaders' Group and the G20 Finance Ministers' Group.[14]

The case for creating a new coordinating role for the United Nations in the global community of development actors has several merits. The UN has some specific comparative advantages, including global legitimacy, diversity of expertise and global reach. These might make it more effective than other institutions and more successful than past efforts in coordinating aid. Some might also see this role as a way to further enhance the legitimacy and power of the organization. Nonetheless, a measure of caution is in order. There are significant challenges and difficulties in aid coordination, and the UN would best take heed of these as it seeks to establish itself as a new center for development coordination and cooperation.

WHY ARE THERE SO MANY DEVELOPMENT ASSISTANCE INSTITUTIONS?

Development assistance is not facing either with too few institutions or too little governance, but rather a surfeit thereof. Take development assistance aimed at improving global public health and in particular addressing the HIV/AIDS pandemic. The World Health Organization was created in 1948 to act as the directing and co-coordinating authority on international health work.[15] Yet in the last decade we have seen several other international agencies and initiatives created by governments in order better to coordinate efforts. In 1996 ECOSOC authorized the creation of a new joint UN program on HIV/AIDS. UNAIDS was established as a global program that unified the work of six Specialized Agencies, including the WHO. Meanwhile, at the Okinawa G8 Summit in July 2000, the idea of an international funding mechanism to fight HIV/AIDS, tuberculosis and malaria crystallized, and was unanimously supported by the UN General Assembly in 2001. The Global Fund to Fight AIDS, Tuberculosis and Malaria was created as an independent public-private partnership to increase the global resources available to

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12 ECOSOC is made up of 54 Member States, participating for three year periods on a rotational basis.

13 High-Level Panel Report, *supra* note 9, at para 280.

14 High Level Panel Report, *supra* note 9 at para. 280.

15 *Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946*; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p.100) and entered into force on 7 April 1948, Article 2a.

combat AIDS, tuberculosis, and malaria and to direct the resources effectively to areas of greatest need.[16]

The result is only the tip of the iceberg of institutions engaged in delivering assistance to address the HIV/AIDS pandemic. In spite of an apparent predilection for international cooperation and organization, states have continued to channel the lion's share of their development assistance budgets (including that for HIV/AIDS) through their own bilateral programmes and agencies, which are often poorly coordinated with those of other states as well as with multilateral efforts. Indeed about 70 per cent of countries' official development assistance is channeled bilaterally, with only about 30 per cent going to multilateral agencies.[17]

Within national governments, coordination can also be a problem. Aid programs tend to be run by designated aid agencies often sitting within or closely linked to foreign affairs. Even within the aid agencies, there may often be goals that are difficult to reconcile with each other, such as specific foreign policy objectives alongside wider concerns for development and poverty reduction. However, the scope for competing goals is yet larger when one takes into account the other agencies and arms of government which are involved in foreign assistance aimed at goals such as export-promotion, commercial opening, foreign policy and national or global security. All have an impact on development assistance. And this sometimes produces potentially conflicting goals pursued by the same government. For example in Sudan, USAID spends billions of dollars developing the South, while the US Congress continues to maintain longstanding sanctions against the country.[18]

In recent years there is much hand wringing about the lack of coherence and coordination across different agencies of national governments. Indeed, within Canada, the Netherlands, Australia, the United Kingdom and the United States, efforts are under way to draw together the various diplomatic, military and development initiatives into a more coherent and effective response to failing states.[19] For our purposes, it is vital to note that fragmentation within government administrations projects directly into fragmented international cooperation. This is because each government agency has its counterpart in global governance: finance ministries sit at the tables of the World Bank and IMF, health ministries sit at the table of the WHO, education ministries sit at UNESCO, and so forth. The result is a problem of coordination which has three levels—within governments, between

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16 Sarah Ramsay "Global Fund makes historic first round of payments" (2002) 359 The Lancet. 1581-1582.

17 Multilateral assistance provided by DAC members has hovered at around 30 per cent of all Official Development Assistance flows between 1996 and 2003, with the remainder being channelled through bilateral mechanisms. See OECD, Development Assistance Committee, *Development Cooperation Report.* (Paris: OECD, 2004).

18 "It'll do what it can get away with" *The Economist* (3 December 2005) 26.

19 See Adele Harmer & Joanna Macrae eds., *Beyond the Continuum: The Changing Role of Aid Policy in Protracted Crises* (London: Overseas Development Institute, 2004).

governments, and between the international agencies that governments create and govern. To some degree any success in enhancing cooperation will require change at all three levels.

With the surfeit of institutions and governance at global and national levels, the problem of coordination is a very challenging one. A lack of coordination means that a plethora of competing actors, goals, and aid delivery mechanisms results in duplication, fragmentation, contradictory goals and endless red tape. The result is that in any aid-receiving country, a bilateral aid agency is not only competing for domestic officials' time with other diplomatic representatives from their own country, but also with numerous other bilateral and multilateral agencies. Even within multilateral organizations, donors have targeted resources into ear-marked trust funds that often still provide them with the ability to design and control development programming. Unsurprisingly, contradictory goals often end up being pursued on the ground, and through inefficient and burdensome aid delivery processes. This can have the related consequence of eroding local governance capacity as foreign agencies poach competent local officials from the domestic administration, and remaining officials need to devote more of their time to managing donor agencies.

What Makes Cooperation among Governments Difficult?

There are a number of reasons why—even after having created multilateral institutions—donor states may find it difficult to coordinate aid efforts. Some are very obvious. Their domestic political landscape can be littered with the divergent and contradictory interests of government agencies, private companies, non-governmental organizations and interest groups. It is unusual, to say the least, for aid agencies to champion policies which reduce their staff numbers or budgetary resources, constrain their discretion or threaten national economic and commercial considerations.

A second reason for non-coordination is the perception (not always backed by sound evidence) of many policy-makers that aid that is not nationally identified does not command public support and is thus neither politically useful to politicians nor effective in sustaining long-term public support for aid.

A third obstacle to coordination is the place of any aid agency within its national political setting. Aid ministers are accountable to their cabinet colleagues. They must achieve results within the electoral cycle in order to demonstrate their political relevance and must spend their budget in a fiscal year to assure them access to funds the following year. They must meet national auditing requirements and preserve accountability to taxpayers by demonstrating the value for money delivered by national aid budgets.

A fourth reason for poor coordination lies in genuine philosophical differences about what the aims of aid should be. For example, in the contemporary good governance agenda, donors can remain undecided about whether a state-centric or society-centric approach is the best way to advance political accountability and reform. For example, Canada's governance programming has

shifted its emphasis over time away from building public sector institutions to fostering a vibrant "civil society."[20] Within aid-receiving countries, donors might disagree on more fundamental issues, for example in Vietnam where the relative prioritization of poverty reduction in development programming generated the ire of some who felt this emphasis neglected more traditional infrastructure project activities.

It is not only the goals of aid that are contentious, but also the methods used to achieve them. For example, donors have different views as to the fundamental question of whether donor conditions should focus on specific policy prescriptions, more general process requirements, or simply final outcomes. The current policy consensus is that donors should coordinate their policies and practices around national strategies and systems (alignment). However, this requires that donors accept a model of conditionality focused on processes and outcomes rather than policy prescriptions—something which many donors find problematic. This approach also requires that recipients have strategies and systems in place which donors can align with; in many recipient countries, this is difficult to achieve given domestic political and administrative constraints. Even donors who embrace the alignment agenda may be hard pressed to accept domestic processes in recipient countries that might threaten the integrity of their activities. One such case occurred in July 2002, when the United Kingdom's Department for International Development defended the Tanzanian President's right to replace his personal Presidential jet (worth £15 million) just before he was to receive a £270 million aid package from Britain.[21]

Some of the problems described above could perhaps be resolved if clear evidence and best practices were available around which consensus could be built and programmes designed. However, the evaluation of aid is plagued with both methodological and political difficulties. The protracted time frames involved in achieving development results create difficulties in evaluating programmes in the short run. This is compounded by inevitable difficulties in establishing causation between aid expenditures and outcomes.

Finally, it is worth noting that there are some perceived benefits from non-coordination which accrue to governments. States create institutions so as to entrench particular preferences and goals (both domestic and international). Creating new institutions permits governments to add new goals or mechanisms without having to reform or close down already existing institutions. Subsequently, the fact that there are numerous uncoordinated agencies at national and global levels gives governments a choice as to how to achieve their goals, reducing the extent to which they are bound by any over-arching arrangement.

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[20] Robert Muggah, "Difficult Partners and Fragile states: Reconsidering Canada's Governance Agenda in Haiti" *Global Economic Governance Programme Discussion Paper* (2005).

[21] David Henke, "£15 million jet sparks new Tanzania row." *The Guardian* (22 July 2002), online: Guardian Unlimited ‹.http://www.guardian.co.uk/tanzania/story/0,11441,759626,00.html›.

From a development assistance perspective, there may also be some potential advantages to non-coordination. In development assistance multiple agencies could, in theory at least, afford aid-recipient countries more choice, creating healthy competition in the provision of particular kinds of services and leading to more effective demand-driven outcomes.

FOR WHOM IS MORE COORDINATION DESIRABLE?

Most of the rhetoric about donor coordination focuses on the benefits of such coordination for development outcomes and aid effectiveness. However, there is ambiguity about how this will occur. In particular there is ambiguity about whether coordination should aim at enhancing the influence of donors, or enhancing the influence of aid-receiving governments.

Some believe that coordination is a way to make donors more influential and that this will enhance aid effectiveness. The argument is that if donors were to coordinate better, each would be able better to specialize on particular countries and sectors. This would permit individual donor agencies to develop greater focus and specialization based on their comparative advantages, and to build up a "core business" which they become good at, carving out a particular niche for themselves.[22] The assumption is that the greater focus would translate into better quality and more concentrated influence over particular aid-recipient countries which would in turn translate into more effective aid.

On the other side of the debate is the view that more effective aid will result if aid-receiving countries are given a greater voice in the aid system as a whole, as well as in the formulation of their own national strategies. More voice in the aid architecture has underpinned the debate surrounding the UN's role in development assistance, where an increased role for the UN is seen in many quarters as a way to increase the voice of developing countries in the aid system. More voice in formulating their own national development strategies has been the goal of the World Bank in encouraging indebted poor countries to formulate Poverty Reduction Strategy Papers, and by parts of the donor community that have attempted to shift to sector-wide and general budget-support as mechanisms for delivering aid so that it can better support a national government's priorities and framework.

The ambiguity as to who would or should be empowered by coordination makes exhortations for more coordination rather more complex to adjudicate than they may seem. This is revealed most clearly if we think about aid coordination from the perspective of an aid-receiving country.

One benefit from greater coordination is clear for aid-receiving countries. Greater coordination can reduce the administrative burden on the recipient

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[22] Such arguments are critically reviewed in Lauchlan T. Munro, "Focus-Pocus? Thinking Critically about Whether Aid Organizations Should Do Fewer Things in Fewer Countries" (2005) 36 Devel. Change 425.

government so that instead of having to negotiate and report on progress in a particular area in a different ways to a number of different donors, that process becomes dramatically simplified, taking up less time, and enabling better quality results.[23]

However, coordination may also disadvantage aid-receiving governments by reducing their bargaining power vis-à-vis donors. This disadvantage was well understood in the 1980s when developing countries became alarmed at the emergence of "cross-conditionality". Cross-conditionality meant that donor conditions became interlinked—a receiving country would have to meet the full conditions of one institution (for example the IMF) before assistance could be accessed from any other (such as the World Bank or a regional development bank). Coordination can also magnify particular domestic political conflicts. It is sometimes also the case that aid programs coordinated among donors favour particular elements in recipient governments and societies—finance ministries may favour coordination around the national budget while other ministries prefer direct relationships with donors that are outside budgetary processes.[24] An alternative to greater donor coordination could be conceived as a fragmented system which enabled receiving governments to make choices among different donors so as best to match national goals with what donors are offering.

One way to clarify the debate about who gains from coordination is to distinguish two distinct goals in the coordination debate. One goal is greater *harmonization among donors* of their policies and the way they deliver aid. This could be achieved by donors acting together with little reference to aid-receiving countries. As such, it could result in a system which overrides the interests or preferences of aid-receiving governments.

The alternative goal is *alignment between donors and recipients* in their policies and systems. This would require intensive discussions by donors and aid-recipients as to what was being aligned.

An equally important distinction worth drawing is that which exists between policies and processes. Where policies are harmonized or aligned, the action being taken is essentially a political one. The actual goals being sought by a government and donors are affected. Where system processes are harmonized the result is more administrative—it is the delivery of particular policies that is being affected. These distinctions are tabulated on Table 1.

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[23] An example of the extent of this problem is aid for public expenditure management, as documented by the World Bank in Richard Allen, Salvatore Schiavo-Campo, & Thomas Columkill Garrity, *Assessing and Reforming Public Financial Management: A New Approach* (Washington DC: The World Bank, 2004).

[24] Samuel Wangwe, "The Management of Foreign Aid in Tanzania." (Paper presented to the Workshop on Economic Management, 21 March 1997) *ESRF Discussion Paper* 15. online: Economic and Social Research Foundation ‹http://www.esrf.kabissa.org/›.

Table 1: Stages of the Policy and Implementation Process

Donors	*National process*
Policy alignment/harmonization	Vision and goal setting
	Strategy formulation
Systems alignment/harmonization	Budget formulation and policy setting
	Financial disbursement channels
	Contracting
	Implementation arrangements
	Monitoring and evaluation
	Reporting

Source: ODI (2004)[25]

Recipient governments have consistently argued for greater alignment of aid to their own policies. If donors were to align their aid with countries' own policies, this would permit recipient governments to set clear and consistent priorities appropriate to their circumstances and to direct resources accordingly. This would be in keeping with the current donor emphasis on "putting governments in the driving seat" and ensuring greater policy ownership by aid-receiving countries. However, where policy harmonization takes place without alignment to a national government's priorities, it creates a risk that conditionality turns into "the highest common multiple amongst the donors and creditors".[26] This leaves little space for ownership by governments.

Slightly different is the argument for aligning systems or the way in which aid is delivered. Here greater alignment could reduce the transaction costs of aid and the administrative burden faced by recipient institutions. It can also improve the availability of information and data to the recipient government. Even when alignment with their own systems is less than perfect, recipients generally have an interest in harmonized donor systems. Many of the benefits of coordinated systems can be reaped without alignment.

One specific risk for aid-receiving countries from greater donor harmonization crosses over the distinction between policies and system processes that we have just discussed. Where donors use performance assessment frameworks collectively to adjudicate the performance of aid-recipients, the risk to any aided country is that all funds could be stopped in response to the same concern about

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25 Overseas Development Institute, "*Harmonisation and Alignment in Fragile States*" (2004). (Draft report submitted to the Senior-Level Forum on Development Effectiveness in Fragile States January 2005), at 15, online: Overseas Development Institute ‹http://www.odi.org.uk/›.

26 Allison Johnson & Matthew Martin. "Empowering Developing Countries to Lead the Aid Partnership: A Background Paper for the UNDP Human Development Programme" (2005), online: Human Development Reports ‹ http://hdr.undp.org/›.

delivery. While donors may have legitimate reasons to halt funding, coordination of performance assessment frameworks can increase the range of circumstances where this happens. For this reason, aid-receiving governments have expressed a preference for donors who disburse funds on the basis of "independent decisions and discussions with the recipient".[27]

In summary, coordination can dramatically shift the balance of bargaining power between donors and recipients. This shift can occur in favour of donor or recipient. Greater donor harmonization without alignment with aid-recipients could give donors more control and influence within countries to which they give aid. Equally, as seen from an aid-recipient's perspective, that kind of coordination would reduce choices and the scope for a government to make its own national economic decisions. By contrast, greater harmonization of aid processes could streamline aid, making its administration less cumbersome for aid-receiving governments. And greater alignment by donors of both policies and processes with aid-receiving governments could magnify these benefits for aid-receiving countries.

In the end the coordination debate is plagued by an ambiguity among donors about whether or not they wish to enhance their own control over aid or whether they wish to enhance the ownership and control of aid-receiving countries. Donor governments are naturally concerned with how their aid is used by other governments. Furthermore, they have to account to their own legislatures and audit bodies for the way in which their aid budgets are used. This creates two pressures on any change in the global development assistance regime. First, there is a push towards coordination of a kind which enhances donors' collective power. Second, there is a brake on that movement so as to keep each individual donor able to respond to immediate domestic political exigencies.

IMPLICATIONS FOR REFORM OF THE UNITED NATIONS

Against a backdrop of an expanding number of actors involved in development assistance and the complexity of motives for coordination, a variety of forces impede coordination. As such, it makes sense to consider whether calls for the UN to become a development cooperation forum are either realistic or desirable. Does the UN system provide structures that can overcome members' incentives which militate against coordination? Does it provide a path for enhanced coordination in development assistance?

It is intuitively appealing to imagine the United Nations at the heart of a coordinated multilateral development system. Indeed, others have written persuasively about how this might be achieved.[28] Clearly some degree of

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27 Allison Johnson & Matthew Martin, "Key Analytical Issues for Government External Financing." (London: Debt Relief International, 2004), online: Development Finance Group ‹http://www.development-finance.org›.

28 Kemal Dervis, *A Better Globalization: Legitimacy, Reform and Governance* (Washington, DC: Centre for Global Development, 2005).

specialization within the international system does seem sensible; for example, leaving short-term macro-level balance of payments issues to the International Monetary Fund, micro-level long-run supply side obstacles to development to the World Bank, political governance themes to the UNDP, and health policies to the World Health Organization.

One concrete proposal to move the UN back at the heart of the international system has been expounded at length in a recent book by Kemal Dervis, a former Turkish Finance Minister and currently UNDP Administrator.[29] He recommends the creation of a United Nations Economic and Social Security Council (UNESC) with powers in the economic and social sphere parallel to those the UN Security Council possesses in the military arena. UNESC representatives would be elected in a system of weighted votes and constituencies.[30] UNESC would comprise 14 council officials with distinguished careers designing and implementing social and economic policies. They would meet regularly and be assisted by a small secretariat. Its new function would be as a governance umbrella or strategic board for the entire international system in the economic and social spheres, including the UN Specialized Agencies, the Bretton Woods institutions and the WTO. While it would not interfere with the workings of any of these institutions, it would have the power to appoint the heads of all of them through transparent criteria and emphasis on professional qualifications, experience and leadership. UNESC would be an advocate for mobilizing international resources for development and act as an evaluating body of all institutions and their programs. But most importantly, it would enhance coordination and cooperation within the international development system.

Dervis' idea is intuitively appealing as well as an obvious way to enhance international coordination and strengthen the legitimacy of both the Bretton Woods and UN agencies. And yet, exhortations that the solution to the failures of development is more aid that is more coordinated under its UN auspices puts a heavy burden of expectation on its shoulders. Given that powerful interests militate against coordination, is it feasible to expect that the UN is in a position to overcome these? Recall that existing coordinating bodies like the World Bank or the OECD's Development Assistance Committee (where rich states exercise far more relative influence than they do in the UN) are already sidelined in many cases. No new plan for coordination will succeed unless it radically alters the incentives faced by donors and their agencies.

In this article we have emphasized a number of issues which make coordination difficult within and between governments: the incentives faced by different actors in the system to preserve existing institutions, the multiple goals of

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29 *Ibid*.

30 Military capability would not enter into the formula for determining the voting strength of any country. Instead, voting strength would be determined by a country's share in world population, GDP and contributions to the UN global goods budget. *Ibid.* at 96.

donors, the desire for nationally "flagged" development assistance and differing views on the objectives and modalities of aid. It is not clear that a new role for the UN will change the incentives faced by donors and donor agencies, but it might provide an effective forum where best practices can be examined and consensus reached on the appropriate ends and means of development assistance.

While it is important to temper expectations that the UN can succeed where others have failed, the rationale for having a more legitimate and effective global coordination of aid is powerful. A global coordinator could provide a starting point to leverage developing country pressure on donors to streamline processes and advance the harmonization and alignment agenda even further to their benefit. Furthermore, what is not achieved by the present fragmented system of aid delivery is an overall allocation of aid across different countries which is effective and equitable. At present, the aid regime consists of "donor darlings" and "donor orphans".

Having said all this, we have noted above that coordination in development assistance may not always be desirable from the perspective of recipients. An enhanced role for the UN in coordination has the potential to increase the voice of aid-receiving countries in the process and deliver outcomes more in their interests, but will not easily resolve the fundamental tension between the desire of donors to influence and control aid recipients and the recognition that real ownership by recipients is essential for development success.

The United Nations at sixty sits within a transformed development assistance system. The organization comprises numerous specialized agencies working at the global and regional levels to enhance the development prospects of poorer countries. These have been joined by numerous other public and private sector initiatives. The result is hundreds of different initiatives overlapping in development assistance—a juggernaut of governance, oversight mechanisms, negotiations and priorities. The challenge is to find ways to lighten the impact of this top-heavy system on the hundred or so countries in the world it has ostensibly been created to assist. Current exhortations for more aid and more coordination are unlikely to achieve this result.

The UN and the Responsibility to Practice Public Health

DAVID P. FIDLER*

INTRODUCTION

Analyses of, and proposals for, reform of the United Nations (UN) frequently present the challenges facing the UN, its member states, and their respective populations as interconnected problems that all must be addressed effectively for progress to be made. For example, the UN Secretary-General's High-level Panel on Threats, Challenges, and Change (High-level Panel) stated that "[p]overty, infectious disease, environmental degradation and war feed one another in a deadly cycle."[1] The argument that poverty, infectious disease, environmental degradation, and war are interrelated problems of human governance can produce resignation that the task is impossible. Mounting scepticism about the UN's potential to contribute significantly to addressing these interdependent crises does little to temper such resignation. The outcome of the World Summit in September 2005 perhaps has, for some, deepened this pessimism.[2]

If, as the UN and UN reform strategies argue, poverty, disease, environmental degradation, and insecurity are intertwined, then a critical element of any response must involve policies that produce synergistic benefits for each of these areas of concern. This article focuses on public health as a critical synergistic strategy on which the future role of the UN in world affairs may depend. As analyzed below, overlaps between poverty, infectious disease, environmental degradation, and security point to the improvement of public health nationally and globally as a critical mission for governance in the twenty-first century. Public health is at the heart of strategies designed to advance development, tackle infectious diseases, mitigate environmental degradation, and support peace and security. Reflecting on the High-level Panel's report, the UN Secretary-General argued that "[w]e need to pay much closer attention to biological security", and he supported the High-level Panel's call "for a major initiative to rebuild global public

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1 *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) at para 22, online: United Nations ‹http://www.un.org/secureworld/ report.pdf› [*A More Secure World*]. For analysis of the High-level Panel's report, see Anne-Marie Slaughter, "Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform" (2005) 99 A.J.I.L. 619 and Marco Odello, "Commentary on the United Nations" High-Level Panel on Threats, Challenges and Change," (2005) 10 J. Confl. & Sec. L. 231.

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›. [*World Summit Outcome*].

health."[3] In many ways, the UN reform agenda has at its core the strategic objective of achieving significant improvements in global public health.

The plausibility of imagining the UN dealing effectively with the interlinked crises of development, disease, environmental degradation, and security hinges, therefore, on the plausibility of the UN fostering significant improvements in global public health. Whether such improvements occur depend on the extent to which the UN can make what I call the *responsibility to practice public health* a major feature of the individual and collective behaviour of states. By connecting the strategic importance the UN and UN reform efforts have given public health in addressing problems related to development, disease, environmental degradation, and security with the attempts to promote a *responsibility to protect* as a new norm for international relations, I outline the component parts of the responsibility to practice public health, provide examples that support the reality of its formation in world politics, and consider questions that this responsibility raises. The article argues that the fate of UN contributions to international relations in the first decades of the twenty-first century will depend more on the responsibility to practice public health than on more prominent issues, including Security Council reform, international law on the use of force, peace building, and even the responsibility to protect in connection with large-scale, violent atrocities.

PUBLIC HEALTH AT THE CORE OF UN REFORM STRATEGIES

The role of the UN and the need for UN reform are not new topics in international relations; but never before has public health featured in UN reform proposals as prominently as it did in the report of the High-level Panel (December 2004)[4] and in the Secretary-General's own report *In Larger Freedom* (March 2005).[5] Neither document contains a section on "public health" because both integrate the need for public health improvements across the range of problems confronting the UN and its member states in the twenty-first century. The High-level Panel identified development, disease, and environmental degradation as critical components of what it called "comprehensive collective security",[6] and the deterioration of public health globally as a threat to comprehensive collective security and called for the rebuilding of global public health.[7] The High-level Panel also argued that, in cases of a suspicious or overwhelming outbreak of infectious disease, the Security Council should become involved to support actions of the World Health Organization

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3 *A More Secure World*, *supra* note 1 at viii.

4 *Supra* note 1.

5 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), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement› [*In Larger Freedom*].

6 *A More Secure World*, *supra* note 1 at 14.

7 *Ibid*. at paras. 66-70.

(WHO) and to mandate greater state compliance with multilateral efforts to control the outbreak.[8]

In terms of *In Larger Freedom*, each of the Secretary-General's objectives for UN reform—freedom from fear, freedom from want, and freedom to live in dignity—depends on progress in the area of public health. To achieve freedom from want, the Secretary-General emphasized fulfillment of the eight UN Millennium Development Goals (MDGs),[9] three of which target specific health problems (child mortality; maternal health; and the challenges of HIV/AIDS, malaria, and other diseases) and four of which seek improvement in key social determinants of health (extreme poverty and hunger; universal primary education; gender equality; and environmental sustainability).[10] The eighth MDG (develop a global partnership for development) seeks cooperation with pharmaceutical companies to provide access to affordable, essential medicines in developing countries.[11] In addition, eight of the sixteen targets set for achieving the eight MDGs and eighteen of the forty-eight indicators used to measure progress towards the MDG targets directly relate to health.[12]

The Secretary-General also asserted that ensuring access to sexual and reproductive health services, providing safe drinking water and sanitation, controlling pollution and waste disposal, assuring universal access to basic health services (including services to promote child and maternal health, to support reproductive health, and to control killer diseases), building national capacities in science, technology, and innovation, and ensuring environmental sustainability are national priorities for achieving freedom from want.[13] In addition, strengthening global infectious disease surveillance and increasing research on the special health needs of the poor are global priorities in realizing freedom from want.[14]

In terms of freedom from fear, the Secretary-General's vision for collective security included addressing threats presented by "poverty, deadly infectious disease and environmental degradation", because these threats can have equally catastrophic consequences as war, conflict, civil violence, organized crime, terrorism, and weapons of mass destruction.[15] The Secretary-General expressed particular concerns about security threats from biological weapons and biological terrorism, arguing that "[o]ur best defence against this danger lies in strengthening public health."[16]

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8 *Ibid.* at para. 144.

9 *In Larger Freedom*, *supra* note 5 at paras. 28-31.

10 UN Millennium Development Goals, online: ‹ http://www.un.org/millenniumgoals/›.

11 *Ibid*.

12 World Health Organization, *Health in the Millennium Development Goals*, online: World Health Organization ‹http://www.who.int/mdg/goals/en/›.

13 *In Larger Freedom*, *supra* note 5 at paras. 40-41, 43-44, 46, 57.

14 *Ibid*. at paras. 63-64, 67.

15 *Ibid.* at para. 78.

16 *Ibid.* at para. 93.

Such strengthening should include bolstering WHO capabilities in the areas of disease surveillance and response.[17] The threat from infectious diseases is such that the Secretary-General stated that he was ready to call to the attention of the UN Security Council "any overwhelming outbreak of infectious disease that threatens international peace and security".[18]

The Secretary-General's conception of freedom to live in dignity also connected with public health. The Secretary-General emphasized that protecting human rights was important for fulfilling the objectives of development and security.[19] He further declared that "[t]he right to choose how they are ruled, and who rules them, must be the birthright of all people, and its universal achievement must be a central objective of an Organization devoted to the cause of larger freedom."[20] Public health supports this right and attribute of human dignity because "[e]ven if he can vote to choose his rulers, a young man with AIDS who cannot read or write and lives on the brink of starvation is not truly free."[21]

The prominence of public health in the UN reform strategies of the High-level Panel and the Secretary-General parallels efforts made in other forums to highlight public health's growing importance to development, security, human rights, and environmental protection.[22] Arguments about the centrality of public health to the process of economic development, such as those made by the Commission on Macroeconomics and Health,[23] echo public health's profile in the MDGs. The rise of infectious disease threats, both naturally occurring and intentionally caused, has made public health a frequent topic in debates about national and international security.[24] The relationship between public health and

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17 *Ibid.*

18 *Ibid.* at para. 105.

19 *Ibid.* at para. 140.

20 *Ibid.* at para. 148.

21 *Ibid.* at para. 15.

22 See, e.g., *Empowering People at Risk: Human Security Priorities for the 21st Century* (Working Paper for the Helsinki Process on Globalization and Democracy Report of the Track on "Human Security") (2005) (making health a priority for the human security agenda), online: Human Security Gateway ‹http://www.humansecuritygateway.com/data/item907994828/view›.

23 Commission on Macroeconomics and Health, *Macroeconomics and Health: Investing in Health for Economic Development* (Geneva: World Health Organization, 2001).

24 See, e.g., Chemical and Biological Arms Control Institute (CBACI) & Center for Strategic and International Studies International Security Program, *Contagion and Conflict: Health as a Global Security Challenge* (Washington, D.C.: CBACI, 2000); Jonathan Ban, *Health, Security, and U.S. Global Leadership* (Washington, D.C.: CBACI, 2001); Andrew T. Price-Smith, *The Health of Nations: Infectious Disease, Environmental Change, and Their Effects on National Security and Development* (Cambridge, MA: MIT Press, 2002); Jennifer Brower and

human rights—both civil and political rights and economic, social, and cultural rights—has been a feature of human rights and public health discourse over the past decade.[25] Analyses of the emergence and re-emergence of infectious diseases identify environmental degradation as an underlying cause of the appearance and spread of pathogenic microbes.[26] In addition, much of the body of international environmental law was developed to protect, directly or indirectly, human health from the harmful effects of pollution and other forms of environmental degradation.[27]

The argument that public health is a core element of leading UN reform strategies does not claim that public health is the only element of such strategies or constitutes the "magic bullet" for all global problems. UN reform and the issues it attempts to address are too complex for reductionist analysis. The argument does claim, however, that public health represents a critical public good that UN reform proposals integrated into thinking about development, disease control, security, human rights, and environmental degradation. Strategies that cut across these areas are badly needed. The High-level Panel complained, for example, that "[i]nternational institutions and States have not organized themselves to address the problems of development in a coherent, integrated way, and instead continue to

Peter Chalk, *The Global Threat of New and Reemerging Infectious Diseases: Reconciling U.S. National Security and Public Health Policy* (Santa Monica: RAND, 2003).

25 The importance of civil and political rights to health has arisen with respect to strategies to fight discrimination created by the HIV/AIDS pandemic (see L. O. Gostin, *The AIDS Pandemic: Complacency, Injustice, and Unfulfilled Expectations* (Chapel Hill: University of North Carolina Press, 2004), at 61-87 (analyzing human rights and public health in the HIV/AIDS pandemic)) and to the use of quarantine and isolation to deal with contagious disease threats, whether intentionally caused or naturally occurring (see, e.g., M.A. Rothstein et al., *Quarantine and Isolation: Lessons Learned from SARS* (Report from the Institute for Bioethics, Health Policy and Law, University of Louisville School of Medicine to the Centers for Disease Control and Prevention, 2003)). In terms of economic, social, and cultural rights, renewed attention has developed in the past five years with respect to the right to health, as evidenced by the issuance of a General Comment on the right to health (see Committee on Economic, Social, and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN CECSROR, 22nd Sess., UN Doc. E/C.12/2000/4 (2000)) and the appointment of a Special Rapporteur on the Right to Health in 2002 by the Commission on Human Rights (see Office of the UN High Commissioner for Human Rights, Special Rapporteur of the Commission on Human Rights on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, online: Office of the UN High Commissioner for Human Rights ‹http://www.ohchr.org/english/issues/health/right/›).

26 Institute of Medicine Committee on Microbial Threats to Health in the 21st Century, *Microbial Threats to Health: Emergence, Detection and Response* (Washington, D.C.: National Academies Press, 2003), at 75-77.

27 D. P. Fidler, "Challenges to Humanity's Health: The Contributions of International Environmental Law to National and Global Public Health" (2001) 31 Environmental Law Reporter 10048.

treat poverty, infectious disease and environmental degradation as stand-alone threats."[28]

Public health is a strategic "best buy" for national and UN policies because it constitutes an integrated public good that benefits the fight against poverty, diseases, environmental degradation, and insecurity. I have argued elsewhere that the rise of public health's importance in national and international politics means that public health itself is becoming an independent marker of good governance.[29] The High-level Panel captured the essence of this argument when it concluded that improving global disease monitoring capabilities was important for not only fighting emerging infectious diseases and defending against biological terrorism but also "building effective, responsible States".[30] Public health's importance to development, disease control, environmental protection, and security gives it governance importance obscured by the traditional "stove piping" of policy areas and by conventional categorization of public health as an activity belonging in the "low politics" of international affairs.

This conclusion concerning the strategic importance of public health necessitates coming to grips with the assertions in the reports of the High-level Panel and the Secretary-General that the global public health system is, presently, inadequate for the important role it must play in the areas of development, disease control, security, human rights, and environmental protection. The High-level Panel observed that many current infectious disease problems "signify a dramatic decay in local and global public health capacity."[31] The Secretary-General argued that "[t]he overall international response to evolving pandemics has been shockingly slow and remains shamefully underresourced."[32] Understanding this state of affairs requires comprehending the historical relationship between the UN and public health.

THE UN AND PUBLIC HEALTH IN HISTORICAL PERSPECTIVE

Supporting international cooperation on health was one of the functions assigned to the UN by its Charter.[33] The WHO's establishment as the specialized UN agency with responsibility for international health enhanced the UNs institutional capabilities in this realm. The WHO Constitution's preamble expressed a vision for health in the affairs of states and peoples that resonates with public health's central

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28 *A More Secure World*, *supra* note 1 at para. 55.

29 D.P. Fidler, "Germs, Governance, and Global Public Health in the Wake of SARS," (2004) 113 J. Clin. Invest. 799.

30 *A More Secure World*, *supra* note 1 at para. 69.

31 *Ibid.* at para. 47.

32 *In Larger Freedom*, *supra* note 5 at para. 63.

33 *Charter of the United Nations*, 26 June 1945, Article 55(b).

role in contemporary UN reform strategies.[34] The preamble linked the enjoyment of the highest attainable standard of health with international security, economic development, and human rights.[35] The WHO's main focus was on improving health conditions in developing countries, and it provided support to such countries through vertical programs (e.g. disease eradication initiatives) and horizontal strategies (e.g. improving overall health system capacities). The WHO's influence and prestige reached its peak in the late 1970s when it successfully eradicated smallpox from the planet and launched its seminal Health for All by the Year 2000 campaign, which sought to ensure that everyone would have access to primary health care services by 2000.

The 1980s and 1990s witnessed not the march towards health for all but rather a "twenty years' crisis" for the WHO and the UN system with respect to global health. Looming largest in this crisis was the emergence of HIV/AIDS into one of the worst pandemics in human history.[36] In addition to HIV/AIDS, the world experienced the resurgence of new and old infectious diseases, fuelled by a diverse array of social and economic phenomena, including globalization, antimicrobial resistance, and environmental degradation.[37] Public health experts also saw many countries beginning to bear a "double burden of disease"—a burden arising from continued infectious disease problems accompanied by growing rates of non-communicable diseases associated with, among other things, tobacco consumption.[38] The establishment of the World Trade Organization in 1995 left many public health experts thinking that health and its importance to human rights and social justice in developing nations had been subordinated to the trade and corporate interests of developed countries.[39] Making matters worse was the decline

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34 Constitution of the World Health Organization, 22 July 1946, in World Health Organization, *Basic Documents*, 40th ed. (Geneva: World Health Organization, 1994) [WHO Constitution], at 1.

35 *Ibid*.

36 Joint United Nations Programme on HIV/AIDS (UNAIDS), *Report on the Global HIV/AIDS Epidemic 2002* (Geneva: UNAIDS, 2002), at 44 ("Twenty years after the world first became aware of AIDS, it is clear that humanity is facing one of the most devastating epidemics in human history.").

37 World Health Organization, *World Health Report 1996: Fighting Disease, Fostering Development* (Geneva: World Health Organization, 1996), at v (WHO Director-General warning that the world stands "on the brink of a global crisis in infectious diseases.").

38 World Health Organization, *World Health Report 1997: Conquering Suffering, Enriching Humanity* (Geneva: World Health Organization, 1997), at v (The WHO Director-General argues that "[i]n the battle for health in the 21st century, infectious diseases and chronic diseases are twin enemies that have to be fought simultaneously on a global scale.").

39 For analyses of the relationship between trade and health, see World Health Organization and World Trade Organization, *WTO Agreements & Public Health: A Joint Study by the WHO and the WTO Secretariat* (Geneva: World Health Organization, 2002); E.R. Shaffer, et al., "Global Trade and Public Health," (2005) 95 Amer. J. Publ. Hlth. 23.

in the WHO's effectiveness and influence precipitated by a number of factors, including leadership problems at its Geneva headquarters.[40] Topping off the twenty years' crisis was the realization that nuclear, chemical, and especially biological terrorism was a growing threat, which also highlighted the extent to which national and international public health capabilities were inadequate.[41]

This potted history of the relationship between the UN and public health until the end of the twentieth century provides some background on the discrepancy between the critical function leading UN reform strategies have given public health and the reality of public health on the ground. This discrepancy raises questions about the plausibility of the UN contributing to the significant improvements in global public health that UN reform proposals have argued are necessary. If the twenty years' crisis tells the tale of UN intergovernmentalism on public health being overwhelmed, what can we realistically expect from arguments that the international community must elevate public health as an integrated public good to support the achievement of security, development, disease control, human rights, and environmental protection?

PUBLIC HEALTH AND THE RESPONSIBILITY TO PROTECT

Assessing the prudence and feasibility of placing global public health at the heart of UN activities in the twenty-first century is a task far too complex for the space allotted to this article, but a preliminary sketch of important issues can be attempted. The prominence of public health in the leading UN reform proposals, combined with public health's rise on the agenda of world politics more generally, point conceptually to the need for a principle of individual and collective responsibility to improve national and global public health—the responsibility to practice public health. This responsibility advocates individual and collective actions that derive from public health theory and practice.

The concept of the responsibility to practice public health brings to mind the growing prominence of the emerging norm called the "responsibility to protect." Both the High-level Panel and the Secretary-General argued that the UN and its member states must embrace and act upon the responsibility to protect.[42] As elaborated by the Secretary-General, the responsibility to protect

> lies, first and foremost, with each individual State, whose primary raison d'être and duty is to protect its population. But if national

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40 F. Godlee, "WHO in Crisis," (1994) 309 Br. Med. J. 1424, at 1427-1428 (arguing that WHO "is suffering a crisis of confidence, both internally and internationally" and is "entering a period of intense soul searching and internal upheaval.").

41 For example, the WHO responded to this growing threat by updating its 1970 report on the health aspects of chemical and biological weapons. See World Health Organization, *Public Health Response to Biological and Chemical Weapons: WHO Guidance* (Geneva: World Health Organization, 2004).

42 *A More Secure World*, *supra* note 1 at para. 203; *In Larger Freedom*, *supra* note 5 at para. 135.

> authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations.[43]

The support in the UN reform strategies for the responsibility to protect continues the work done by others, most prominently the International Commission on Intervention and State Sovereignty (ICISS).[44] As elaborated by ICISS, the responsibility to protect is based on the premise that state sovereignty means that the state itself has primary responsibility for the protection of the people living in its territories.[45] When a state is unwilling or unable to stop or avert serious harm from affecting its population as a result of internal war, insurgency, repression, or state failure, then the principle of non-intervention in international law yields to the international responsibility to protect.[46] This international responsibility embraces three component responsibilities: to prevent crises that put populations at risk; to react to situations of compelling human need with appropriate measures; and to rebuild to ensure that the harms to the population do not arise again.[47] The responsibility to protect provides the legitimacy for military intervention by the international community in extreme cases when peaceful diplomatic or coercive measures, such as sanctions, have failed to stop the suffering of the population in question.[48] Support for the responsibility to protect from the High-level Panel, the Secretary-General, and the World Summit basically follows the ICISS formulation of the responsibility to protect.[49]

Neither the High-level Panel nor the Secretary-General connected the emerging norm of the responsibility to protect with their respective arguments on the critical importance of public health to twenty-first century humanity. Consistent with the approach of the ICISS, they focused the responsibility to protect on large-scale, violent atrocities, such as genocide, ethnic cleansing, and crimes against humanity.[50] The World Summit's outcome statement also focused the responsibility to protect on such atrocities.[51]

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43 *In Larger Freedom*, *supra* note 5 at para. 135.

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

45 *Ibid.* at paras. 2.14-2.15.

46 *Ibid.* at para. 4.1.

47 *Ibid.* at para. 2.32.

48 *Ibid.* at para. 4.10.

49 *A More Secure World*, *supra* note 1 at para. 203; *In Larger Freedom*, *supra* note 5 at para. 135; *World Summit Outcome*, *supra* note 2 at paras. 138-139.

50 *A More Secure World*, *supra* note 1 at para. 203; *In Larger Freedom*, *supra* note 5 at paras.134-135.

51 *World Summit Outcome*, *supra* note 2 at para. 139.

The relevance of the concept of individual and collective responsibility to protect to the massive human suffering associated with the global failures in public health is, however, clear.[52] The UN reform documents and other UN activities communicate the enormity of the public health threats and harms populations in both developed and developing countries face in the early twenty-first century—HIV/AIDS, tuberculosis, malaria, malnutrition, unsafe water, lack of sanitation, antimicrobial resistance, and emerging infectious diseases such as SARS and avian influenza. Large-scale atrocities involving violence are a horrific problem requiring the UN's attention; but such atrocities do not encompass all the severe suffering populations endure because of the unwillingness or incapability of governments to protect their populations from serious, foreseeable, and often preventable harms. The depressing global morbidity and mortality statistics connected to HIV/AIDS, tuberculosis, and malaria alone reveal a fundamental failure by states, individually and collectively, to protect the well-being of human populations from pathogenic threats. To these macabre statistics must be added the misery and death caused by diseases related to poverty and environmental degradation. Reflecting on the grim statistics connected with communicable diseases in connection with the High-level Panel's emphasis on human security, Slaughter asked, "If human security is our aim, why on earth should we privilege the saving of lives from violence over the saving of lives from disease?"[53]

THE ELEMENTS OF THE RESPONSIBILITY TO PRACTICE PUBLIC HEALTH

Both the logic of the High-level Panel's and the Secretary-General's reasoning on the strategic importance of global public health and the brutal realities of disease on the ground in the world today point to the need to formulate a specific responsibility to practice public health. Formulation of this responsibility borrows from thinking developed with respect to the responsibility to protect and from the basic functions of public health practice. These functions are (1) *surveillance* of disease and health trends in populations; and (2) *interventions* to address the introduction or spread of health risks in populations. Monitoring population health through surveillance provides the data that allows interventions to be made. Surveillance is, thus, critical to effective interventions. Similarly, surveillance without effective intervention does not protect public health.

Interventions come in three forms. *Prevention* interventions prevent health risks from reaching populations. Treatment of water supplies to eliminate pathogens or contaminants and disease eradication campaigns are examples of prevention

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52 Odello, *supra* note 1 at 241 (This "emerging rule" concerning the responsibility to protect seems to be applicable in cases of genocide, ethnic cleansing and gross violations of human rights, but there are no clear answers when we have to deal with pandemic disease, famine, floods, etc. …Owing to the fact that the [High-level Panel] Report deals with a wide range of new "threats," it could be considered that the responsibility to protect involves those situations as well.").

53 Slaughter, *supra* note 1 at 624.

interventions. *Protection* interventions protect populations from health risks that will reach human populations. The idea behind protection interventions is to "harden the target"—strengthen a population's resilience against health risks. A classical example of a protection intervention is vaccination, such as vaccination against childhood diseases or seasonal influenza. *Response* interventions are actions taken to control the impact on population health from risks that do affect people. Such interventions can involve treating sick individuals (e.g. antiretrovirals for people infected with HIV) or containing the sources of the health risks (e.g. isolation or quarantine of contagious persons or addressing the source of toxic pollutants).

The public health functions of surveillance and intervention apply whether the health context is entirely internal or affects more than one country. These functions are transarchical because they apply whether the political context is hierarchical, as prevails within states, or anarchical, as exists among states. Surveillance and intervention have this transarchical quality because they are based in epidemiology—the science of the study and control of diseases. The only epidemiological path to better national and global public health leads through surveillance and intervention.

Combining the basic principles of the responsibility to protect[54] with the basic functions of public health produces the core features of the responsibility to practice public health:

- *Basic principles of the responsibility to practice public health*

  1. State sovereignty implies responsibility, and the primary responsibility for the protection and promotion of the health of the people lies with the state itself.

  2. Where population health is suffering serious chronic or acute harm and the state in question is unable or unwilling to mitigate or eliminate the harm, the principle of non-intervention in international law yields to the international responsibility to practice public health.

  3. The international responsibility to practice public health authorizes the international community of states and non-state actors to take extraordinary measures to address severe disease situations that involve the cross-border movement and spread of disease organisms or agents.

- *Foundations of the responsibility to practice public health*

  The foundations of the responsibility to practice public health, as a requisite principle for the international community of states and non-state actors, stem from:

  1. The obligations to populations inherent in the concept of sovereignty.

  2. The necessity for public health, as a "public good", to be the primary responsibility of governments.

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54 ICISS, *supra* note 44 at XI.

3. The obligations concerning international cooperation for health found in the *UN Charter*.

4. The responsibilities linked to human health expressed by the WHO Constitution.

5. Specific legal obligations related to the protection of human health found in international legal instruments.

6. The developing practice of states, regional organizations, the UN (especially WHO and including the Security Council), and international non-governmental organizations with respect to health promotion and protection.

- *Elements of the responsibility to practice public health*

The national and international responsibility to practice public health encompasses four specific responsibilities:

1. The responsibility to monitor: to conduct surveillance of population health and determinants of health to determine the sources of disease threats and the nature of specific disease harms.

2. The responsibility to prevent: to intervene to prevent disease organisms or agents from adversely affecting population health.

3. The responsibility to protect: to intervene to protect populations from disease organisms or agents present in societies.

4. The responsibility to respond: to intervene to react to situations in which disease organisms or agents cause outbreaks or epidemics of diseases in populations.

RESPONSIBILITY PRINCIPLES AND THE SOCIAL CONTRACT CHALLENGE TO WESTPHALIANISM

As with the responsibility to protect, the responsibility to practice public health is a norm that overrides the principles of sovereignty and non-intervention when the state fails to live up to its responsibilities. These "responsibility principles" reject Westphalian assumptions and practices grounded in the idea of sovereignty as supreme control over territory and the people and activities in it. As the ICISS stated, the responsibility to protect involves re-characterizing sovereignty by moving "from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties."[55] Westphalianism created two levels of society with little interaction between them: (1) domestic society subject to sovereignty and off-limits to other states under international law; and (2) international society, or the society of states created by their interactions with each other in the context of anarchy (including interactions in diplomacy, trade, and war). Responsibility principles reject this bifurcation and conceive of world politics along the lines of a

[55] ICISS, *supra* note 44 at para. 2.14.

social contract with dynamics more reminiscent of federal governance systems than anarchical Westphalianism.

The social contract nature of the responsibility to practice public health can be illustrated through an analogy to public health in federal systems, such as the United States. Under the US Constitution, the states of the Union have primary responsibility (that is, they have sovereignty) over public health.[56] When health threats escape the borders of a state, or the state is unwilling or unable to address a serious health problem, the federal government's responsibility in the area of public health is triggered. The federal government's role derives part of its scope from the capabilities of the state governments on public health. The weaker or more vulnerable those state-level capabilities are, the more involved the federal government must become. Developments in the last twenty to thirty years have produced a federalization of public health power in the United States because state-level capabilities increasingly have to be supported and led by the federal government exercising its constitutional authority.[57]

The same dynamic operates in international relations and helps explain the rise of public health as a political issue in world politics in the last ten to fifteen years. Globalization and other developments have increasingly stressed the ability of individual states to handle threats to population health, especially in the area of infectious diseases. The nature, speed, and scope of many health threats has placed more demands on states' foreign policies, the capabilities of international organizations, and the resources of NGOs and multinational corporations than ever before in history.[58] As an epidemiological matter, the basic functions of public health cannot operate in this day and age under the old Westphalian framework, particularly its strong principle of non-intervention, which rendered sovereignty virtually sacrosanct. The world confronts the need to adjust to the globalization of public health governance.

At the same time as the responsibility to practice public health pierces the Westphalian veil of sovereignty, it demands that the "international community" better organize itself to shoulder effectively the globalization of public health governance. The twenty years' crisis revealed that the UN and its intergovernmental public health capabilities proved a poor match for the challenges that emerged after the halcyon days of the late 1970s, when WHO basked in the triumph of smallpox's eradication and the launch of the Health for All campaign. The principle of the responsibility to protect reflects exactly the same dynamic: the principle demands that the international community be ready, willing, and able to intervene, by

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56 L. O. Gostin, *Public Health Law: Power, Duty, Restraint* (Berkeley: University of California Press, 2001), at 25-59 (analyzing how federalism structures public health governance in the United States).

57 D. P. Fidler, "Constitutional Outlines of Public Health's "New World Order" (2004) 77 Temple L. Rev. 247, at 250-257 (analyzing the federalization of public health in U.S. constitutional governance).

58 *Ibid.* at 257-272 (analyzing the globalization of public health governance).

military force if necessary, to stop large-scale, violent atrocities. Social contract politics in the context of anarchy is expensive, not only in terms of sovereignty costs but also in the material capabilities that must be built nationally, internationally, and globally to address globalized forces and threats effectively.

EVIDENCE OF THE EMERGING RESPONSIBILITY TO PRACTICE PUBLIC HEALTH

The responsibility to protect remains dogged by scepticism about the reality behind the rhetoric. No doubt some readers understood the conceptual framing of the responsibility to practice public health but wondered whether, in light of what happened to the UN and the WHO during the twenty years' crisis, this responsibility is merely a figment of my imagination. In this section, I argue that evidence exists to support the claim that the responsibility to practice public health is an emerging feature of twenty-first century international relations.

The Millennium Development Goals

As already indicated, the MDGs comprise a central objective in UN thinking about global politics in the early twenty-first century; but they also embody more specifically key aspects of the responsibility to practice public health. The MDGs operate on the basis of population surveillance that provides the epidemiological data necessary to assess the adequacy of prevention, protection, and response interventions. Progress towards each of the MDGs' health-related goals, targets, and indicators can only be assessed by empirically monitoring the health of populations around the world. The health-related targets of the MDGs are assessed by collecting information on specific health indicators. The data collected allows experts to develop a picture for what kind of interventions are needed and what interventions may not be working. As the WHO commented, "MDG monitoring has for the first time made available a reliable and comparable set of country health statistics—information which is useful for both policy-making and advocacy purposes."[59] The MDG process is, in fact, a grand epidemiological project both horizontally across the world's regions and vertically within individual countries for both direct public health problems (for example, child mortality, maternal health, and infectious diseases) and key social determinants of health (for example, poverty, hunger, education, gender equality, and environmental sustainability).

Revitalization of WHO

Part of the twenty years' crisis for UN activities on global public health related to problems the WHO experienced during the 1980s and 1990s that limited its effectiveness and lessened its influence. The last ten years have seen, however, efforts made to revitalize the WHO so that it can better fulfill its mandate as the specialized agency of the UN for public health. This revitalization process is too

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[59] World Health Organization, *Health and the Millennium Development Goals* (Geneva: World Health Organization, 2005), at 14.

complex to try to capture comprehensively here, but it involves strategies to make the WHO more responsive to the problems the globalization of public health presents to its member states concerning both communicable and non-communicable diseases. Indications of this revitalization can be found, for example, in the manner in which the WHO (1) supported the MDGs;[60] (2) reshaped its approach to global surveillance and response to infectious diseases, the potential of which was demonstrated in the successful WHO-led effort to control the dangerous global outbreak of Severe Acute Respiratory Syndrome (SARS) in 2003;[61] (3) provided leadership on combating the globalization of non-communicable diseases, especially the WHO-led efforts to adopt the Framework Convention on Tobacco Control[62] and to develop a global strategy for fighting the spread of obesity-related diseases;[63] and (4) recognized the need to create partnerships with other international organizations (e.g. World Bank) and non-state actors (e.g. Gates Foundation) on a range of global health problems.[64]

The New International Health Regulations

The new International Health Regulations adopted in May 2005 by the WHO (IHR 2005)[65] constitute particularly compelling evidence of the emergence of the responsibility to practice public health. For many reasons, the IHR 2005 constitute a historic development in the use of international law for public health purposes; and I explore this seminal international legal regime in detail elsewhere.[66] In terms of this article, the IHR 2005 are important because they embody, in an international legal agreement that will become binding on consenting states parties in 2007, the responsibility to practice public health in a manner never before seen in the long history of public health's relationship with international law.

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60 *Supra* note 12.

61 See D. P. Fidler, *SARS, Governance, and the Globalization of Disease* (Basingstoke: Palgrave Macmillan, 2004).

62 World Health Organization, *Framework Convention on Tobacco Control* (2005) online: World Health Organization ‹http://www.who.int/tobacco/framework/fctc_en.pdf›.

63 World Health Organization, *Global Strategy on Diet, Physical Activity, and Health: Obesity and Overweight* (2004) online: World Health Organization ‹http://www.who.int/dietphysicalactivity/publications/facts/obesity/en/›.

64 See e.g. World Health Organization, *The Civil Society Initiative*, online: World Health Organization ‹http://www.who.int/civilsociety/en/index.html›.

65 World Health Assembly, *Revision of the International Health Regulations*, WHA58.3, 23 (2005) [IHR 2005].

66 D. P. Fidler, "From International Sanitary Conventions to Global Health Security: The New International Health Regulations" (2005) 4 Chinese J.I.L. 325.

Starting in the latter half of the nineteenth century, states began to use international law to facilitate cooperation on infectious disease control.[67] The approach crafted for the early international sanitary conventions of the late nineteenth and first half of the twentieth century was, however, very limited in terms of the diseases to which the treaties applied and the positive obligations of states within their own territories. This Westphalian approach prevailed because the major purpose of these treaties was to minimize the impact of national quarantine regulations on flows of international trade. The international sanitary conventions were as much or more trade agreements as they were instruments focused on public health. The WHO continued this approach when it adopted the International Sanitary Regulations in 1951,[68] which the WHO later renamed the International Health Regulations in 1969 (IHR 1969).[69]

The twenty years' crisis demonstrated, beyond any doubt, how bankrupt the approach embodied in the IHR 1969 was in the context of global public health in the last decades of the twentieth century. State parties routinely violated the IHR 1969, and the IHR 1969 did not even apply to the emergence and re-emergence of many infectious diseases worrying global public health experts in the 1980s and 1990s.[70] The WHO began the process of revising and updating the IHR 1969 in 1995;[71] and the outbreak and containment of SARS accelerated the revision process, eventually producing a radically different international legal regime for global public health in the form of the IHR 2005.

The IHR 2005 contain a host of provisions that connect directly to the responsibility to practice public health. First, the scope of the IHR 2005 covers both communicable and non-communicable diseases regardless of origin or source.[72] The IHR 1969 and its predecessor regimes never ventured beyond a short list of naturally occurring communicable diseases, the spread of which was associated with international trade and travel. The IHR 2005's comprehensive disease scope means that the obligations on surveillance and intervention in this regime are now driven by global public health needs, not the trade interests of the great powers.

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67 For an overview of the use of international law on infectious disease control during this historical period, see D. P. Fidler, *International Law and Infectious Diseases* (Oxford: Clarendon Press, 1999), at 21-57.

68 International Sanitary Regulations, 25 May 1951, 175 UNTS 214.

69 World Health Organization, *International Health Regulations* (1969) (3rd ann. ed.) (Geneva: World Health Organization, 1983) [IHR 1969].

70 For analysis of the failure of the IHR 1969, see Fidler, *supra* note 67 at 65-71.

71 World Health Assembly, *Revision and Updating of the International Health Regulations*, WHA48.7 (1995).

72 IHR 2005, *supra* note 65 at Article 1.1 (defining "disease" to mean "an illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans").

Second, the IHR 2005 require all state parties to develop core public health capacities within their respective territories within a set period of time in order to engage in surveillance and to undertake appropriate interventions with respect to serious disease events within their own territories or the territories of other states.[73] Nothing in the long history of international law on public health approaches these obligations to build and maintain core surveillance and intervention capabilities at the state level. The IHR 1969 only mandated, for example, the maintenance of minimal public health capabilities at ports of entry and exit for trade and travel.

Third, the IHR 2005 require state parties to notify the WHO of all disease events that may constitute a public health emergency of international concern.[74] This notification duty functions as part of the global surveillance system the IHR 2005 supports, and the duty goes far beyond the IHR 1969's requirement for state parties to report outbreaks of less than a handful of infectious diseases. The IHR 2005 also breaks significantly with the IHR 1969 by empowering the WHO to collect and utilize surveillance information obtained from NGOs and other non-state sources, such as the media.[75] This provision feeds into the WHO's Global Outbreak Alert and Response Network (GOARN),[76] through which WHO harnesses the power of information technologies to state and non-state actor participation in global public health to create a more comprehensive, rapid, and effective surveillance system than anything seen before in the history of international health cooperation. The IHR 2005 also permits the WHO to seek verification from a state party about information it has received from sources other the state party in question, and the IHR 2005 requires state parties to respond to WHO verification requests.[77] This surveillance system drastically reduces the incentives and the possibilities states formerly had to cover-up serious outbreaks of diseases in their territories.

Fourth, the IHR 2005 grant the WHO the authority to declare whether a disease event actually constitutes a public health emergency of international concern.[78] This important decision, which could carry serious political and economic consequences for states, is not left in the hands of sovereign states. If the WHO declares a public health emergency of international concern, it is empowered to promulgate temporary recommendations on how state parties should respond to such an emergency.[79] These recommendations would pinpoint what constitute sound public health interventions vis-à-vis the public health emergency of

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73 *Ibid.* at Articles 5.1, 13.1, and Annex 1.

74 *Ibid.* at Article 6.1.

75 *Ibid.* at Article 9.1.

76 World Health Organization, *Global Outbreak Alert and Response Network*, online: World Health Organization ‹http://www.who.int/csr/outbreaknetwork/en/›.

77 IHR 2005, *supra* note 65 at Articles 10.1-10.2.

78 *Ibid.* at Article 12.

79 *Ibid.* at Article 15.

international concern. State parties deviating from WHO recommendations or other provisions in the IHR 2005 on appropriate interventions must justify their actions by providing relevant information to the WHO.[80] Each of these new WHO authorities reflects the logic of the globalization of public health governance because they acknowledge the need to shift some governance authority and responsibilities from the national to the international level.

Fifth, the IHR 2005 requires that all public health interventions taken to deal with disease events and public health emergencies of international concern be not more restrictive of trade and not more intrusive for individuals than is necessary to achieve the level of health protection sought.[81] These obligations seek to ensure that trade interests and human rights are respected as much as possible when states and the WHO address serious international disease threats and mirror the principle in the responsibility to protect that action "should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied."[82]

This description of the IHR 2005 should help make clear why the Secretary-General and the World Summit supported either the revision of the IHR or the IHR 2005 itself.[83] The IHR 2005 expresses the necessity for the individual and collective responsibility to practice public health as clearly as the MDGs. The new Regulations represent a milestone for the UN system in advancing global public health in international law. The acceptance by states of the IHR 2005's (1) much more demanding surveillance and intervention obligations at the national level; (2) empowerment of the WHO in terms of surveillance and intervention; and (3) involvement of non-state actors in governance of global public health, all in binding international law, reveals a level of consensus about the importance of collective action on global public health that surpasses any previous treaty or non-binding instrument concerning public health.

Security Council Involvement in Global Public Health

Another indicator of the emergence of a responsibility to practice public health can be found in the Security Council's involvement in global public health issues. The Security Council has, twice in the past five years (2000 and 2005), convened to address the threat HIV/AIDS poses to international peace and security.[84] Before the first Security Council meeting on HIV/AIDS in 2000, the Council had never before

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80 *Ibid.* at Article 43.

81 *Ibid.* at Articles 17(d), 31.2, and 43.1.

82 ICISS, *supra* note 44 at XI.

83 *In Larger Freedom*, *supra* note 5 at para. 64; *World Summit Outcome*, *supra* note 2 at para. 57.

84 See UNSC Res 1308 (2000), UN Doc. S/Res/1308 (2000); and *Security Council Presidential Statement Recognizes "Significant Progress" Addressing HIV/AIDS Among Peacekeepers, But Says Many Challenges Remain*, SC/8450 Press Release, 18 July 2005, online: United Nations ‹http://www.un.org/News/Press/docs/2005/sc8450.doc.htm›.

become seized of a matter pertaining to the threat diseases pose to international peace and security. These meetings have set a precedent that the Security Council's mandate to maintain international peace and security encompasses severe disease threats that appear to be escaping the control of sovereign states to the serious detriment of international relations.

Both the High-level Panel and the Secretary-General took this precedent one step further by advocating for Security Council involvement in situations involving overwhelming outbreaks of infectious diseases.[85] These proposals are the public health equivalent of the arguments under the responsibility to protect that the Security Council should intervene in connection with large-scale, violent atrocities relevant states appear unable or unwilling to address. The proposals also complete the logic of the globalization of public health governance by invoking the power of the international body with the most comprehensive governance authority found in international law.

QUESTIONS ABOUT THE RESPONSIBILITY TO PRACTICE PUBLIC HEALTH

Identifying the responsibility to practice public health as a strategic principle conceptually in UN reform analyses and developments in global public health underscores the importance of this responsibility to the UN, its member states, and non-state actors in contemporary world politics. The strategic importance of global public health to the future of the UN and its role in world politics invites closer scrutiny of the responsibility to practice public health. A comprehensive critique is beyond the scope of this article, but a few words are needed to emphasize that this responsibility confronts conceptual, political, and practical challenges that render it suspect, fragile, and incomplete. This section briefly mentions critical questions the emergence of the responsibility to practice public health raises.

To begin, one could ask whether the responsibility to practice public health adds anything conceptually to the generally recognized (but often ignored) responsibilities already connected with development, disease control, and environmental degradation. The Secretary-General observed that "[e]ach developing country has primary responsibility for its own development," which responsibility developed countries support with undertakings on "development assistance, a more development-oriented trade system and wider and deeper debt relief."[86] The preamble of the WHO Constitution contains propositions on the responsibilities of states for the health of their peoples.[87] No end of documents support the principle that states must be environmentally responsible and make progress toward sustainable development.

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85 *A More Secure World*, *supra* note 1 at para. 144; *In Larger Freedom*, *supra* note 5 at para. 105.

86 *In Larger Freedom*, *supra* note 5 at para. 32.

87 WHO Constitution, *supra* note 34 at 1 ("Governments have a responsibility for the health of their peoples, which can be fulfilled only by the provision of adequate health and social measures.").

More sharply, questions could be raised about the traction such general responsibilities concerning development, public health, and environmental protection create in international relations. The Secretary-General followed his description of the development responsibilities of developing and developed countries by soberly stating that, "All of this has been promised but not delivered. That failure is measured in the rolls of the dead—and on it are written millions of new names each year."[88] The need for UN reform plans to identify public health as a strategic, cross-cutting approach suggests that the WHO Constitution's sentiments on public health responsibilities have not historically taken deep root in the international system. In terms of responsibilities associated with sustainable development, the Secretary-General expressed his concerns for development efforts "if environmental degradation and natural resource depletion continue unabated."[89]

Scepticism about the responsibility to practice public health may also underscore the continuing failure of national governments and the "international community" to allocate the resources needed to facilitate the kind of surveillance and intervention capabilities required by the globalization of public health governance. The UN reform strategies" emphasis on development, disease control, and environmental degradation produced no new commitments of resources at the World Summit to fund a cross-cutting approach based on global public health (or any other approach for that matter). Even the remarkable governance changes made in the IHR 2005 are tarnished because the Regulations provide neither resources nor even a strategy for funding the building and maintenance of the national and international surveillance and response capabilities at the heart of this new regime.

The manner in which the responsibility to practice public health is unfolding may also draw concerns from public health theory and practice. From a public health perspective, the contrast between the global governance breakthrough in the new IHR and the perceived insufficient progress made on health-related MDGs reveals dynamics that may privilege *reactive* policies concerning mobile and dangerous cross-border disease events to which developed countries are vulnerable (for example, SARS, avian influenza, pandemic influenza) over *preventive* and *protective* governance for threats that kill millions in developing countries but do not necessarily threaten the territories or interests of the rich countries (for example, childhood mortality from malnutrition, diarrhoeal diseases, and lack of access to vaccines for childhood diseases; maternal mortality caused by inadequate access to reproductive health services; and sickness and death related to local water and air pollution).

This kind of skewed trajectory for global health governance is not sustainable because continued failure to prevent and protect (as the MDGs attempt to do) feeds the deadly cycle that exists between poverty, disease, environmental degradation, and insecurity. Governance mechanisms that are merely reactive and

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88 *In Larger Freedom*, *supra* note 5 at para. 32.

89 *Ibid*. at para. 57.

attempt only to manage crisis after crisis spawned by this deadly cycle are not resilient. The globalization of public health governance needs the responsibility to practice public health to generate as much governance resiliency as possible nationally and globally.

CONCLUSION

The plausibility of the UN contributing to the interlinked crises of development, disease, environmental degradation, and insecurity depends on the effectiveness of the UN's future efforts to strengthen global public health. The UN's challenge is to embed the emerging principle of the responsibility to practice public health more deeply into the individual and collective behaviour of states, international organizations, and non-state actors. The UN has a better chance focusing on this challenge than on many other, more high-profile features of UN reform debate, such as increasing the size and composition of the Security Council, the need to change the international law on the use of force, and the responsibility to protect triggered by large-scale, violent atrocities.[90] Each of these reform areas derives from the UN's mission to help save present and succeeding generations from the scourge of war; but the prospects for increasing the UN's contributions to international relations in the twenty-first century are dimmest with respect to making the Security Council both more legitimate and effective by increasing its size, achieving genuine consensus on the international law on the use of force, and advancing a consistent application of the responsibility to protect.

The World Summit basically, if in a rather uninspiring way, accepted the vision of the UN reform documents that makes global public health improvements critical to mitigating and perhaps reversing the deadly cycle produced by the interdependence of poverty, disease, environmental degradation, and insecurity. Underpinning this vision is the emerging norm of the responsibility to practice public health. Visions and norms are necessary but not sufficient to achieve the governance resiliency required in the face of these mutually reinforcing threats to human well-being. Despite stressing how critical improving global public health will be for advancing humanity's values and interests in the twenty-first century, oddly neither the High-level Panel nor the Secretary-General made any recommendations or proposals for making the existing institutions that work on global public health more effective. The closest proposal was the Secretary-General's argument that an initiative on streamlining governance of the global environment was needed.[91] Along the lines of a Peacebuilding Commission or integrating global environmental governance, an important contribution could have been made by establishing a Healthbuilding Commission or a global health governance initiative to transform the responsibility to practice public health from a fragile, emerging norm

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90 Slaughter, *supra* note 1 at 624 (comparing the task of preventing threats from violence and threats from disease and arguing that "preventing disease is likely to be the easier challenge").

91 *In Larger Freedom*, *supra* note 5 at para. 212.

into a living principle of human governance. This transformation remains the UN's burden and opportunity.

Development, Disease and Environmental Degradation: A Commentary[*]

ELIZABETH DOWDESWELL[**] AND CHRISTINE HOGAN[***]

Critical assessments of our international organizations are not new—in fact, they are regularly scheduled and essential. But, 60 years on, the United Nations (UN) seems to have arrived at a critical juncture. Universal pessimism and concern is deafening. What does this mean for the prospects of genuine UN reform? What does it mean for the UN in its work focused on environment, development, and disease issues?

Past anniversaries, including those in 1955, 1985 and 2000, were helpful in setting priorities and launching major initiatives. Leaders gathered and collaborated to assure themselves that the UN continued to be effective and relevant. At the conclusion of each of these historical Summits, a consensus emerged and, despite challenges and evolving expectations, the balance between optimism and pessimism regarding the organization's future consistently tilted to optimism.

Last September in New York, as the world's leaders gathered to mark the UN's sixtieth anniversary, there was a difference. Lines regarding UN reform were drawn in the sand. Clear proposals for concrete change were tabled by governments (such as Security Council reform and the creation of a Human Rights Council). An ambitious blueprint for reform was set out by the Secretary General. Notwithstanding the usual rounds of diplomatic interventions and modest, consensus language, pessimism and resignation seem to have won the day. There was a growing recognition that an organization with a "board of directors" of more than 190 countries was fundamentally flawed and capable of little more than negotiated gridlock and lowest common denominator decision making. The inability of countries to mobilize around the Millennium Development Goals (MDGs) was evidence of a dysfunctional system. The undeniable consensus was that the UN is at a crossroads, and its iconic status was dealt yet another blow. How does an organization recover and rebound when such basic fundamentals as public trust, legitimacy to act and purposeful leadership have been devalued?

With the outcome of the recent summit fresh on our minds, what does it mean, and where does it lead us? Do we prepare for the incremental demise of the UN that some have suggested is inevitable? Alternatively, do we view this recent wave of pessimism as the biggest window of opportunity for genuine reform that the

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[*] The views expressed in this article are those of the authors, and do not reflect the views or policies of any organizations with which the authors are affiliated.

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UN has seen in decades? Can it be a window for rebuilding trust, legitimacy, and leadership?

If there is to be real reform in the fields of environment, health and development, the three panellists provided a starting point by reflecting on myths and misunderstandings about the very nature of the UN and the way it works. They touched on the asset of universality and neutrality but recognized that it does not mean equality of voice and influence. Panellists spoke of the disagreements about objectives and agendas and persistent efforts to reach a consensus, which lead to accepting decisions that represent the lowest rather than the highest common denominator. National sovereignty is a very stubborn obstacle for real future progress. The myth of a "system" was unmasked through examples of fragmentation and lack of coherence. The UN excels in the use of its convening power to raise awareness of issues and build momentum for action, but usually there is no enforcement mechanism, which results in a consequent reliance on nation states for action and compliance. Finally, the UN is intergovernmental and thus largely insulated from the potential productive contributions of non-state actors.

Three sets of consideration could help in shaping a reform agenda: (1) learning from the lessons of the past (both past successes and past frustrations); (2) understanding the nature of the issues that lie ahead in the 21st century and acknowledging the shortcomings of existing institutions and processes to tackle those challenges; and (3) making adjustments for the current state of geopolitics including the changing dynamics between north and south, and between rich and poor.

LESSONS OF THE PAST

Looking back, it was in the 1970s that the global community agreed that multilateral institutions were necessary to support and guide the protection of the global environment and to promote sustainable development. The UN Environment Programme was born and environmental programming in other international and national bureaucracies was strengthened. The influence and prestige of the World Health Organization on matters of public health (especially disease eradication initiatives) reached a peak in the late 1970s, when polio was eradicated and the seminal *Health for All by the Year 2000* campaign was launched. The inter-relationships between poverty, environmental degradation and human health were coming to the fore.

In the past 30 years, we have learned a great deal from the way environmental issues have been tackled internationally. A strong base of international law has been developed, including key initiatives like the Convention on International Trade of Endangered Species (CITES) and the Montreal Protocol on Substances that Deplete the Ozone Layer.

But in retrospect, ozone depletion seems like an easy problem relative to the complexities of the issues we face today. It was not "easy" in the sense that it did not require scientific ingenuity to diagnose the problem, to sort through the human health and environment impacts and to develop the prescription, but it was "easy" in

the sense that it was a narrow issue with a rather specific cause that could be traced to a particular industrial sector and regulated out of the market in developed and developing countries alike. The systems and decisions taken in the environmental field in the last thirty years excelled at dealing with issues on a sector-by-sector basis (for example, marine pollution and species protection) or on an issue-by-issue basis (for example, ozone depleting substances and hazardous waste).

Learning from the Montreal Protocol

- Scientific assessment was linked to policy response.
- Precautionary principle in action—governments took action in the face scientific uncertainty (*i.e.*, no actual damage to human health had been proven).
- Specific timetables for each country's phase-out were mandated. This "technology forcing" accelerated phase out and created markets for safer alternatives.
- Universal participation—but through common and differentiated responsibilities.
- Integration of science, economics and technology.
- Institutional platform (UNEP) allowed countries to come together and find consensus. UNEP's credibility rested with its organization of the scientific assessments and then its persistence in working with countries on a legally binding response and today as a clearinghouse for implementation.

Contrast those issues with global climate change—a diffuse problem whose cause has taken decades to achieve scientific consensus on, and that has impacts that are too numerous to enumerate. Climate change is compounding the current challenges faced by developing countries such as lack of food and water security, HIV/AIDS, poor human health, and environmental degradation. The damage and losses resulting from climate changes undermine the effectiveness of development assistance. They place increasing demands on humanitarian assistance and emergency response measures. The poor and marginalized bear a disproportionate share of the impacts on the fragile ecosystems that are often essential to their livelihoods. In turn, this affects poverty levels, hunger, and human health. If left unaddressed, climate change poses a major obstacle to achieving the MDGs.

Twenty-First Century Issues and Challenges

Clearly, then, while learning from the past is critical to shaping our future world, on their own these lessons are insufficient for dealing with today's and tomorrow's challenges. For the past ten years sustainable development has been described as the politics of hope. Today, concepts of "human security" and the "responsibility to protect" have been added to our vocabulary in recognition of emerging challenges.

We need to develop a deeper understanding of the nature and complexities of the issues that are confronting us in the twenty-first century—many of which

were highlighted in "A More Secure World: Our Shared Responsibility", the report of the UN's High-level Panel on Threats, Challenges and Change.[1]

Today, despite best efforts, the state of the global environment continues to decline. Environmental problems transcend borders and necessitate international cooperation. Many environmental challenges themselves are increasingly complex, including climate change and genetically modified organisms. Combine this with the fact that the cumulative and uneven effects of industrialization and resource consumption are not particularly well understood.

Transboundary pollution and global issues like climate change are threatening environmental and human health, and the links between environmental degradation and poverty are indisputable. For instance, the recently completed Arctic Climate Impact Assessment found that air temperatures in Alaska and western Canada have increased as much as three to four degrees Celsius in the past fifty years. Other observations from this assessment include melting glaciers, reductions in the extent and thickness of sea ice, thawing permafrost, and rising sea levels. Arctic climate change presents serious challenges to the health and food security of some indigenous peoples and is threatening the survival of entire cultures.

As for biodiversity, it continues to provide a bountiful source of medicines and food products, and it maintains genetic variety that reduces vulnerability to pests and diseases, yet according to the United Nations, we are degrading and in some cases destroying the ability of the environment to continue providing these life-sustaining services for us.

And if all this were not enough, unsafe water and poor sanitation cause an estimated 80 per cent of all diseases in the developing world. The annual death toll exceeds five million—ten times the number killed in wars, on average, each year. More than half of the victims are children. No single measure would do more to reduce disease and save lives in the developing world than bringing safe water and adequate sanitation to all.

Do the existing institutional structures have the ability to deal with these issues? From a governance perspective, we know that the number and range of international institutions and instruments for dealing with these issues have grown steadily over the past quarter century. International institutions now exist to perform the functions of information broker, convener, facilitator, standard bearer, scientist, banker and investor.

International institutions and states have not organized themselves to address the problems of development in a coherent, integrated way, and instead continue to treat poverty, infectious disease and environmental degradation as stand-alone threats.

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1 *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›.

Environmental concerns are rarely factored into security, development or humanitarian strategies or the larger agendas of trade liberalization and global security. Nor is there coherence in environmental protection efforts at the global level.

We also know that this system of institutions has poorly developed mechanisms for compliance and enforcement, that the institutional structures for managing international agreements are fragmented, and that capacity-building at the local and national level is uneven and slow.

We know that integration of the science and policy agendas still pull in different directions and are not integrated. We also know that many of the right tools (science, technology, genomics-based tools) exist but are not diffused and widely implemented in developing countries. While no one has an interest in stifling scientific curiosity, collectively we must do better at putting science and technology to work for the improvement of the human condition.

Based on the above summary, there is clearly little cause for comfort, less reason for self congratulation, and no justification for complacency.

FACTORING IN GEOPOLITICS

The third consideration as we think through UN reform relates to geopolitics. Without doubt the benefits of globalization are unevenly distributed. With globalization comes an increase in the numbers of failed and failing states and new asymmetric security threats. There is the challenge of how to respond to the unprecedented military, economic and diplomatic power of the United States while recognizing the emergence of major new economic actors (such as India and China) and the potential of new consumer societies. The pace of technological advancement varies significantly from North to South and the disparities are growing, not narrowing.

As the world adapts to this most recent era of globalization, significant barriers to progress within the developed world must be addressed if we have any hope of tackling the issues noted above. This includes tackling the following:

(a) the lack of financial resources and appropriate investment models;
(b) a non-receptive policy environment;
(c) a lack of human resources to develop policies, institutions and infrastructure (including scientific, legal and financial resources);
(d) few incentives for entrepreneurial activities;
(e) insufficient investment in research and development; and
(f) limited public education and dialogue that would lead to effective and accepted public policy.

Given all of these considerations, the panel offered the following initial thoughts for those designing a blueprint for reform.

Strengthening the UN

First, the UN should focus on its core competencies of its convening power and its legitimacy. Attention is required on organizational fundamentals such as managing

public funds with probity, eliminating corruption, acting in areas of comparative advantage, acting with clarity of vision, taking public (not special) interest to heart, and being a model for other international institutions.

Second, non-state actors and sub-national and local governments need to see and hear that national governments are serious about acting on global issues and that there will be consistent, long-term policy direction, regulation and management of major global issues such as climate change. The UN is essential in negotiating international environmental treaties among parties with the constitutional power to do so. Strong long-term political signals will shift capital flows.

Third, given that the planet is becoming more interconnected and not less so, there is a greater need than ever for integrated, coherent regimes. This means linking the UN regimes and organizations to other sectorial international regimes, including organizations that deal with trade and investment, health, development, biodiversity, and desertification. The UN needs to show it can deliver a flexible, creative, and incentive-based regime. Specifically, with respect to climate protection, a key test will be the UN's ability to attract emerging economies and non-players like the United States back into the global climate change regime.

Thinking Out of the Box

New governance models are emerging and should be examined for their potential to enact change.

Networks hold particular promise. In the past decade considerable attention has been directed to the examination of networks as a response to fast-paced change, complex issues, and global interdependence. Anne-Marie Slaughter, in *A New World Order*, describes a world of networks, each with specific objectives and activities, membership, and history.[2] Some are government networks while others are global policy networks. Some expand regulatory reach while others build trust and establish relationships. Most exchange information about their own activities, develop data-bases of best practices and offer technical assistance and professional socialization to members from less developed countries. Clearly these networks can develop new ideas and broaden engagement, but they cannot replace the constitutional authority of governments. We should be thinking about how we can encourage networks and simultaneously preserve and enhance the credibility of formal intergovernmental regimes.

Flexible and functional multilateralism warrants greater exploration. Such fora as the L-20 and the G-20 have the potential to engage the new global titans (such as India and China) in matters of global public health and climate change without the suffocating apparatus of the UN. These fora need not be formal negotiations or treaty negotiations. Increasingly, countries need to search out and create safe havens for designing implementation strategies and for building

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[2] Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

consensus. The trap to avoid is the creation of new "clubs" where only a limited number of countries participate and there is no access for civil society or industry. Perhaps it would be wise to recognize that there is no single model that perfectly meets the needs and aspirations of all countries.

There is tremendous scope for greater corporate engagement in global issues and for greater public-private partnerships. As their global reach extends, their stake in human well-being on an international scale changes. The Bill and Melinda Gates Foundation is a great success in the public health field that has proven to be a model for other sectors.

Conclusion

The possibilities of reform seem real. So too are the constraints. We need to overcome the feeling of fatigue that is permeating this dialogue and push for innovation, while being careful not to abandon the potential of authentic global cooperation as reflected in the UN.

Constraining and Enabling
the Use of Force

Discursive Power in the UN Security Council

IAN JOHNSTONE*

INTRODUCTION

Legal norms relating to the use of force have come under stress in recent years as a result of practices in three areas: self-defense against terrorism, humanitarian intervention, and the use of force to protect civilians in peace operations. Discourse surrounding the practices suggests the normative boundaries have shifted. Much of the discourse has occurred in and around the Security Council of the United Nations, even when the issue at stake is the authority to act unilaterally. This suggests that the Council is not only a decision-making body but also a key venue for deliberation and justificatory discourse—a place where the rules about the use of force are defined, debated, interpreted and reinterpreted. In this article I begin by briefly offering a perspective on where the law stands in each of the three areas identified above. I then turn to an analysis of the Security Council as a deliberative setting, the power of whose deliberations is illustrated, paradoxically, by the reluctance to adopt formal criteria for intervention. I argue that this has important implications for Council reform. If the Council is seen as a deliberative body, then *how* it deliberates is significant. From that perspective, proposals for improving working methods should not be dismissed as a distant second best to expanding the membership. Such proposals go to the heart of the Council's role in shaping the international legal order.

THE USE OF FORCE: EVOLVING LAW AND PRACTICE

Preemption, Prevention and Self-Defense: Accumulation of Events Theory

An instructive way of looking at where the law on self-defense stands post-9/11 is by comparing the reactions to the US-led interventions in Afghanistan and Iraq.[1] The official justification for the US and allied attacks on Al-Qaeda and the Taliban in

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1 For a good cross section of views on both, see Jonathan I. Charney, "Editorial Comments" (2001) 95(4) A.J.I.L. 835 (about Afghanistan); and "Agora: Future Implications of the Iraq Conflict" (2004) 97(3) A.J.I.L. 553. For my own comparative analysis of the two cases, 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 at 827-836.

October 2001 was self-defense in connection with the events of 9/11.[2] This was a stretch from traditional interpretations of Article 51 of the UN Charter in two respects: (a) it was invoked against a non-state actor (Al-Qaeda); and (b) in exercising its right of self-defense, the US and its Afghan allies changed the regime in power in Afghanistan. Yet the international community was largely prepared to accept this interpretation of Article 51. Evidence that the Security Council itself saw the defensive response to 9/11 as legal is resolution 1368, adopted the day after the attacks, which contains a preambular paragraph reaffirming the inherent right of self-defense.[3] Many organizations, including NATO and the OAS, invoked the right of self-defense in support of the US, and some referred explicitly to resolution 1368 in doing so. The European Council stated on 21 September 2001 that "on the basis of Security Council resolution 1368, a riposte by the US is legitimate"[4], and on 8 October 2001, the EU's General Affairs Council declared "its wholehearted support for the action being taken in self-defence and in conformity with the UN Charter and UN Security Council resolution 1368".[5] Similarly, the Permanent Council of the OSCE expressed its support on 11 October 2001 for "the United States" and other states' rights of individual and collective self-defence following armed attacks, in accordance with Article 51 of the Charter of the United Nations, as reaffirmed in United Nations Security Council resolutions 1368 and 1373".[6] Moreover, many states participated directly or indirectly in Operation Enduring Freedom and are participating in the economic and political reconstruction of Afghanistan under the authority of Security Council resolutions 1386 and 1401, signifying implicit approval of the US interpretation of Article 51 as presented to the Security Council on 7 October.[7]

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2 John Bolton, "Letter from the Permanent Representative of the US to the President of the United Nations Security Council" (7 October 2001, UN Doc. S/2001/946).

3 SC Res. 1368, UN SCOR, UN Doc. S/RES/1368 (12 September 2001), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement›.

4 European Union, *Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001*, online: European Union ‹www.eurunion.org/partner/EUUSTerror/ExtrEurCounc.pdf›.

5 European Union, *General Affairs Council Conclusions: Action by the European Union Following the Attacks in the United States*, 8 October 2001, online: European Union ‹www.eurunion.org/partner/EUUSTerror/GenAffCounc1008.pdf›.

6 Organization for Security and Cooperation in Europe, *Statement by the Permanent Council supporting United States-led Actions to Counter Terrorism*", PC.JOUR/360/Corr.1, 11 October 2001, Annex. Online: Organization for Security and Cooperation in Europe ‹www.osce.org/documents/pc/2001/10/1695_en.pdf›.

7 For a fuller review of the reactions, see Ian Johnstone, "The Plea of 'Necessity' in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism" (2005) 43 Colum. J. Transnat'l L. 337 at 370-372.

When self-defense against terrorism was invoked eighteen months later as one of the justifications for military action against Iraq, the international reaction was quite different. In February 2003, US Secretary of State, Colin Powell presented evidence to the Security Council of Iraq's failure to comply with its WMD-related obligations and the connection between Saddam Hussein and Al-Qaeda. Implicitly, Secretary Powell was arguing that military action against Iraq could be justified on two distinct legal grounds: under the authority of Security Council resolutions and on the basis of self-defense. The doctrine of pre-emption was never the official US justification for military action in Iraq,[8] but by announcing it in the National Security Strategy of 2002 (NSS) and referring to it from time to time in the lead-up to war, the Bush Administration made it part of the debate. The central argument contained in the NSS is that Article 51 of the UN Charter permits "anticipatory self-defense", and that the notion of anticipatory self-defense can and does encompass pre-emptive strikes, including action to "forestall or prevent … hostile attacks by our enemies." Few states or knowledgeable observers were persuaded that the links between Saddam Hussein and Al-Qaeda were sufficiently tight to justify the invasion of Iraq as a defensive response to 9/11, and even fewer were prepared to endorse such an expansive doctrine of pre-emption. When that became obvious, the Bush Administration largely gave up trying to make its case on the grounds of self-defense—at least to international audiences. The letter of 20 March 2003 the US sent to the President of the Security Council setting out the legal justification for the war contains not a word about terrorism or pre-emption, and only a cryptic reference to the need to "defend the United States and the international community" in one of the final paragraphs.[9] The legal case is based on the enforcement of existing Security Council resolutions relating to Iraq's weapons of mass destruction.

Since then, there has been less talk of pre-emption in official US circles, although the doctrine is still on the books. The High-level Panel on Threats, Challenges and Change addressed the issue in December 2004 (hereinafter HLP), concluding that a threatened state can take military action pre-emptively in response to an imminent attack, but not preventively against a "non-imminent, non-

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8 See William Taft and Todd Buchwald, "Pre-Emption, Iraq and International Law" (2003) 97 A.J.I.L. 557.

9 John Bolton, "Letter from the Permanent Representative of the US to the President of the UN Security Council" (21 March 2003, UN Doc. S/2003/351). The cryptic reference could be interpreted as a nod to the right of self-defense against terrorism, although in the context of the letter as a whole, it is more plausibly read as a claim that, in enforcing Security Council resolutions, the US was defending collective interests, as is its responsibility as a member of the Council. If the US had wanted to make an Article 51 self-defense claim, it could have done so much more directly.

proximate" one.[10] On its face, this looks like a narrow interpretation of self-defense and a flat rejection of the NSS version of the doctrine of pre-emption. Yet according to one of its members, Brent Scowcroft, the Panel in effect "amplified" and "re-defined" Article 51 to accommodate unilateral pre-emptive self-defense against imminent threats, but not preventive action against more remote or distant threats.[11] Preventive action against "non-imminent" threats can and should be taken by the Security Council under its broad authority to maintain international peace and security. General Scowcroft stressed that the distinction between permissible pre-emption and impermissible prevention under Article 51 was important, but not a bright line. It remained to be worked out in practice.[12]

Where then, does the law on self-defense against terrorism stand post-Afghanistan and Iraq? Without trying to provide a full answer to the question, I would argue that it is usefully illuminated by the *accumulation of events* theory.[13] The theory relaxes the test of imminence when a state has been subject to a series or pattern of attacks.[14] If a state that suffered past attacks can present compelling

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10 *Report of the Secretary-General's on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, UN GAOR, 59th Sess., Supp. No. 565, UN Doc. A/59 (2004) at paras 188-189, online: United Nations ‹http://www.un.org/secureworld/ report.pdf›.

11 Woodrow Wilson International Center for Scholars, "Legitimacy and the Use of Force: Discussion on the United Nations' High-level Panel on Threats, Challenges and Change" March 23, 2005, available at ‹http://wilsoncenter.org/index.cfm?fuseaction=events.event_summary&event_id=11068›.

12 Proceedings of the 2005 Annual Conference of the American Society of International Law, April 2005 [forthcoming].

13 This section draws on my comments at the 2005 Annual Conference of the American Society of International Law, as well as Johnstone, *supra* note 8.

14 There is a respectable body of legal opinion to support this theory. It dates back to the debates over Israeli attacks on PLO headquarters in Tunisia in 1985 and US strikes on Tripoli in 1986, and was reinforced by the ICJ in both the *Nicaragua* case (1986) and *Iran Platforms* case (2003). Neither opinion is about terrorism, of course, but there is language in both to suggest that a pattern of events can be justification for a self-defensive response, even if a single incident in the pattern may not be. In the *Nicaragua* case, the Court said about incursions into Honduras and Costa Rica "[v]ery little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly *or collectively*, to an "armed attack" by Nicaragua." *Military and Paramilitary Activities in and Against Nicaragua, Merits*, [1986] I.C.J. Rep. 14 at para. 231 [emphasis added]. In *the Iran Platforms* case, the Court ruled that "[*e*]*ven taken cumulatively*, these incidents [Iran committed such as the laying of mines and firing on ships]... do not seem to the Court to constitute an armed attack on the United States," implying that, on a different set of facts, a pattern of such attacks might justify a response in self-defense. *Case Concerning Oil Platforms (Islamic Republic of Iran v. U.S.)*, [2003] I.C.J. Rep. 90 at para. 50 [emphasis added]. For an analysis of the Oil Platforms case, see

evidence of both the source of the attacks and a genuine threat of future attacks from the same source, then a self-defensive response would be legal. In those circumstances, the test of imminence is not simply a matter of time, but also of the nature, likelihood and potential gravity of future attacks. The accumulation of events theory splits the difference between the NSS approach and that of the HLP since, on the one hand, the former did not call for an abandonment of the *imminence* test, just its adaptation; and on the other hand, the latter left wiggle room in its position by using the word *proximate* alongside *imminent*. Arguably, threats that are part of a pattern of events are "proximate" enough to justify self-defense.

More difficult legal questions arise when there has only been one past attack or none at all, just a threat. Even though there has been no "pattern" of attacks, the accumulation of events theory may be helpful as a way of gauging the likelihood and imminence of future attacks. Mary Ellen O'Connell has written that "clear and convincing evidence" of future attacks is the appropriate test, since that is an accepted standard in other areas of international law.[15] A past attack would certainly be an important piece of evidence—especially when followed by explicit threats of further attacks—and so, for example, the US would have been justified in acting against Al-Qaeda even if 9/11 had been its first attack on the US (which it was not).[16] Other relevant "events" would be a failed or thwarted attack, the discovery of written plans, or the apprehension of individuals engaged in specific planning. This looks like a slippery slope, but it is not so slippery that it would justify preventive action against all threats, no matter how remote. The military action against Iraq, for example, did not meet the test because there was no evidence of an "accumulation of events" to suggest Saddam Hussein was conspiring with Al-Qaeda to launch terrorist strikes on the US.

Whether or not this *accumulation of events* theory is persuasive, the important point is that much of the debate about pre-emption and the use of force against terrorism has radiated out of the UN Security Council. The debate did not occur there only, but because of resolution 1368, the letter the US sent to the Council

Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, "Exploring the Limits of International Law Relating to the Use of Force in Self-Defense" (2005) 16 E.J.I.L. 499.

15 Mary Ellen O'Connell, "The Myth of Pre-emptive Self-Defense" (2002) A.S.I.L. Task Force on Terrorism 7.

16 Richard Gardner argues that the events of 9/11 alone constituted an "armed attack" against the US and gave rise to a self-defensive right to destroy Al-Qaeda's bases. Richard Gardner, "Neither Bush nor the 'Jurisprudes'" (2003) 97 A.J.I.L. 585 at 589. Thus there was no need to apply the *doctrine of pre-emption*, the *accumulation of events theory*, or for that matter even produce evidence of a possible future attack. The US response was part of an on-going war that began with 9/11. Personal communication with author (31 March 2005).

when it started military action in Afghanistan,[17] the debate about Iraq kicked off by President Bush in the UN General Assembly in September 2002, and the presentation of Secretary Powell in February 2003, the Security Council became a focal point for justificatory and condemnatory discourse. The contrasting reactions to the actions in Afghanistan and Iraq illuminate where the shifting law on self-defense against terrorism stands.

Humanitarian Intervention

The most illuminating way of understanding where the law relating to humanitarian intervention currently stands is to focus on the international reaction to NATO's intervention in Kosovo in 1999. Prior to Kosovo, the Security Council had been adopting a progressively more expansive interpretation of what constitutes a threat to international peace and security, which accommodated the use of force for humanitarian purposes. The developments occurred not as part of a systematic effort to rewrite the rules of international law, but rather as a case-by-case reaction to crises as they erupted and as a function of the political dynamics within the Security Council. No single decision represented a radical departure from existing international law and practice; taken together however, the decisions added up to a significant evolution in how the Security Council understood the scope and limits of its role.

This expansion can be traced through a series of cases, starting with the humanitarian operation in Northern Iraq in 1991, undertaken by the US, UK and France on the basis of ambiguous authority provided by Security Council resolution 688.[18] Subsequent steps in this progression were the operations in Bosnia, Somalia, Rwanda, Haiti and Sierra Leone. None was a pure case of humanitarian intervention, but by the time of the Kosovo crisis in late 1998-early 1999, the Security Council had authorized or endorsed a number of forcible interventions which were partly, if not exclusively, for humanitarian purposes. It was never sanguine about the use of force in these circumstances and each case was treated as unique, rather than as a principled application of a new doctrine of humanitarian intervention.

When NATO intervened in Kosovo, it did not have explicit Security Council authority and the weight of scholarly and official opinion is that the intervention was illegal. None of the three principal legal justifications—authority based on existing Security Council resolutions, a customary right of humanitarian

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17 John Bolton, "Letter from the Permanent Representative of the US to the President of the UN Security Council" (7 October 2001, UN Doc. S/2001/946).

18 Resolution 688 declares the consequences of Iraq's Kurd and Shi'ite populations to be a threat to international peace and security, but it was not explicitly adopted under Chapter VII, as all prior resolutions on Iraq had been. UNSC Res. 688, UN SCOR, 46th Year, UN Doc. S/RES/0688 (1991), online: United Nations ‹http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/596/24/IMG/NR059624.pdf?OpenElement›.

intervention or self-defense—was persuasive. However, a fair characterization of the international reaction to the intervention is that NATO's violation of the law was "excused". The "interpretive community"[19] of governments represented on the Security Council, other interested governments, lawyers, NGOs and blue ribbon panelists deemed the intervention illegal, but turned a blind eye to the violation of the law given the extreme circumstances.

This reading is supported by the many statements of government representatives who were disinclined to accept the legality of the intervention but reluctant to condemn it. This includes many Islamic countries, and even some NATO members who stressed the exceptional nature of the action and down-played its relevance as a precedent. The reaction of the Non-Aligned Movement (NAM) is especially revealing. At the time of the intervention in March 1999, the NAM refrained from directly condemning the action despite the efforts of South Africa as chair to get it to do so. Instead it merely affirmed NAM's belief in the Security Council as the appropriate conflict resolution body.[20] Yet, several months later, in response to the UN Secretary-General's speech to the General Assembly, NAM Ministers rejected the legality of unilateral humanitarian intervention.[21] The inference is that the NAM viewed the Kosovo intervention as illegal, but was prepared to excuse it at the time it occurred, while reaffirming the prohibition against use of force at the first appropriate opportunity. Even the US unwillingness to pin its case on a single legal justification can be seen as tacit acknowledgement that the action rested on shaky legal foundations but would likely be "excused". Then Secretary of State Madeleine Albright, a staunch proponent of the intervention, said after-the-fact that the Kosovo situation was *sui generis* and it was "important not to overdraw the lessons that come out of it."[22] This signals that the US was not trying to change the law in favor of a general doctrine of humanitarian intervention; it was deliberately and consciously acting in a manner it saw as contrary to the law (though it could not admit to that), in the hope and expectation that NATO action would be excused in the particular circumstances.

Since Kosovo, the notion of a "responsibility to protect" (R2P) has gained currency. First articulated by the International Commission on Intervention and

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19 On "interpretive communities", see Ian Johnstone, "Security Council Deliberations: The Power of the Better Argument" (2003) 14 E.J.I.L. 437 at 464-475, which applies the concept to an analysis of the arguments put forward to justify the Kosovo intervention.

20 Philip Nel, "South Africa: the Demand for Legitimate Multilateralism" in Albrecht Schnabel & Ramesh Thakur, eds., *Kosovo and the Challenge of Humanitarian Intervention* (New York: United Nations University Press, 2000) 240 at 245-246.

21 UN, Press Release, GA/SPD/164 (18 October 1999).

22 US Secretary of State Madeline Albright, Press Conference, (Singapore, 26 July 1999), online: U.S. Department of State ‹http://secretary.state.gov/www/statements/1999/990726b.html›.

State Sovereignty (ICISS), the central claim is that "where a population is suffering serious harm … and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect".[23] Early efforts to have the principle enshrined in a declaration by the General Assembly or Security Council faltered, but it has already informed debates on some issues. The R2P concept was invoked, for example, by virtually every member of the Council in deliberations on Darfur in late 2004 and early 2005.[24] Additionally, the SC resolution authorizing the African Union Mission in Sudan (AMIS) has an overarching humanitarian purpose.[25] The AU itself has articulated a version of the principle in its Constitutive Act and Protocol Relating to the Establishment of the Peace and Security Council. Both instruments grant the Union a right to intervene in a Member State "in respect of grave circumstances, namely war crimes, genocide and crimes against humanity" and, since 2003, a "serious threat to legitimate order."[26]

The effort to adopt the principle at the global level took on new life after the High-level Panel reported that there is a "growing acceptance" of the responsibility to protect against avoidable catastrophe and when Governments are unable or unwilling to fulfill that responsibility, it "should be taken up by the wider international community," including if necessary through the use of force.[27] The HLP stressed that the international responsibility falls on the Security Council and recommended the adoption of a set of guidelines or criteria to be taken into account

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23 ICISS, *Report of the International Commission on Intervention and State Sovereignty, the Responsibility to Protect* (International Development Research Center, 2001) at XI.

24 See, for example, the statements on resolution 1564, UN SCOR, 59th Year, UN Doc. S/PV.5040 (18 September 2004), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/PRO/N04/515/29/PDF/N0451529.pdf?OpenElement›.

As Nick Wheeler points out in this volume, the R2P principle was invoked both by states who sought to encourage outside intervention, either in the form of sanctions or military action, and those who opposed it.

25 African Union Peace and Security Council, Communiqué, PSC/PR/Comm (XVII), "Communiqué of the Seventeenth Meeting of the Peace and Security Council" (19 October 2004), online: Africa Union ‹http://www.africa-union.org/News_Events/Communiqu%C3%A9s/Communiqu%C3%A9%20_Eng%2020%20oct%202004.pdf›.

In addition to ceasefire monitoring, AMIS's mandate is to "contribute to a secure environment for the delivery of humanitarian relief and, beyond that, the return of IDPs and refugees to their homes," and to protect civilians and humanitarian operations "under imminent threat and in the immediate vicinity." The mandate is less robust than some would like, but that has more to do with a lack of capacity and prudential calculations about the overall prospects for peace in Sudan than principled objections to SC authorized humanitarian intervention.

26 *Constitutive Act of the African Union*, Article 4(h); Protocol Relating to the Establishment of the Peace and Security Council (2002), Article 4(j), as amended in February 2003.

27 *Supra* note 11 at para. 201.

in deciding whether to exercise it.[28] An early draft of the document that came out of the 2005 World Summit included a paragraph on the responsibility to protect, including the responsibility of the Security Council to act under Chapter VII when necessary.[29] The US objected to this language on the grounds that it implied a legal responsibility. As US Permanent Representative to the UN, John Bolton, put it in a letter to the President of the General Assembly:

> [W]e agree that the host state has a responsibility to protect its population from such atrocities, and we agree in a more general and moral sense that the international community has a responsibility to act when the host state allows such atrocities. But the responsibility of the other countries in the international community is not of the same character as the responsibility of the host, and thus we want to avoid formulations that suggest that the other countries are inheriting the same responsibilities that the host has.... [T]he obligation/responsibility discussed in the text is not of a legal character.... We do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.[30] Bolton's position was ultimately accepted. While the "responsibility to protect" language reframes the debate away from a more controversial right to intervene, it is not likely to be widely accepted if cast as an even more controversial "duty to intervene".

Responding to the US and other objections,[31] in a section of the Summit document entitled "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity," language about the Council's responsibility to act was replaced with the following: the international community

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28 *Ibid.* at para. 203 and 207. The Secretary General endorsed this approach in his report, *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), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement›.

29 High Level Plenary Meeting of the General Assembly, *Revised Draft Outcome of the High-level Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly*, UN Doc. A/59/HLPM/CRP.1/Rev.2, (5 August 2005) at para. 118, online: Reform the UN ‹www.reformtheun.org/index.php?module=uploads&func=download&fileId=782&XARAYASID=ad45c8558a94a›.

30 Letter from Ambassador John Bolton, Permanent Representative of the United States of America to the UN, to the United Nations (30 August 2005), online: Reform the UN ‹http://www.reformtheun.org/index.php?module=uploads&func=download&fileId=811›.

31 US amendments are marked on the 5 August draft, in a document dated 17 August 2005 with the words "OD US Version #2" handwritten at the top, online: Reform the UN ‹http://www.reformtheun.org/index.php/countries/44?theme=alt1›.

is "prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case by case basis".[32] While there is no appeal to adopt guidelines or criteria for humanitarian intervention, the declaration "stresses the need for the General Assembly to continue consideration of the responsibility to protect… bearing in mind the principles of the Charter of the United Nations and international law."[33]

Thus, it would seem that, based on Security Council practice and debates emanating from that practice, the law on humanitarian intervention is as follows: the Security Council has the competence but not the duty to authorize humanitarian intervention; such intervention is illegal without Security Council authorization as a general matter; but there are rare cases of extreme humanitarian necessity when unauthorized action will in effect be excused by the international community.

The Use of Force to Protect Civilians in Peace Operations

Parallel to debates over a general responsibility to protect, a more specific debate has arisen over the responsibility of peacekeepers to protect civilians. While blue ribbon panels and now the UN have articulated the broad R2P norm, the Security Council has been mandating an increasing number of peace operations to protect civilians under Chapter VII of the UN Charter.[34]

The significance of this development is best understood in the context of the evolution of the peace operations doctrine within the United Nations. Historically and with few exceptions, peacekeeping was a consent-based enterprise and force was used only in self-defense. A sharp line was drawn between Chapter VI peacekeeping and Chapter VII enforcement action. The changed nature of the operations at the end of the Cold War led to a blurring of that line, highlighted by Secretary General Boutros-Ghali in his famous 1992 *Agenda for Peace* where he suggested consent was no longer a defining element of peacekeeping and peace enforcement units ought to be formed to occupy a halfway house between peacekeeping and enforcement action. In the 1995 *Supplement to an Agenda for Peace*, he backed away from that position and, reflecting on the failures in Bosnia and Somalia, insisted that peacekeeping and peace enforcement should not be mixed: "[t]o blur

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32 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›.

33 *Ibid.* at para. 139.

34 For an excellent review of the convergence between this normative shift and "protection of civilians" mandate of peace operations, see Victoria Holt, "Responsibility to Protect: Considering the Operational Capacity for Civilian Protection" (revised January 2005), online: Stimson Center ‹http://www.stimson.org/fopo/pdf/Stimson_CivPro_pre-pubdraftFeb04.pdf›.

the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel.... [P]eacekeeping and the use of force (other than in self-defense) should be seen as alternative techniques and not just as adjacent points on a continuum, permitting easy transition from one to another."[35] The sharp line the *Supplement* tried to draw was blurred again by the Report of the Panel on UN Peace Operations (the Brahimi Report, 2000). It affirms that consent, impartiality and the use of force only in self-defense remain the "bedrock principles of peacekeeping," but goes on to suggest that consent is often unreliable;[36] that impartiality does not mean neutrality but rather "adherence to the principles of the Charter and to the objectives of a mandate";[37] and that UN operations must be prepared to deal effectively with spoilers (groups who renege on their commitments or otherwise seek to undermine a peace accord by violence) and be able "to project credible force against the lingering forces of war and violence".[38] The blurring of the line was explicitly acknowledged by the HLP in 2004 when it states forthrightly that the distinction between Chapter VI peacekeeping and Chapter VII peace enforcement is "misleading"[39] and that the difference between the two should not be exaggerated.[40] "There *is* a distinction between operations in which the robust use of force is integral to the mission from the outset ... and operations in which there is a reasonable expectation that force may not be needed."[41] But the usual practice now is to give both types of operation a Chapter VII mandate, on the understanding that even the most benign environment can turn sour.[42]

This back and forth on the use of force suggests that the UN ought to have a peace operations "doctrine", but due to political sensitivities it does not possess, other than what appears in training manuals, a master list of standard rules of engagement, and various semi-official documents like the 2003 *UN Handbook on Multilateral Peacekeeping Operations.* As a result, there is no set policy on the responsibility of peacekeepers to protect civilians. The Brahimi panel tried to set such a policy by insisting that UN peacekeepers "who witness violence against

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35 Report of the Secretary-General on the Work of the Organization, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. No. A/50/60 – S/1995/1 (3 January 1995) at paras. 35 and 36, online: United Nations ‹http://www.un.org/Docs/SG/agsupp.html›.

36 *Report of the Panel on UN Peace Operations*, UN Doc. A/55/305-S/2000/809 (2000) at para. 48, online: United Nations ‹http://www.un.org/peace/reports/peace_operations/›.

37 *Ibid.* at para. 50.

38 *Ibid.* at paras. 21 and 51, and Executive Summary. On *spoilers* more generally, see Stephen Stedman, "Spoiler Problems in Peace Processes" (1997) 22 I.S. 5.

39 *Supra* note 11 at paras. 211-212.

40 *Ibid.* at para. 213.

41 *Ibid.* at para 212 [emphasis in original].

42 *Ibid*.

civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles."[43] The latest version of the *Handbook on Peacekeeping*, on the other hand, states: "in specific circumstances, the mandate of a peacekeeping operation *may include* the need to protect a vulnerable civilian population from imminent attack. The military component *may be asked* to provide such protection in its area of deployment only if it has the capacity to do so."[44] The implication is that there is no obligation to protect civilians unless explicitly stated in the mandate.

Meanwhile, as is often the case in peace operations, practice has moved ahead of theory. Since late 1999, no fewer than ten operations—both UN and non-UN—have been given mandates under Chapter VII "to protect civilians under the imminent threat of physical violence."[45] This language is often qualified by the words "within its capabilities and areas of deployment" Thus the peacekeepers do not have a blanket responsibility to protect all civilians, which would generate expectations that could rarely be met. However, it is now standard practice to include this more limited protection mandate in every operation where consent of all the parties to the conflict is unreliable, or worse, non-existent.[46]

This development is not entirely new. Since the end of the Cold War, a substantial number of missions have had *implicit* mandates to protect civilians, even if the precise term was not used. The United Nations Protection Force (UNPROFOR) in Bosnia, for example, had a mandate to "deter attacks against the safe areas".[47] The Implementation Force (IFOR) and Stabilization Force (SFOR), the NATO-led missions that succeeded UNPROFOR, had broad mandates to use "all necessary measures" to carry out their missions, which included support for humanitarian functions and the authority "to respond appropriately to deliberate

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43 *Supra* note 38 at para. 62.

44 UN, *Handbook on UN Multilateral Peacekeeping Operations* (2003), at 64, online: United Nations ‹http://pbpu.unlb.org/pbpu/handbook/Handbook%20on%20UN%20PKOs.pdf›

45 For UN operations, see for example UNSC Res. 1270, UN SCOR, UN Doc. S/RES/1270 (1999) on Sierra Leone; UNSC Res. 1291, UN SCOR, UN Doc. S/RES/1291 (2000) on DRC; UNSC Res. 1528, UN SCOR, UN Doc. S/RES/1528 (2004) on Cote d'Ivoire; UNSC Res. 1542, UN SCOR, UN Doc. S/RES/1524 (2004) on Haiti; UNSC Res. 1545, UN SCOR, UN Doc. S/RES/1545 (2004) on Burundi ; UNSC Res. 1590, UN SCOR, UN Doc. S/RES/1590 (2005) on Sudan (2005); and UNSC Res. 1609, UN SCOR, UN Doc. S/RES/1609 (2006) on Cote d'Ivoire. For non-UN operations, see UNSC Res. 1464, UN SCOR, UN Doc. S/RES/1464 (2003 on the French-led Operation Licorne and ECOWAS in Cote d'Ivoire; and UNSC Res. 1564, UN SCOR, UN Doc. S/RES/1564 (2004) on the African Union in Darfur.

46 The Government of Canada played a central role in insisting that this should become standard language in Security Council resolutions.

47 UNSC Res. 836, UN SCOR, UN Doc. S/RES/836, (1993)

violence to life and person".[48] The UN- and US-led missions in Somalia had mandates to establish a secure environment for humanitarian operations.[49] The French-led Operation Turquoise had a mandate to provide "security and protection of displaced persons, refugees and civilians at risk",[50] Protection of civilians falls within the mandate of the NATO-led force in Kosovo (KFOR)[51], as it did with the International Force in East Timor (INTERFET) and then the UN Transitional Administration in East Timor (UNTAET) prior to Timor-Leste becoming independent.[52]

The protection of civilians has not been exercised consistently and indeed there are places, such as the Democratic Republic of Congo, Côte d'Ivoire and Sudan, where it is doubtful the missions have the capacity to fulfill the commitment. Yet there have been a good number of situations in recent years where peace operations have acted robustly to protect civilians—with good results and general acceptance.[53] It is too early to say that stopping "violence against civilians" is *presumed* to be in the mandate of all peace operations, but clearly there is a move in that direction. Failure to do so could be seen as inconsistent with UN Charter principles and therefore inconsistent with the principle of impartiality as defined in the Brahimi report. The mandates and activities of the peace operations reflect the normative shift signified by endorsement of the "responsibility to protect" principle. Arguably, they are a concrete manifestation of efforts to put the principle into practice—not as dramatic as a full-scale humanitarian intervention, but nevertheless part of the incremental process of giving meaning and content to an inchoate norm. Again, this normative evolution has occurred as a result of Security Council practice and discourse in and around the Security Council about the practice.

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48 UNSC Res. 1031, UN SCOR, UN Doc. S/RES/1031 (1995); UNSC Res. 1088, UN SCOR, UN Doc. S/RES/1088 (1996).

49 UNSC Res. 794, UN SCOR, UN Doc.S/RES/794 (1992); UNSC Res. 814, UN SCOR, UN Doc S/RES/814 (1993).

50 UNSC Res. 925, UN SCOR, UN Doc S/RES/925 (1994); UNSC Res. 929, UN SCOR, UN Doc S/RES/929 (1994).

51 UNSC Res. 1244, UN SCOR, UN Doc S/RES/1244 (1999).

52 UNSC Res. 1264, UN SCOR, UN Doc S/RES/1264 (1999); UNSC Res. 1272, UN SCOR, UN Doc. S/RES/1272 (1999).

53 Non-UN operations like SFOR (Bosnia), KFOR (Kosovo), INTERFET (East Timor), Operation Artemis (DRC), AMIB (Burundi) and AMIS (Darfur) come to mind, as do a number of UN missions, including UNAMSIL (Sierra Leone), MINUSTAH (Haiti), MONUC (Democratic Republic of the Congo) and ONUB (Burundi).

THE SECURITY COUNCIL AS A DELIBERATIVE BODY

Deliberation Matters

Some of these use of force issues were addressed at the 2005 World Summit, but only R2P was a major topic of discussion. The result of the negotiations on that issue was the first ever UN-wide, consensus-based endorsement of the principle, in surprisingly unequivocal terms. The various drafts and final outcome document were virtually silent on self-defense and pre-emption. They reaffirmed that Charter provisions were sufficient to address "the full range of security threats" and, in a brief reference to the notion of criteria for intervention (see below), early drafts recognized the need to continue discussing principles for the use of force.[54] A penultimate draft included a square bracketed amendment that "the use of force should be considered an instrument of last resort," as well as a determination "to enhance the consistent application of non-use of force in international relations."[55] All of that language was removed from the final declaration, as was the reference to criteria for intervention. In the end, the Summit simply reaffirmed the UN Charter. While a good deal of energy and attention was devoted to the new Peacebuilding Commission, on peace operations themselves, the summit said UN operations should have "adequate capacity to counter hostilities and fulfill effectively their mandates"[56]—a hint at robustness, but nothing about the responsibility to protect civilians. Given the Summit's roots in the HLP report, which itself was prompted by a "fork in the road" identified by the SG following Iraq, that so little was said about use of force issues shows how difficult effective deliberation among 191 states can be.

On the other hand, as my review of the three areas of evolving law suggests, a great deal of debate and deliberation about the use of force takes place in and around the Security Council. This is true not only when the Council itself is contemplating military action, but also with respect to unilateral action, either because some state is seeking implicit or explicit support for its use of force in self-defense (as with Afghanistan and, to an extent, Iraq) or other states are seeking to condemn and constrain the use of force (as with Kosovo). Governments that are members of an international institution feel compelled to justify their conduct and defend their behavior in terms of the norms of that institution. The question is not whether the debates occur—it is easy to find evidence of them in and around the Security Council—but whether they matter. Does deliberation on the basis of law and norms matter when it comes to the use of force, or is it mere rhetorical jousting with no impact on behavior? A social scientist could try to answer that question by

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54 *Supra* note 30 at para. 54-56.

55 *Draft Negotiated Document*, *12 September 2005, 12:30 pm*, online: Reform the UN <http://www.reformtheun.org/index.php?module=uploads&func=download&fileId=828>

56 *Supra* note 34 at para. 92.

marshalling empirical evidence. He or she could seek to determine, for example, whether the uncertain legality of the war in Iraq generated diplomatic, political and economic costs to the US, beyond the costs associated with policy differences over the wisdom of the action. Evidence that some states (like Turkey) could have been induced to support the US more actively in the war and its aftermath if they saw it as legal would be relevant. Gathering that kind of empirical evidence would be difficult but not impossible.

An easier way of answering the question—perhaps counter-intuitive—is to look at the length to which states go to *avoid* deliberating on the basis of law and norms. This is circumstantial evidence that states believe deliberations matter (why else work so hard to ensure they do not come under unwelcome pressure to discuss and debate an issue before acting?). Consider, for example, the intense opposition to the adoption of criteria for intervention, as proposed by both the HLP and the Secretary-General, picking up on the suggestion made by the ICISS.[57] The underlying rationale for such criteria set out by the HLP is that the effectiveness and legitimacy of decisions about the use of force depend on the common perception of "their being made on solid evidentiary grounds, and for *the right reasons* ...."[58] Criteria for intervention are designed to improve the quality of deliberations in the Council, in the hope that this will lead to more transparent decision-making, and more effective and more widely respected decisions.[59] At least part of the logic seems to be that decision-makers must make their case for a decision on the basis of reasons that are shared or can be shared by all who are affected, even if they do not agree with the decision itself. Deliberation on the basis of agreed standards injects an element of impartial argumentation into the process, mitigating if only slightly the effects of material power, calculations of national interests and vote-trading or buying.[60] It was hoped that criteria for intervention would improve accountability by both deterring illegitimate action and generating political will for legitimate action.

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57 In fact the High-level Panel and Secretary-General go further than the ICISS by proposing a set of generic guidelines that would apply to any use of force, whether for humanitarian or other reasons. High-level Panel report, *supra* note 11 at para 207; *In Larger Freedom*, *supra* note 29 at para. 126; ICISS, *supra* note 24, "Synopsis" at XII.

58 *Supra* note 11 at para. 204 [emphasis added].

59 *Ibid.* at paras. 204-207; and *In Larger Freedom*, *supra* note 29 at para. 127.

60 The theoretical roots of that line of argument are in the theory of deliberative democracy, which holds that decisions must be justified in terms those who are subject to them can accept. See Ian Johnstone, "Deliberative Legitimacy in International Decision-Making" in Hilary Charlesworth & Jean-Marc Coicaud, eds., *The Faultlines of Legitimacy* [forthcoming in 2006] and Ian Johnstone, "Deliberating and Legislating in the Security Council" in Bruce Cronin & Ian Hurd, eds., *Virtual Authority in the UN Security Council* [forthcoming] ["Deliberating and Legislating"].

Opponents to the adoption of criteria outnumber proponents by a large margin. The US is opposed for three related reasons: (a) it does not want the Security Council to be constrained in how it responds to threats posed by terrorism and weapons of mass destruction; (b) it worries about coming under unwelcome pressure to act in response to humanitarian crises; and (c) it fears a spillover into the realm of unilateral action. While the criteria are designed for Security Council deliberations, they could be invoked by NGOs and others when unilateral military action is being contemplated, compelling the US to offer justifications on the basis of criteria that it fears could be unduly constraining or bring unwelcome pressure to act. Many developing countries are opposed for similar reasons: they will be used to legitimize military action when not appropriate, or, although less of a concern to most developing countries with the exception of some in Africa, to constrain it when it would be appropriate.

What is more interesting about both the proposal for criteria and the expressed concerns about them is that they reflect an implicit assumption that deliberation and persuasion somehow matter, even when it comes to decisions about the use of force. The guidelines, after all, are nothing more than a set of questions the members of the Security Council should ask themselves each time the issue of intervention arises. They are not binding, nor are they even framed as triggering criteria meant to produce an automatic response. They are in effect an invitation to debate and deliberate on the basis of agreed standards.

Why, one might reasonably ask, should anyone expect the Council to be more effective in dealing with threats like terrorism and genocide simply because a set of non-binding debating principles have been adopted? [61] Conversely why would anyone be concerned that the adoption of such principles will either constrain or generate pressure for action? Both those who support and those who oppose the adoption of criteria seem to share a view that runs counter to one of the fundamental premises of political realism: that material power and hard bargaining over interests are all that matter in the Security Council, and that deliberation and persuasion on the basis of norms count for nothing. One would assume that decisions about intervention come down to political will, not legal quibbles. Yet, interestingly, both the proponents and opponents of criteria seem to think that legal quibbles do matter—either for generating or deflecting political will.[62]

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61 And this line of questioning comes not only from realists in the US. In an article in *The Indian Express*, the author ridiculed "sentimentalists in India [who] have often viewed the UN as some kind of a world parliament that deliberates and acts in a just manner." It is not, the author continued. "Its decisions are the product of crass political bargaining among the P5. The UN can't transcend the balance of power."

62 In commenting on this paper at the JILIR conference on 7 October 2005, Ambassador Paul Heinbecker—a diplomat with extensive Security Council experience—affirmed that deliberation and legal arguments do matter in the Council. He cited the series of

Proposals for Security Council Reform

The power of the Security Council derives in large part from its composition, voting rights and formal authority to adopt binding decisions. But it is not only a place where the five permanent members (P5) bargain over their interests and adopt resolutions to advance them. It is also a place where the terms of appropriate international behavior are defined, debated, interpreted and reinterpreted. Those deliberations occur not only among the 15 members of the Council, or some small sub-set of them, but among a broader range of actors. The actors are not all equal participants of course, but it is inaccurate to suggest that decisions come down entirely to the relative power of the principal actors.

The Council can be conceived as a four-tier deliberative setting.[63] The top tier is composed of the five permanent members who have equal voting power and engage in deliberations on relatively free and equal terms. The second tier is the Security Council as a whole. The votes of the non-permanent members count for less than those of the P5, because they lack veto power, but any of the P5 that wants to pass a resolution must solicit their support, sometimes competing with other P5 states soliciting votes for a counter resolution. They contribute to the deliberative process by setting the parameters of the more equal deliberations among the P5. The third tier is the rest of the UN membership, who do not have votes in the Security Council, but, in principle at least, can act as a loyal opposition. They have some opportunity to participate in debates, in open Council meetings for example, or as troop contributors to peace operations. And for Council decisions on most peace operations to be effective, there must be a substantial degree of buy-in among them, especially when the members of the Council are not offering troops. The fourth tier is the constellation of experts (lawyers, pundits and policy analysts), engaged representatives of non-governmental organizations, organs of international public opinion and other citizens who have a stake in and keep a close watch on what is going on in the Security Council. One not need invoke a mythical "international community" to make the case that the members of the Council feel compelled to appeal to networks of actors and citizens beyond governmental chambers. This network is part of a broad interpretive community, whose judgment—real or anticipated—matters to governmental decision-makers. They wield indirect influence even over closed door deliberations in the Security Council because

resolutions deferring investigation and prosecutions by the International Criminal Court of peacekeepers and officials from non-ICC parties. See SC Res. 1422 (2002) and 1487 (2003). In Ambassador Heinbecker's view, these resolutions were clearly *ultra vires* the Council because they imply either that peacekeeping or the ICC is a threat to international peace and security (the threshold for action under Chapter VII), neither of which is plausible. He argued that the decision of the Council not to renew the deferral in 2004 was due in part to the power of these legal arguments.

63 I elaborate on this notion of the Council as a four-tier deliberative setting in Johnstone, "Deliberating and Legislating", *supra* note 56.

debates in private are animated by arguments that will be used later to justify positions in public.

Conceiving of the Security Council in this way suggests that improving its effectiveness depends in part on improving the quality of its deliberations. This is a thread that runs through debates on Council reform. Consider, for example, the synopsis of the relevant section of the HLP report:

> The Charter of the UN provided the most powerful states with permanent membership on the Security Council and the veto. In exchange, they were expected to use their power for the common good and promote and obey international law.... In approaching the issue of UN reform, it is as important today as it was in 1945 to combine power with principle. Recommendations that ignore underlying power realities will be doomed to failure or irrelevance, but recommendations that simply reflect raw distributions of power and make no effort to bolster international principles are unlikely to gain the widespread adherence required to shift international behaviour.[64]

In effect, the Charter is a bargain between the P5 and the rest of the world; the P5 get special privileges, in exchange for which they are expected to exercise those privileges in a manner that upholds the Charter-based normative order. The HLP goes on to say that effective SC decision-making requires greater "consultation" with those who must implement decisions.[65] The success of a sanctions regime or "legislative" action, like resolutions 1373 (on the suppression of financing and other forms of support for terrorism) and 1540 (designed to prevent WMD from falling in to the hands of terrorists), requires the proactive cooperation of many governments as well as non-governmental actors. The relevant constituencies—those affected by these sorts of resolution—are enormous. Obviously, there are practical limits on the scope of consultations, but direct participation is not the only thing that matters. Equally important, those directly engaged must address their reasons for action to those most affected, taking their concerns into account, even if they have no vote or say over the decision.

This is reinforced by the HLP's call for a system of *indicative voting* as a way of increasing the accountability of the veto function.[66] The rationale seems to be that governments who are required to announce their positions publicly prior to an actual vote will be less likely to cast a veto if the reasons for it are unlikely to pass muster in the court of international public opinion. And the HLP welcomes the

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64 "Synopsis," *supra* note 11, at 64.

65 *Supra* note 11 at para. 248.

66 *Ibid.* at para. 257.

impact of "greater civil society engagement in the work of the Security Council,"[67] which is felt not primarily in terms of direct participation but through the audience effect. Engaged civil society representatives serve as stand-ins for the broader constituency of all those affected by SC decisions. They are the audience to whom good reasons must be addressed and who have ways of expressing their displeasure if they do not like what they hear. Knowing these representatives of civil society are listening attentively, the speakers measure their words, aware that not any argument will fly.

The HLP's proposals sparked a lively debate on Security Council reform, which centered on expansion of the permanent membership. The so-called G-4, composed of Brazil, Germany, India and Japan, tabled a resolution in the General Assembly that would have created six new permanent seats without veto and four non-permanent seats. Though no states were mentioned by name, the likely six were the G-4 plus two of three African countries: Nigeria, South Africa and Egypt. To counter allegations that adding six new great powers would not go far towards diminishing the "undemocratic" and "hereditary" manner in which Council seats are allocated,[68] the G-4 draft includes detailed proposals for improving working methods in the Council to enhance its "transparency, inclusiveness and legitimacy." Thus, for example, they propose SC meetings in public as a general rule, regular consultation with non-members of the Council, making draft resolutions available immediately and holding timely meetings with troop and financial contributors to a peace operation.

The most trenchant criticism of the proposal is that none of the six can be expected to represent their regions as a whole.[69] A more subtle criticism is that if eleven of the world's great powers have a permanent seat at the table there will be less incentive to consult more broadly. The current P5 may be able to authorize a coalition of the willing to engage in military action without much support, but they will not and can not do all the heavy lifting of peacekeeping on their own, let alone enforce sanctions or coercively impose terrorism legislation on 186 member states. They must reach out. A P11 may feel less of a need to do so, making the Council less democratic.

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67 *Ibid.* at para. 260.

68 James Paul and Celine Nahory, "Theses towards a Democratic Reform of the UN Security Council" (13 July 2005) *Global Policy Forum* 4.

69 Beyond that, Italy accused two of the G-4 of "improper and unethical" behavior in trying to secure votes for their bids by offering aid or threatening to cut it off. The Italian Ambassador called this a "distortion of the democratic will." See Statement of the Permanent Representative of Italy to the UN General Assembly, 26 July 2005, online: Permanent Mission of Italy to the United Nations ‹http://www.italyun.org/docs/statemen/2005_07_26_spatafora.htm› . See also Statement of Permanent Representative of Pakistan.

A rival resolution, introduced by the Uniting for Consensus group (comprised of regional rivals of the G-4—Italy, Mexico, Argentina and Pakistan—as well as Canada), calls for no new permanent members and ten new non-permanent members. The one concession to permanence would be to remove the prohibition against re-election. Canada's Permanent Representative to the UN defended the proposal in these terms:

> First, it is democratic. At a time when so many of us promote democratic principles of governance, is it not essential that we reflect those same principles in our own governance: in the crucial decision about which member states will serve on the UN's most powerful body? Is it not fundamental that where regions are accorded a permanent presence, those who serve on the Council must manifestly hold the continuing confidence of their regional colleagues, tested and expressed at intervals that the regional members consider appropriate?.... Second, the approach provided for in Resolution L.68 makes the Council more accountable to member states. Permanence is the polar opposite of accountability. Permanence produces positions that reflect national perspectives. Permanence claims the power of the office as of right, and forevermore. Resolution L.68 takes a different approach.... [I]t draws on more contemporary values in proposing an enlarged council in which membership is earned, by winning and keeping the confidence of your peers. Apart from being sound in principle, the accountability that is inherent in this approach is also more likely to produce a Security Council in which regional and global concerns predominate over national interests.[70]

The appeal for a more democratic and accountable Council echoes a refrain heard often in the US, among both proponents of UN reform and skeptics who doubt the UN can ever be reformed, precisely because it is a deeply undemocratic institution.[71]

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[70] Statement by Ambassador Allan Rock, Permanent Representative of Canada to the United Nations General Assembly, introducing draft Resolution A/59/L.68 under Agenda Item 53: Question of the equitable representation on and increase in the membership of the Security Council and related matters (26 July 2005), online: Canadian International Policy Library ‹http://www.dfait-maeci.gc.ca/cip-pic/library/securitycouncil-en.asp›.

[71] See two speeches by Kim Holmes, Assistant Secretary of State for International Organization Affairs, "The Challenges Facing the UN Today: An American View" (Remarks before the Council on Foreign Relations, 21 October 2003); "Why the UN Matters to U.S. Foreign Policy" (Remarks before the Baltimore Council on Foreign Affairs, 6 December 2004). A more skeptical view is expressed by Charles Hill, former aide to Secretaries of State Schultz and Kissinger, "How to save the UN (if we really have to)" *The Wall Street Journal* (7 December 2004) A14. Neither view, of course is confined to the US. The Ottawa Citizen ran an editorial shortly after the HLP report came out

This begs a question: what does democratization of the Security Council mean? A full answer to that complex question is beyond the scope of this paper, but following the logic of deliberative democracy, it would seem that many of the protagonists in the debate on Council reform believe making the Council a better venue for deliberation is one way of making it more democratic. This does not necessarily require a larger or even more representative Council in voting terms, but rather one where there is greater *involvement of non-members*, *accountability* and *transparency* in its work.[72]

Conclusion

The Security Council operates within a normative climate that it in turn shapes. Legal norms relating to self-defense, humanitarian intervention and the use of force by peacekeepers have evolved, in part because of the practice and deliberations of the Security Council.[73] The P5 wield the lion's share of power in those deliberations,

stating that the UNs problem was that "undemocratic countries enjoy the power of sheer numbers." "Is it really better," the Citizen asked, "to have a giant collection of illiberal non-democracies acting multilaterally than to have liberal democracies acting unilaterally?" "UN reform is overdue" *Ottawa Citizen* (4 December 2004) B6.

72 *Supra* note 34 at para. 154.

73 In this paper, I have focused on legal norms without drawing a sharp distinction between legal norms and social or other kinds of norms. But the distinction does matter, as Brunée and Toope have argued persuasively. Jutta Brunée and Stephen J. Toope,

which they use not only to advance their interests but also to reshape the international legal order. The US wields the most influence,[74] but not in direct proportion to its material power precisely because the normative climate surrounding the institution—which it helped to shape—influences the deliberations within it. From this perspective, the Council is an arena for pushing the limits of the law, while compelling a form of discourse that makes it difficult to stretch those limits beyond recognition.

"International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Transnat'l L. 19. And the distinction is important in Security Council deliberations, because legal norms have greater discursive bite than less precise, less binding norms. The difference is a matter of degree rather than kind, but to illustrate the point consider the following two lines of argument a government representative may make in any inter-governmental setting: (1) "we know what the law is, but in the current circumstances we must ignore it" and (2) "we know what accepted behavior is but in the current circumstances we must behave differently." The former is much more likely to meet resistance through counter-arguments than the latter.

74 Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16 E.J.I.L. 369.

A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit[1]

NICHOLAS J. WHEELER[**]

Amidst the general disappointment that accompanied the outcome of the United Nations World Summit in September 2005, there were several important rays of hope. One of these, and perhaps in the longer term the most important, was the General Assembly's (GA's) endorsement of the "responsibility to protect". One hundred ninety-one states committed themselves to the principle that the rule of non-intervention is not sacrosanct in cases where a government commits genocide, mass killing, and large-scale ethnic cleansing within its borders. United Nations Secretary-General Kofi A. Annan described this new commitment as a "most precious"[2] one in terms of protecting endangered populations, and some state leaders boldly claimed that, had such a declaration existed in 1994, this would have prevented the Rwandan genocide, and the massacres a year later at Srebrenica. For example, the United Kingdom's Secretary of State for Foreign Affairs, Jack Straw, stated in his speech to the Labour Party conference on 28 September that "[i]f this new responsibility had been in place a decade ago, thousands in Srebrenica and Rwanda would have been saved."[3] This paper critically reflects on this claim by considering how far the General Assembly's adoption of the responsibility to protect significantly changes the parameters shaping humanitarian intervention in contemporary international society. The UN's endorsement of this new norm fails to address the fundamental question of what should happen if the Security Council is unable or unwilling to authorize the use of force to prevent or end a humanitarian tragedy, and second, it fails to address the question of how this norm could be better implemented to save strangers in the future.

The argument proceeds in three parts: first, I consider the genesis of the responsibility to protect in the report produced by the Canadian sponsored

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1 Some of the ideas in this article build upon Nicholas J. Wheeler, "Strangers in Peril" (2005) 61:8-9 *The World Today* 15. I am grateful to Alex Bellamy, Ken Berry, Justin Morris and Jennifer Welsh for their comments on earlier versions of this article, and to the editors of the Journal for their very helpful advice when revising the piece for publication. I would also like to thank all those who contributed to the panel on the use of force at the Symposium organised by the Faculty of Law at the University of Toronto, Toronto 5-6 October 2005, especially Ambassador Paul Heinbecker, Dr. Mary Ellen O'Connell and Dr. Ian Johnstone.

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2 Kofi A. Annan "A glass at least half-full" *Wall Street Journal* (19 September 2005) A16.

3 Speech by Foreign Secretary Jack Straw, "Address" (Address at the Labour Party Conference, Brighton, 28 September 2005) [unpublished], online: The Labour Party ‹http://www.labour.org.uk/index.php?id=news2005&ux_news[id]=ac05js&cHash=6cd4f7cecf›.

International Commission on Intervention and State Sovereignty (ICISS). Here, I argue that what was imaginative about the ICISS report, entitled *The Responsibility to Protect*, was that it tentatively suggested ways for the UN to act when the Council could not agree on collective action. Unfortunately, none of the key recommendations in the report were taken up, and I consider how far this reflected the US and UK invocation of humanitarian justifications over Afghanistan, and especially Iraq, which was widely seen as discrediting the notion of the responsibility to protect. The second part of the article examines how the idea of the responsibility to protect moved from the margins to gain endorsement by the GA. I argue that three factors were crucial in explaining this change: first, the ideas in the ICISS report were taken up positively by the Secretary-General's High-level Panel on Threats, Challenges and Change, which reported to Kofi Annan in December 2004. The High-level Panel broke with ICISS by omitting any discussion of what should happen if the Security Council was unable or unwilling to act. This enabled it to secure a consensus among those members of the panel who were most sensitive about eroding state sovereignty. The High-level Panel shared the Canadian sponsored Commission's enthusiasm for reaching an agreement on the criteria that should govern the use of force, and this idea was taken up by Annan in his major report *In Larger Freedom*, which sets out a detailed blueprint for UN reform. However, this part of the reform package was a casualty of the negotiations in New York which took place in the run-up to the world summit. But once the responsibility to protect was decoupled from an agreement on criteria, many developing states that were nervous about agreeing to an idea that they worried might legitimize great power interventionism in the internal affairs of weaker states, dropped their reservations and were prepared to sign up to the responsibility to protect. Finally, there is some evidence that those who were most opposed to the idea were increasingly persuaded that they could use the language in the summit declaration to undermine efforts to promote intervention at the UN. In other words, far from enabling intervention, it seems that some governments saw the GA's endorsement as an important mechanism for constraining the use of force.

The final part of this article considers the limits of the responsibility to protect in terms of questions of authority and political will, by focusing on the difficulties of reaching agreement in the Council in cases where the preventive use of force is being considered, and in situations where there is no political will to act.

ICISS AND THE RESPONSIBILITY TO PROTECT

The idea of the "responsibility to protect" was first explicitly articulated in the report produced by the ICISS. Set up at Lloyd Axworthy's initiative, the Commission sought to develop a new normative framework that would ensure that there were no more Rwandas and no more Kosovos. Here, it was responding to Kofi Annan's plea that the UN avoid future situations where the Security Council was

united but ineffective as over Rwanda, and where it was divided with particular states acting without express Council authorization as over Kosovo.[4] The report argued that the debate over sovereignty versus intervention should be re-framed in terms of the responsibility to protect. States are entrusted with the primary responsibility to protect the security of their citizens. However, should they fail to exercise this responsibility, then "the principle of non-intervention yields to the international responsibility to protect."[5] The report declared that, "[t]he most compelling task now is to work to ensure that when the call goes out to the community of states for action, that call will be answered. There must never again be mass killing or ethnic cleansing. There must be no more Rwandas."[6] The Commission viewed their report as

- contributing to the generation of the political will necessary to avoid future Rwandas;
- bridging the divide between North and South in relation to contending claims of human rights versus sovereign rights by moving the debate away from the legal right of states to intervene and towards the international responsibility to protect the victims of humanitarian crises; and
- establishing threshold principles—large scale killing and ethnic cleansing—and precautionary ones (right intention, last resort, proportional means and reasonable prospect of success) to establish when intervention will be permissible.

The ICISS argued that the task was endeavouring to make the Council work better. To this end, it proposed that the "Permanent Five" (P-5) should agree not to exercise the veto—unless vital interests are at stake—in cases where there is majority support for a resolution authorizing the use of force to prevent or end a humanitarian catastrophe.[7]

Most governments responded positively at the declaratory level to the report's recommendations. However, no substantive progress was made on implementing its key recommendation that the General Assembly and Security Council endorse the idea of the "responsibility to protect" and adopt the threshold and precautionary principles in the report. There was no support from the P-5 for

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4 See Kofi A. Annan, "Unifying the Security Council in Defence of Human Rights" (Address delivered at the Centennial of the First International Peace Conference, The Hague, 18 May 1999), reprinted in Kofi A. Annan, *The Question of Intervention: Statements by the Secretary-General* (New York: United Nations Department of Public Information, 1999) at 33.

5 Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Commission on Intervention and State Sovereignty, 2001) at xi.

6 *Ibid*. at 70.

7 *Ibid*. at xiii.

agreed limits on the veto (France was the most enthusiastic here), and whilst some developing states welcomed a greater role for the General Assembly, there was no question of the veto-bearing members of the Council agreeing to this.

Supporters of the report blamed the lack of progress on the attempt by the United States and United Kingdom to justify the 2003 war against Iraq in humanitarian terms. For example, Gareth Evans, co-chair of the Commission— and an influential member of the High-level Panel—contended in May 2004 that the "poorly and inconsistently argued" humanitarian justification for the war has almost "choked at birth by what many were hoping was an emerging new norm justifying intervention on the basis of the principle of 'responsibility to protect'."[8] The worry was that the misuse of humanitarian arguments by America, and especially Britain, would reinforce long-standing suspicions on the part of many Southern states that a doctrine of humanitarian intervention would be a weapon used by the strong against the weak.[9] With the benefit of hindsight, it is evident that Evans was being overly pessimistic, but his assessment appeared accurate at the time, and this begs the question as to what might explain the change in attitudes that led governments at the summit to sign up to the responsibility to protect.

FROM THE HIGH-LEVEL PANEL TO THE 2005 DECLARATION

The first factor that significantly changed the normative context was Annan's decision to convene the High-level Panel. One important consequence of the divisions in the Council over Iraq was Annan's commissioning of fifteen highly experienced representatives from North and South to examine how the UN can be reformed to meet the new security challenges of the twenty-first century. Its report, *A More Secure World: Our Shared Responsibility*, takes as its point of departure the core assumption in the ICISS report, that state and human security are indivisible and that it is to collective action by states that we have to look to address the myriad threats facing humanity. The High-level Panel proposed that the UN should adopt the emerging norm of the responsibility to protect in cases of "genocide and other large-scale killing, ethnic cleansing or serious violations of international law."[10] It also recommended that the Council reach agreement on the criteria for the use of force, and proposed the following principles: *seriousness of threat*; *proper purpose*; *last*

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8 Gareth Evans, "When is it Right to Fight?" (2004) 46 Survival 63.

9 For a more extensive discussion of this argument, see Nicholas J. Wheeler & Justin Morris, "Justifying Iraq as a Humanitarian Intervention: the Cure is Worse than the Disease" in W.P.S. Sidhu & Ramesh Thakur, eds., *The Iraq Crisis and World Order: Structural and Normative Challenges* (Tokyo: United Nations University Press, forthcoming in 2006).

10 *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) at paras 57-58, online: United Nations ‹http://www.un.org/secureworld/report.pdf›.

resort; *proportional means*; and *balance of consequences*.[11] The fact that Russian and Chinese representatives on the High-level Panel were prepared to accept such language, when their governments had opposed British attempts in 1999-2000 to reach agreement on criteria in the Council, reflected, in part, the strength of arguments being mobilised by key members of the Panel, crucially Evans and the British representative, Lord David Hannay. It was also crucially dependent upon the High-level Panel's explicit statement that the use of force would have to be authorized by the Council under its Chapter VII provisions. It was this criterion that the United Kingdom had refused to accept in negotiations over criteria in the Council, believing that such a constraint would bind it and its allies in future cases where consideration was being given to using force without express Council authorization, as had happened over Kosovo.

This strong affirmation of the Chapter VII provisions of the Charter was coupled with an appreciation that the Council had to have the authority—and indeed the *responsibility*—to use force preventively to meet the security challenges of a post 9/11 world. This is a ground-breaking development because it enables the Council to adopt resolutions that authorize coercive action, including ultimately the use of force, to prevent threats from growing in the first place. The Secretary-General warmly welcomed the report of the High-level Panel, and he incorporated all its proposals relating to the responsibility to protect and the use of force into his own document, *In Larger Freedom*. The latter was distributed in March 2005 for discussion within the General Assembly in the run-up to the September summit. Moreover, in taking up the ideas of the Panel, Annan clearly included prevention of genocide and ethnic cleansing in his definition of what counts as a threat to "international peace and security".[12]

On the question of criteria, the Secretary-General has been an enthusiast since he first raised the question of humanitarian intervention in 1998. *In Larger Freedom* states that if the Council can reach agreement on the principles set out in the report of the High-level Panel, this would "add transparency to [the Security Council's] deliberations and make its decisions more likely to be respected, by both Governments and world public opinion."[13] Implicit in this contention is the assumption that if the Council agrees on criteria, this would enable it to reach agreement in future cases where the issue of intervention might be contested. The question as to whether agreement on principles determining the use of force would

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11 *Ibid*.

12 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 33, online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement›.

13 *Ibid*.

generate Council unity in future cases is a moot one, inasmuch as this part of the reform package was rejected during the negotiations in New York.

Even before the political fall-out from Iraq, there was little enthusiasm in the Council for new guidelines on intervention. The British attempt, led by then Foreign Secretary, Robin Cook, to press this issue in the aftermath of Kosovo failed to gain significant support. The United States strongly opposed such efforts, concerned that guidelines might either restrict its freedom of manoeuvre or push it into actions that it was reluctant to undertake. China and Russia were also opposed, worrying that guidelines might open the door to greater UN interventionism in the internal affairs of Member States.[14] These basic positions have not changed, and if anything, they have hardened: for states like China, India, and Russia, all too conscious of the massive disequilibrium in global power, it is vital that nothing be done that would further restrict the UN Charter's restraints on the use of force. Equally, the United States remains opposed to any guidelines that might constrain its freedom of action when it comes to the use of force.[15] The combined opposition of these states killed any attempt to develop agreed guidelines at the summit.

The principal argument against the Council adopting criteria is that it will enable powerful states to circumvent Council authority.[16] However, this proposition is open to the powerful rebuttal that agreement on thresholds would actually constrain the use of force. The best argument for establishing specific principles is that it makes it harder for states to employ bogus humanitarian claims, since each government is required to defend its actions in terms of the specific criteria.[17] As Evans put it, "[a]t the end of the day strong arguments will look stronger and weak arguments weaker, and these appearances do matter."[18] Those governments which fail to present a persuasive case to other governments, the media and wider world

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14 These competing positions are discussed in Nicholas J. Wheeler, "Legitimating Humanitarian Intervention: Principles and Procedures" (2001) 2 M.J.I.L. 550.

15 See Gareth Evans, "The United Nations: Vision, Reality and Reform" (Address to the Australian Fabian Society, Melbourne, 28 September 2005) (unpublished, copy on file with the author) at 4-5.

16 *Ibid*. at 5.

17 See Jutta Brunnée & Stephen J. Toope, "Slouching Towards New 'Just' Wars: The Hegemon After September 11th" (2004) 18 I.R. 414; Thomas G. Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era" (2004) 35 Secur. Dialogue 144; Ian Johnstone, "Security Council Deliberations: the Power of the Better Argument" (2003) 14 E.J.I.L. 437; and "Discursive Power in the UN Security Council" (Paper presented to the Journal of International Law and International Relations Conference "The UN at Sixty: Celebration or Wake?" (6 October 2005) [unpublished].

18 *Supra* note 8 at 14.

public opinion risk being condemned and even sanctioned.[19] I am not arguing that establishing criteria would eliminate the risk of abuse, but agreement on the principles set out in both the High-level Panel report and *In Larger Freedom* would set a clear benchmark against which to judge the humanitarian claims of states.

The refusal of Russia, China, and the United States to discuss criteria was not accompanied by a rejection of the idea of the responsibility to protect. There was a significant body of international opinion led by the European Union, Canada, and other concerned states that worked hard in the months before the summit to reassure those developing states who were nervous and hesitant about endorsing the responsibility to protect. But it was not only the least powerful who needed persuading to accept the new norm; the United States led by its highly controversial ambassador in New York, John Bolton, objected to language in one of the early drafts of the summit document, which implied a legal obligation to intervene on the part of the Security Council. Ambassador Bolton acknowledged that

> [T]he international community has a responsibility to act when the host state allows such atrocities. But the responsibility of the other countries in the international community is not of the same character as the responsibility of the host.... We do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.[20]

Bolton's position won the day and the final document makes no mention of a specific responsibility to act to stop slaughter and suffering—legal or otherwise. The closest the membership came to endorsing an obligation to intervene was the acceptance that "collective action" may be taken using "Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations... should peaceful means be inadequate and national authorities are manifestly failing to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[21] A small group of developing states (Pakistan and Egypt were important players here) led by China and India fought against inclusion of this language. But in the end, having failed to gain significant support, they reluctantly agreed to sign up to the principle. There was also a sense that none of these states wanted to be seen as responsible for

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19 I develop this argument at length in Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).

20 Letter from Ambassador John Bolton, Permanent Representative of the United States of America to the UN, to the United Nations (30 August 2005), online: Reform the UN ‹http://www.reformtheun.org/index.php?module=uploads&func=download&fileId=811› cited by Ian Johnstone this volume.

21 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 31.

preventing an agreed outcome at the summit, and in the case of China, it seems that it was prepared to trade-off its opposition to the responsibility to protect in return for greater concessions on the idea of a human rights council which it strongly opposes.

The third factor which seems to have smoothed the passage of the summit declaration is that those governments which are reluctant about humanitarian intervention are increasingly persuaded that the language of the responsibility to protect can be used to constrain rather than enable interventions. In this regard, it is important that the paragraph in the summit communiqué before the paragraph dealing specifically with responsibility to protect states that, "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[22] Alex Bellamy shows in his forthcoming article on Darfur how those states which opposed applying sanctions against the Government of Sudan argued in Council deliberations during 2004 that the responsibility rested first with states, and that in the case of Darfur, the crisis had not yet reached the point where it was reasonable to argue that Sudan was failing in its responsibilities.[23] It remains to be seen how far states employ this type of argument to undermine the case for armed intervention in future cases. Certainly, the hope of those who have pushed for the adoption of the responsibility to protect is that the agreement in the final outcome document will make it much harder for states to hide behind the shield of sovereignty when they are failing to protect their populations.

THE LIMITS OF THE RESPONSIBILITY TO PROTECT

Without detracting from the success of what was achieved in New York in terms of gaining a new acceptance of the responsibility to protect, there are two critical limits to what has been achieved. The first is that the agreement in paragraph 139 of the outcome document does nothing to address the fundamental problem of political will. Those media commentators who have trumpeted the agreement on the responsibility to protect imply that the barrier to humanitarian intervention has been the principle of non-intervention.[24] This belief is shared by those state leaders who have pushed this idea at the UN. For example, I noted earlier Foreign Secretary Straw's comment that had the responsibility to protect been in place in 1994, the Rwandan genocide would have been averted. The problem with this reading of history is that the fundamental barrier to intervention in Rwanda—as Annan

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22 *Ibid*.

23 See Alex Bellamy, "The Responsibility to Protect and Darfur" Ethics. Int. Affairs [forthcoming, copy on file with the author].

24 See Tod Lindberg, "Protect the people: United Nations takes bold stance" *The Washington Times* (27 September 2005) A19.

acknowledged in a 1999 report to the GA—was lack of political will.[25] No state opposed intervention in Rwanda on grounds of sovereignty, and had any state, or group of states, sought a mandate from the Security Council to use force in April and May 1994, it is virtually inconceivable that this would have been opposed. Thus, the real test of the summit declaration is whether it increases the likelihood of the Council mustering the political will to act to prevent and halt future humanitarian crises. The continuing failure to respond both effectively and quickly to the humanitarian emergency in Darfur suggests that declaratory commitments to the principle of the responsibility to protect are not backed up by the political will to save strangers in peril.

The second problem with what was agreed in New York is that it does nothing to address the fundamental problem of what should happen if the Council is unable to agree in cases where particular states are seeking a mandate to prevent or stop a humanitarian emergency. In the case of Darfur, for example, the implication is that if a majority of the Council supported a request for authorization from a coalition of Western and African states seeking to end the atrocities, and this was opposed by one or more of the permanent members, then this would be the end of the matter. Few will be satisfied with this outcome, since each of us can imagine circumstances in which we would support moral imperatives trumping the legal prerogatives of the UN Charter. Some Western governments are prepared to support military action to stop slaughter and suffering if the Council fails to exercise its responsibilities. This is most likely to occur because one of the P-5 uses its veto, but it is possible to imagine circumstances in which there is insufficient support for a resolution authorizing the use of force to end a humanitarian crisis. For others, notably Russia, China and India, bypassing the Council undermines international law and sets dangerous precedents which others might emulate.

The difficulty is that states can sign up to the principle of the responsibility to protect but disagree over its application in particular cases. The problem of Council unity is unlikely to arise in cases where there is clear-cut evidence of genocide and mass killing (unless one of the P-5 has a vital interest at stake), but if military intervention occurs at this point, it will come far too late for many. It is highly significant that the summit declaration recognizes that the Council has the authority to use force preventively in relation to humanitarian protection, but what it ignores is that securing a consensus that force should be used in such circumstances is fraught with difficulty. The fundamental dilemma in using force in response to warning indicators of an impending disaster is that it can never be known whether intervention is justified; we can never have access to the counter-factual of what would happen if the intervention did not take place. Robert Legvold captures the dilemma of legitimating anticipatory humanitarian intervention:

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[25] Kofi A. Annan, *Preventing War and Disaster: A Growing Global Challenge* (New York: United Nations Department of Public Information, 1999) at 21.

> To wait until massive numbers of lives have been lost before acting will... compound the tragedy.... Yet, to reach agreement on forceful action in response to warning signs before tragedy strikes promises to be difficult in the extreme, if the evidence is ambiguous, as it is likely to be, and if a sizable number of states, including major powers like Russia, China, and India, start from a strong bias against intervention.[26]

The only case to date of this kind was Kosovo. The reason why the latter was such a difficult one for the Council was because there were genuine differences of opinion among the P-5 over whether force was the right means to end the crisis. NATO claimed that it had credible evidence that the Milosevic government was planning to forcibly expel the Kosovars, and this was supported by a majority of states on the Council, which accepted that the humanitarian necessities of the situation justified the use of force. However, Russia and China argued that diplomacy should have been given more time. Had the human rights crisis in Kosovo worsened along the lines predicted by NATO, Russia's position might have changed in the Council. It accepted that the Yugoslav Government was committing gross abuses of international humanitarian law, and had voted in support of Resolution 1199 and abstained on Resolution 1203. The difficulty with this line of argument is how many Kosovars had to be killed—or be expelled— before Russia and China would have sanctioned military action. The burden of justification that falls on states launching anticipatory interventions is far greater than would be the case if the humanitarian catastrophe had already happened, since the risks of abuse are greatest in relation to such preventive actions.

It was the need to avoid divisions in the Council, such as arose over Kosovo, that was a key motivation behind the setting up of ICISS. NATO's unilateralism over Kosovo demonstrates that Western governments are not prepared to always wait for Council authorization when they believe that the preventive use of force is necessary to protect endangered peoples. In such situations, the real question is: who is acting irresponsibly, those who seek to end the killings in the absence of a clear UN mandate or those who argue that such actions break international law and hence undermine the rules restricting the use of force. To its credit, the ICISS report recognised that this question could not be ducked, and it suggested the following procedural mechanisms be employed: states must always request Council authorization before acting (NATO failed this test over Kosovo); a resolution supporting military intervention to prevent or end a humanitarian crisis must have at least majority support (this was not specified but it was understood that this meant securing at least nine votes); and if the veto is exercised in such cases, recourse might be made to the General Assembly under the "Uniting for Peace" resolution and/or to regional bodies. It is a fascinating counterfactual question as to

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[26] Robert Legvold, "Foreword" (2000) 2:1 Pugwash Occasional Papers 10.

whether NATO would have secured majority support in the Council had it followed these procedures over Kosovo, and whether in the event of a Russian or Chinese veto, a resolution supporting military action prior to the commencement of hostilities would have elicited a two-thirds majority in the General Assembly.

The proposals in the ICISS report for limiting the veto and utilising the General Assembly were too controversial for the High-level Panel, and they were also omitted from *In Larger Freedom*. There was no discussion of alternatives to the Council in any of the formal negotiations in New York, and had this been raised, it would have derailed any agreement on the responsibility to protect. Consequently, six years later, it is not evident that the UN is any better placed to cope with a future Kosovo where the Council is divided on the merits of preventive action. There are grounds for some guarded optimism in relation to the prevention of future Rwandas, since the hope must be that by signing up to the responsibility to protect, governments—especially Council members—will find it harder to evade their new declaratory commitment to protect endangered populations. However, if this does not translate into greater political will to use force in extreme cases of humanitarian emergency, rhetorical commitments to the responsibility to protect are likely to be seen as hollow, and the concept could become discredited for years to come. It is the responsibility of all of us to avoid this outcome by holding our representatives at the UN to the fine words they have signed up to so that future generations can look back at the 2005 summit as marking a decisive victory for humanity over statist values and interests.

The Counter-Reformation of the Security Council

MARY ELLEN O'CONNELL*

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,

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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

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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:

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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

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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 consequences[14]

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

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[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-defence. 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

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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 form 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]

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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

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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

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[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

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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 Lauterpact 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

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[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 Punishments 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

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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 Shraga, "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.

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[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

JUTTA BRUNNÉE* & STEPHEN TOOPE**

> *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

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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. 1; 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-

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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.dfait-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

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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) LI 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",' 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

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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

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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

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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

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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

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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 Millenium: 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. 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

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[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

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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.

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[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.

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59 See *supra* note 1 at para. 11.

60 *Ibid*.

Preventing State Failures
and Rebuilding Societies

UN Policies and Strategies: Preventing State Failures and Rebuilding Societies

BERTRAND G. RAMCHARAN*

I INTRODUCTION

The question presented to us for reflection on the occasion of the sixtieth anniversary of the United Nations is: 'celebration or wake?'. On the issues of preventing state failures and rebuilding societies, which I have been asked to address, I would submit that the proper assessment is: 'promise to be fulfilled'. In this article I set out the factors that lead me to this point of view.

The United Nations has a major role to play in the maintenance of international peace and security and it is essential to have a clear view of its core strategies in dealing with these matters. It has been the good fortune of this author, in a career that extended into four decades at the United Nations, to have been head of the Speech-writing team of the Secretary-General, to have written the first draft of Agenda for Peace and the 1992 Annual Report, to have served with UN mediators and peacekeepers in the former Yugoslavia for three-and-a-half gruelling years, to have directed an Africa Division in the Department of Political Affairs of the Secretariat, and to have occupied the posts of Deputy and then High Commissioner for Human Rights. Insights from these experiences influence the observations that follow.

In today's world, there is need for a central, defining concept of the United Nations and in my view that should be "A United Nations of Conflict Prevention". This vision has political, economic, social, humanitarian, and humanitarian dimensions. James Sutterlin's "Perspectives for the 1990s", a magisterial document he drafted for Secretary-General Perez de Cuellar, integrated these dimensions of conflict prevention superbly.[1] It is a lost vision that we must resurrect. The United Nations of the future must increasingly be "A United Nations of Conflict Prevention".

II SOME PERTINENT CONSIDERATIONS REGARDING THE ISSUE OF STATE FAILURE

The blueprint of the Charter of the United Nations is for a world of peace and justice grounded in respect for human rights and in economic and social progress. This remains a valid blueprint. The vision and the idealism of the United Nations are as

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1 *Some Perspectives on the Work of the United Nations in the 1990s* UN GAOR, 42nd Sess., UN Doc. A/42/512 (1987), online: United Nations Documents Online ‹http://documents-dds-ny.un.org/doc/UNDOC/GEN/N87/209/73/img/N8720973.pdf? OpenElement› at 11.

relevant as they have ever been. Whatever problems there are, no one can deny that the United Nations has done a great deal in contributing to peace, international law, human rights and economic and social progress.

However, as the sixtieth anniversary is marked, the United Nations is encountering problems of leadership, divisions in the membership, administration, integrity, corruption and sagging morale. This is one of the lowest points of the United Nations in its sixty-year history. But none of this can take away from the fact that it is an indispensable institution, which provides great service to humanity and that it will continue to do so in the future.

When the United Nations was established large parts of humankind were living under colonial tutelage or imperialistic domination. Colonies had been created at the whims of colonial powers and had been treated or mistreated as their colonial masters ordained. A historic contribution of the United Nations has been to work for the self-determination of these colonial and dependent territories. This process gathered pace in the 1960s and 1970s and was largely completed by the end of the twentieth century.

This means, in effect, that the newly independent states have had barely three or four decades, depending on the country in question, to put down the building blocks of nationhood. When one recalls the arbitrariness of colonial borders, or the fact that in many instances, such as Congo, new countries were set adrift with practically no administrative or governance structures or personnel, one would come to a more sympathetic understanding of the few cases of state failure that have occurred.

When one keeps in mind that a country like Somalia was a pawn on the Cold War chessboard of the superpowers, one can understand why it came to the pass it did. Rather than speaking of state failures it would be more accurate, often, to speak of problems of state building in the aftermath of colonialism and the Cold War. This diagnosis of the problem would lead us to look to a role for the United Nations in fostering state building as a way of heading off state-breakdowns.

To this picture one must also add the phenomenon of free-market globalization and international financial policies that squeeze away the economic life of new countries. How are they to find their feet and promote stability in such an environment? Those tempted to see the problem as one of state-failure must be persuaded instead to adopt the perspective of the challenges of nation building in the aftermath of colonialism and in the runaway world of free-market capitalism.

The on-going battle over the Millennium Development Goals takes on a particular poignancy when viewed through this lens. We must address not only symptoms but also root causes of State failure. But what is this phenomenon? I look at this issue next.

III A DEFINITION OF STATE FAILURE

Professor Daniel Thürer, in an article in the *International Review of the Red Cross* in 1999 offered three elements as characterising the phenomenon of the 'failed state' from the

political and legal points of view. First, there is the geographical and territorial aspect, namely, the fact that 'failed States' are essentially associated with internal and endogenous problems, even though these may incidentally have cross-border impacts. The situation confronting us there is one of an implosion rather than an explosion of the structures of power and authority, the disintegration and destructuring of States rather than their dismemberment.[2]

Second, there is the political aspect, namely the internal collapse of law and order. The emphasis here is on the total or near total breakdown of structures guaranteeing law and order rather than the kind of fragmentation of State authority seen in civil wars, where clearly identified military or paramilitary rebels fight either to strengthen their own position within the State or to break away from it. Third, there is the functional aspect, namely, the absence of bodies capable, on the one hand, of representing the State at the international level and, on the other, of being influenced by the outside world. Either no institution exists which has the authority to negotiate, represent and enforce, or, if one does, it is wholly unreliable, typically acting as 'statesmen by day and bandit by night.[3]

> Thürer further submits that from a legal point of view it could be said that a 'failed State' is a state that, though retaining legal capacity, has for all practical purposes, lost the ability to exercise it. A key element in this respect is the fact that there is no body that can commit the State internationally in an effective and legally binding way, for example, by concluding an agreement.

IV PREVENTING STATE FAILURES

Preventing state failures in the future would, in my view, require actions on a broad front, with respect to human rights, development, nation-building and conflict prevention. To think that state failure could be averted by tackling form rather than substance would be a grave error. I set out elements of a multi-pronged strategy below, beginning with the issue of human rights and risk analysis.

Human Rights and Risk Analysis

The situation of human rights in a country must be a central dimension of risk analysis for the purposes of the prevention of conflict. In the literature on risk assessment, one sees discussion of the meaning of risk, examination of political or investment risks, but one finds very little consideration of the relevance of human rights to risk assessment. It is my submission that any risk assessment of a country must start with consideration of its human rights infrastructure, record, and problems.

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2 Daniel Thurer, "The 'Failed State' and International Law" (1999) 836 International Review of the Red Cross 731.

3 *Ibid.* at 731.

The Adequacy of the National Protection System

In the current human rights strategies of the United Nations, increasing emphasis is placed on the concept of the national protection system. This concept includes looking at the constitution, laws and courts of a country to see the extent to which they are reflective of the international human rights norms. One must also look to see whether the country has specialized human rights institutions such as a national human rights commission or an ombudsman, whether the country is providing for the teaching of human rights in primary and secondary schools, in particular, and whether the country has monitoring arrangements to detect grievances on the part of a group or groups of the population with a view to heading off those grievances.

If significant parts of the national protection system of a country are missing, then one can conclude that the country is likely to be unstable and, depending on its configuration, could easily erupt into violence.

The Degree of Acceptance of the Core International Human Rights Conventions

The role of the Universal Declaration of Human Rights and of the core international human rights conventions is to require States to live up to international minimum standards of human rights protection in key areas, such as respect for civil and political rights; the prohibition of torture; the prohibition of racism and racial discrimination; the prohibition of discrimination against women; protection of the rights of the child; protection against torture; and protection of the rights of migrants.

The national protection system of a country should therefore be built on the Universal Declaration of Human Rights and on these core human rights conventions. If a country has not ratified the key conventions, this might be an indicator that the national consensus within the country might be shaky because the country has not yet begun to internalize what the international community has distilled as the key values that should guide nation-building and that should arbitrate relations between the government and its subjects or between the subjects themselves.

That a country has not ratified one or more of these conventions may not necessarily indicate potential instability. The United States of America, for example, largely because of the relations between the Federal and State governments, has ratified very few international conventions. Even in such instances, however, it would be fair to say that by staying outside of the conventions, a country is denying itself the opportunity of engaging in a dialogue with the international community on how key values are faring within the country.

The State of Governance in the Country

If a country is democratically governed under the rule of law, chances are that the state of respect for human rights will be better – although even this is not assured, depending on the political maturity of the country in question. Nevertheless, a good indicator in risk assessment of a country is whether it has genuine periodic elections

and whether the courts operate freely and independently of the government. If either of these conditions is absent, one can be relatively certain that the level of grievances in the country will be high and the risk of instability and even conflict serious. Political corruption and inefficient courts foment dissatisfaction and grievances and invariably lead to a weak social fabric.

The National Vision

A good indicator of the health of a country is whether there is a unifying vision for all parts of the population – whether they be from different political, economic, social, racial, ethnic or religious backgrounds. In today's multicultural world, it is fundamentally important that each country project a national vision that can give all parts of the population a feeling that they have a stake in the future of the country. In countries where there is the danger of ethnic or religious conflict, such a unifying national vision is vital and can only be constructed on the basis of the international human rights norms guaranteeing the principles of the rule of law and non-discrimination and respect for the rights of minorities, indigenous populations, migrants and other such groups.

The National Security Doctrine

The national security doctrine of a government can often provide an indicator of how stable or equitable the country is. In the contemporary world, a national security doctrine must be grounded in international human rights norms and must give priority to upholding human rights nationally, regionally and internationally. In a world of terrorist threats and global mobilization against terrorism, it is particularly important that there be safeguards against the risks of trampling upon human rights in protecting national security or of countering terrorism.

The State of Freedom of Expression and Freedom of Religion or Belief

If freedom of expression is being stifled and freedom of religion or belief is not respected, it is fairly safe to say that there are grievances lurking beneath the surface in the country that could erupt at any time. If people cannot practice their religion or give expression to their beliefs, they are often ready to fight for it, and, if necessary, to die.

Findings of International Treaty Bodies

Under the principal human rights conventions, states are required to submit reports on their actions to implement the conventions and these reports are considered by treaty monitoring bodies, such as the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, and the Committee on the Elimination of Racism and Racial Discrimination. The comments, conclusions and recommendations of these treaty monitoring bodies can be quite telling about the state of protection of human rights in the country and about whether there are seething problems or problems beneath the surface waiting to erupt. Those engaged in risk analysis must keep abreast of

what the treaty bodies are saying about the state of human rights within a given country.

Findings of United Nations Human Rights Investigations

In the United Nations these days, there are thematic human rights rapporteurs and working groups producing reports once or twice a year on problems such as: extrajudicial executions, torture, enforced disappearances, arbitrary detention, violence against women, religious freedom, the right to food, the right to education, the right to health, and housing issues. These thematic special procedures of the United Nations Commission on Human Rights, in their annual reports, cover some 60-70 countries per year. The reports of these thematic special procedures provide a good indication of whether or not there are serious problems within a country. Evidence of extrajudicial executions, torture, enforced disappearances or arbitrary detention can indicate that the storm clouds are over the country and are about to burst, if they have not already done so.

States of Emergency

If a country is operating under a de facto or de jure state of emergency, then this is a reason to look closer at the country. However, if a country is democratically governed under the rule of law, a state of emergency might not necessarily indicate instability. After all, under Article 4 of the International Covenant on Civil and Political Rights, states are entitled to derogate from certain human rights during a public emergency.

Early Warning and Prevention

Especially in today's world where people are moving across frontiers and cultures are intermingling, it would be advisable for each country to have arrangements to detect and head off grievances that could erupt in strife or conflict. One way of achieving this might be for a national commission on human rights to provide an annual assessment of the state for respect for human rights within the country. Risk assessment of a country could look at whether such arrangements for early warning and prevention exist within the country.

Civilian Control of the Police and the Military

An important question to ask in risk assessment of a country is whether the police and the military are under civilian control. Where this is not the case, there is a greater likelihood that the police and the military will be engaging in excesses on the civilian population leading to potentially explosive situations. Even if there is civilian control of the police and military, it would be important to ask whether there is abuse of power by either. Abuse by the police or the military will certainly foment discontent and possibly strife and conflict.

Prevention of Genocide, Ethnic Cleansing or Mass Killings

Furthermore, in risk assessment of a country, it is necessary to ask about the danger of genocide, ethnic cleansing or mass killing. In a 2004 initiative, the Secretary-General of the United Nations, Kofi Annan, informed the Commission on Human Rights that he intended to designate a Special Advisor on the prevention of genocide, ethnic cleansing and mass killings. This is a major innovation that could be leveraged in this respect. A related indicator is whether there is torture or arbitrary detention or enforced disappearances in the country. If evidence exists that such pernicious practices are taking place then it can be concluded that the country presents major risks of instability and possibly strife or conflict.

I would recapitulate the following checklist of issues that should be kept in mind when undertaking risk assessment through human rights lens:

1) What is the ethnic composition of the country? Is there a minority population? Is there an indigenous population? Is there a migrant population?
2) Is there a unifying vision of the country?
3) What is the state of governance? Is there a functioning democracy?
4) What is the state of the rule of law and the courts?
5) Is there an effective national human rights protection system?
6) Are there major grievances within the population?
7) Is there an internal system of early warming to head off grievances?
8) Is there a de jure or de facto state of emergency?
9) Are there gross violations of human rights?
10) What is the state of human rights of women?
11) Is there a problem of human trafficking in the country?
12) What is the state of respect for the rights of the child?
13) What is the state of freedoms of expression, religion or belief?
14) What is the national security doctrine of the state?
15) What are the UN human rights treaty bodies and the UN human rights investigations reporting about the country?
16) What are the leading international human rights organizations reporting about the country?
17) Are there reputable human rights NGOs in the country and what are they reporting?
18) Are perpetrators of gross violations of human rights being brought to justice?

Implementing the Right to Development

A more far-reaching strategy for preventing state failure is the implementation of the right to development. The right to development is a rallying concept that calls upon the international community and each country to act in a concerted manner to advance the development aspirations of every individual and all nations. It is a concept given varying emphases by different group of countries. Developing countries place the emphasis on transfers of resources from the developed countries. For developed countries, the right to development is the totality of human rights, requiring efforts to implement all human rights, civil and political and economic, social and cultural. This is the position repeatedly taken by developed countries in their statements at the United Nations.

In placing the achievement of the right to development as part of a multi-pronged strategy I am not unmindful of the difficulties being encountered internationally in discussing the practical implementation of the right to development. However, I am struck by the logic of the proposition that preventing state failures in the future would call for implementation of the right to development in each country. As the expression goes, 'develop or perish'.

The implementation of the Millennium Development Goals is closely related to the implementation of the right to development and to the prevention of state failure.

Implementing the Millennium Development Goals.

The Millennium Development Goals are an appeal to humanity. They integrate human rights and look to human rights strategies to help bring about their implementation.

Historically, the human rights idea has contributed to development goals through norms articulating policy goals and standards, advocacy, supervision, studies and the activation of the international conscience. The question that arises for reflection is how the human rights emphasis might help in the implementation of the Millennium Development Goals and in the prevention of state failure.

The United Nations campaign for the achievement of the Millennium Development Goals places emphasis on human rights in broad terms. It emphasizes the human rights underpinnings of the Millennium Goals and notes that injustice and discrimination of one kind or another are increasingly seen as key determinants of poverty, and that it is not by coincidence that the very same determinants account for most human rights abuses.[4]

The Millennium Development Goals campaign also presses the point that the human rights approach

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4 Online: Millenium Campaign <http://www.millenniumcampaign.org/>.

> implies that we are talking not of welfare or charity, but of rights and entitlements. This means that taking action to achieve the goals is an obligation. And the approach also creates a framework for holding various actors, including governments, *accountable*. Moreover it is widely acknowledged that sustainable development requires the active involvement of the poor and civil society. Thus without respect and fulfilment of human rights such as non-discrimination, right to participation, freedom of expression and assembly, achieving – and even more importantly sustaining – the Millennium Goals will not be possible.[5]

I agree with a great deal of this but the further question that arises is: how can practical and concrete human rights approaches contribute to the achievement of the Millennium Development Goals? I would advance six suggestions.

The first relates to the national human rights protection system of each country and how it covers key economic, social and cultural rights. A recent book examined how national human rights commissions perform the protection function[6]. I believe that there should be human rights focal points in key government ministries such as Agriculture, Health, and Housing devoted to advancing a human rights approach and watching over the principle of equality and non-discrimination. I also believe that we should place more emphasis on the role of the courts in protecting key economic, social and cultural rights. Another recent book, *Judicial Protection of Economic, Social and Cultural Rights*,[7] contains decisions from many parts of the world and argues that judicial protection is possible.

Second, I believe that that we should bring to the fore the concept of preventable poverty. Preventive human rights strategies are not given the attention they deserve. In my view they have a special role to play when it comes to basic economic, social and cultural rights. I am aware of the international dimensions of the debate on the implementation of the Millennium Development Goals. However, I believe that alongside this debate, each country has to keep under scrutiny what could be done to prevent poverty using available national resources. Preventable poverty is something that we could also focus on in advocacy campaigns.

Third, I would raise for consideration the principle of non-discrimination. When the International Covenant on Economic, Social and Cultural Rights was drafted the obligation not to discriminate was made mandatory for state parties. The issue can be put simply: alongside preventive strategies that we are calling for, a society must be watching out for pockets of the population that are facing discrimination with regard to basic human rights and act urgently to ameliorate this situation. This kind of action can bring about tangible relief.

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5 *Supra* note 4.

6 Bertrand G. Ramcharan, ed., *The Protection Role of National Human Rights Commissions*. (Leiden: Martinus Nijhoff, 2005).

7 Bertrand G. Ramcharan, ed., *Judicial Protection of Economic, Social and Cultural Rights*. (Leiden: Martinus Nijhoff, 2005).

Fourth, I would argue that we need to place the spotlight more on vulnerable groups of the population such as minorities, indigenous populations, migrants, and historically disadvantaged communities. Placing the spotlight on them brings their plight to the fore and enables the forging of a national consensus to act for their relief and protection.

Fifth, I would place on the table the concept of a consistent pattern of gross violation of economic, social and cultural rights. In 1975 the United Nations Commission on Human Rights adopted a decision to the effect that it would henceforth pay attention to gross violations of economic, social and cultural rights alongside civil and political rights.[8] The follow-up to this decision has been patchy. I believe that nationally, regionally, and internationally, we should place the spotlight in the future on situations where there is a consistent patter of gross violation of economic, social and cultural rights attributable to the policies of governments or other actors, such as corporations. This would give expression to the principle of protection on the ground.

Sixth, I would argue for the periodic publication of a World Report on Economic, Social and Cultural Rights. I believe that the periodic publication of such a report would help show, through human rights lens, what could be done to prevent and reduce poverty and act for the relief of the vulnerable and the poor.

Insisting on the principle of democratic legitimacy on the part of governments.

Achieving the right to development, drawing, to begin with, upon available national resources, calls for efficient and accountable government. In too many situations one sees undemocratic and corrupt governments impoverishing their people. It is therefore important to place emphasis on the principle of democratic legitimacy on the part of governments. Every time one mentions this point, one can expect questions about the appropriate definition of democracy. There may be room for discussion here. But at the end of the day, the Universal Declaration states the principle in simple but unimpeachable form: "the will of the people shall be the basis of the authority of governments."

Exercising the responsibility to protect

> The heads of state and government gathered at United Nations Headquarters from 14 to 16 September, 2005 acknowledged that each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[9] This responsibility, they acknowledged, entailed the prevention of such crimes,

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8 *Study of Situations Which Reveal a Consistent Pattern of Gross Violations of Human Rights*, ESC Dec. 1975/31, UNESCOR 1975, Supp. No. 4, UN Commission on Human Rights, 31st Sess., UN Doc. E/5635 – E/CN.4/1179 (1975), at 73.

9 *2005 World Summit Outcome*, GA Res. UN GA, 60th Sess., UN Doc. A/Res/60/1, September 16 (2005), at 38, online: United Nations ‹http://www.un.org/Depts/dhl/ resguide/r60.htm›.

> including their incitement, through appropriate and necessary means. They accepted that responsibility and pledged to act in accordance with it. They called upon the international community, as appropriate, to encourage and help states to exercise this responsibility and to support the United Nations to establish an early warning capability.

The heads of state and government declared that the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VI and Chapter VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, they declared their preparedness to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the United Nations Charter, including Chapter VII, on a case by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity.

The decisions of the heads of state and government on the establishment of a Human Rights Council are relevant to the discharge of the responsibility to protect. The heads of state and governments resolved to create a Human Rights Council with a mandate to address situations of violations of human rights, including gross and systematic violations and make recommendations thereon. It should also promote effective coordination and the mainstreaming of human rights within the United Nations system. The Council will be responsible for "promoting universal respect for the protection" of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner. Two things are worth noting about this formulation. The mandate of the Commission remains, fundamentally, to promote universal respect. Second, it is to do so in a "fair and equal manner".

Implementing the principles of international cooperation and solidarity.

The Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights, and similar foundation documents of international relations call for nations to cooperate for the common welfare and for countries to demonstrate solidarity towards one another. The United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among Nations, adopted on the occasion of the twenty fifth anniversary of the United Nations codified the Charter's principle of international cooperation.[10]

It is by giving life to the principles of international cooperation and solidarity that one can help implement the right to development, with which I began this presentation of multi-pronged strategies for the prevention of state failure. In

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[10] The United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among Nations, GA Res. 2625 (XXV), UN GAOR, Supp. No. 28, UN Doc. A/5217 (1970).

the blueprint of the United Nations Charter, it is the Economic and Social Council that was meant to spearhead international cooperation and solidarity.

Unfortunately, recent efforts at United Nations reform did not result in much by way of efforts to revitalize the Economic and Social Council. Instead, much store was placed in a Peace Building Commission, established following the September 2005 Summit. It remains to be seen whether it will play mainly a reactive role or whether it can have a preventive role as well.

V REBUILDING SOCIETIES

When it comes to the tasks of rebuilding societies, I would argue that four concepts are crucial: peace building, the modernization of national visions, good governance, and the emplacement of adequate and effective national systems for the promotion and protection of human rights. I deal with each in turn.

Peace-building

As noted above, the United Nations just agreed on the establishment of a Peace-building Commission. As decided by the September 2005 summit of world leaders, the main purpose of the Peace-building Commission is to bring together all relevant actors to marshal resources and to advise and propose integrated strategies for post.-conflict peace-building and recovery. Representatives from the World Bank, the International Monetary Fund and other institutional donors are to be invited to participate in all meetings of the Peace-building Commission in a manner suitable to their governing arrangements, in addition to a representative of the Secretary-General. The Secretary-General was also requested to establish a multi-year Peace-building Fund for post-conflict peace-building, funded by voluntary contributions and taking due account of existing instruments. The objectives of the Peace-building Fund include ensuring the immediate release of resources needed to launch peace-building activities and the availability of appropriate financing for recovery.

The Peace-building Commission should focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and support the development of integrated strategies in order to lay the foundation for sustainable development. In addition, it should provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations, develop best practices, help to ensure predictable financing for early recovery activities and extend the period of attention by the international community to post-conflict recovery. The Peace-building Commission should act in all matters on the basis of consensus of its members.

Modernizing the National Vision

In the aftermath of conflicts especially, a modernized statement of the national vision might be able to help take the society forward. The contours of the renewed national vision could be traced in any peace agreement negotiated. A modernized statement of the national vision can help give people hope and optimism and contribute to pulling the nation forward.

Good Governance

When dealing with preventive strategies, I have argued for the principle of democratic legitimacy. Government, even if it is democratic, might be terribly incompetent. There is sometimes a debate about the meaning of good governance. That is fair. However, it is undeniable as a proposition that good governance can help to hold societies together and take them forward equitably.

Adequate and Effective National Protection Systems

A national protection system has six components: international human rights standards are reflected in the national constitution; international human rights conventions are incorporated into national legislation; judicial protection of human rights is available on the basis of international human rights standards; human rights education is provided at the primary, secondary, and tertiary levels; there are national institutions such as a human rights commission; and the society has in place arrangements of early warning and response in the event that problems are on the horizon.

In the aftermath of conflict, it is vital that the peace agreement concluded provide for key elements of the national protection system. Peace-building strategies must also place emphasis on the creation and strengthening of the national protection system. Unless a society is consciously working on the establishment and strengthening of its national protection system, it will land in trouble before long if it has just emerged from conflict.

I attach a great deal of importance to this concept of a national protection system as a strategic concept that should influence the human rights movement in the future. I was a part of the process that resulted in this concept becoming a prominent part of the first reform package of Secretary-General Kofi Annan, the famous Action II . Secretary-General Annan called upon all parts of the United Nations system to concert their efforts in helping member states establish or strengthen their national protection systems.

Pursuant to this call, an Action Plan was developed in the United Nations for cooperation at the country level, through the United Nations country team. This Action Plan is still on table but it has receded to the background with the debate at the recent global summit on reform of the Human Rights Commission. One would have wished that the outcome document of the global summit would have carried forward more prominently this concept of the national protection system although, when discussing the responsibility to protect, the world leaders acknowledged the importance of capacity building and early warning systems to head off genocide, war crimes, crimes against humanity, and ethnic cleansing.

When this author discharged the functions of United Nations High Commissioner for Human Rights we invited all governments to submit succinct statements of their national protection systems on the basis of a short questionnaire. I received some three dozen replies and published an analytical summary of them. I had in view the eventual publication of a periodic world report focusing on the national protection system of each country. The aim was to highlight this

dimension, and to identify opportunities for international support to countries in strengthening their national protection systems.

I strongly believe that the international human rights movement should give a central place to this concept in their future strategies and it is my hope that a research or similar body would take on the task of publishing periodically a world report on national protection systems.

VI CONCLUSION

In this article, I have sought to step back and take a look at the roots of state failures and how they might be tackled. In my view, preventive strategies should target not only conflict-prone countries but also fragile countries. At the heart of such fragility are often issues of economic opportunity, economic and social justice, and oppressive governance. I think that a multi-pronged strategy is called for when thinking about preventing state failures in the future. I have set out some elements for such a strategy in the future.

When it comes to rebuilding societies, I have placed the emphasis on the modernizing of the national vision and the establishment and strengthening of national systems for the promotion and protection of human rights. At the end of the day, we are dealing, for the most part, with challenges of nation-building in the aftermath of colonialism, the Cold War, and a Darwinian international economic system. Recognizing these factors would enable us to see the prevention of state failure and the rebuilding of societies in terms of development, conflict prevention, and the advancement of human rights.

From State Failure to State-Building: Problems and Prospects for a United Nations Peacebuilding Commission

SIMON CHESTERMAN*

INTRODUCTION

Tolstoy wrote that all happy families are happy alike, while every unhappy family is unhappy in its own way. It is tempting to say the same thing of states, as successful states enter an increasingly homogenous globalized economy and weaker states slip into individualized chaos. That would be only partly true. While the state-building efforts considered in this article demonstrate the importance of local context—history, culture, individual actors—they also outline some general lessons that may be of assistance in addressing problems confronting states emerging from conflict. Put another way, structural problems and root causes are part of the problem of "state failure", but an important question for policy-makers is how weak states deal with crisis. The nature of such a crisis can vary considerably. The emphasis here is on post-conflict reconstruction of states—a central concern, inasmuch as around half of all countries that emerge from war lapse back into it within five years.[1]

Post-conflict reconstruction through the 1990s saw an increasing trend towards rebuilding governance structures through assuming some or all governmental powers on a temporary basis. Such "transitional administration" operations can be divided into two broad classes: where state institutions are divided and where they have collapsed. The first class encompasses situations where governance structures were the subject of disputes, with different groups claiming power (as in Cambodia or Bosnia and Herzegovina), or ethnic tensions within the structures themselves (such as Kosovo). The second class comprises circumstances where such structures simply did not exist (as in Namibia, East Timor, and Afghanistan). A possible third class is suggested by recent experience in Iraq, where

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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. 114 online: United Nations <http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement>. [In Larger Freedom]

regime change took place in a territory with far greater human, institutional, and economic resources than any comparable situation in which the United Nations or other actor had exercised civilian administration functions since the Second World War.[2]

The term "nation-building", sometimes used in this context, is a broad, vague, and often pejorative one. In the course of the 2000 US presidential campaign, Governor Bush used it as a dismissive reference to the application of US military resources beyond traditional mandates. The term was also used to conflate the circumstances in which US forces found themselves in conflict with the local population—most notably in Somalia—with complex and time-consuming operations such as those underway in Bosnia, Kosovo, and East Timor. Although it continues to be used in this context, "nation-building" also has a more specific meaning in the post-colonial context, in which new leaders attempted to rally a population within sometimes arbitrary territorial frontiers. The focus here is on the *state* (that is, the highest institutions of governance in a territory) rather than the *nation* (a people who share common customs, origins, history, and frequently language) as such.[3]

Within the United Nations, "peacebuilding" is generally preferred. This has been taken to mean, among other things, "reforming or strengthening governmental institutions,"[4] or "the creation of structures for the institutionalization of peace".[5] It

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2 See generally Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004).

3 Massimo D'Azeglio famously expressed the difference in the context of post-Risorgimento Italy: "We have made Italy," he declared. "Now we must make Italians." On the creation of states generally, see James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979). On nation-building, see, *e.g.*, Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983); Ranajit Guha, ed., *A Subaltern Studies Reader, 1986-1995* (Minneapolis: University of Minnesota Press, 1997); and Jim Mac Laughlin, *Reimagining the Nation-State: The Contested Terrains of Nation-Building* (London: Pluto Press, 2001).

4 *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, UN Doc A/47/277-S/24111 (1992), at para 55, online: United Nations ‹http://www.un.org/Docs/SG/agpeace.html›.

5 *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc A/50/60-S/1995/1 (1995), at para 49, online: United Nations ‹http://www.un.org/Docs/SG/agsupp.html›. From a UN development perspective, peacebuilding aims "to build and enable durable peace and sustainable development in post-conflict situations." See, e.g., *Role of UNDP in Crisis and Post-Conflict Situations*, Policy Paper Distributed to the Executive Board of the United Nations Development Programme and of the United Nations Population Fund, DP/2001/4 (2000), at para 51, online: United Nations ‹http://www.undp.org/execbrd/pdf/dp01-4.PDF›. The Development Assistance Committee (DAC) of the OECD maintains that peace-building and reconciliation focuses "on long-term support to, and

tends, however, to embrace a far broader range of activities than those particular operations under consideration here—at times being used to describe virtually all forms of international assistance to countries that have experienced or are at risk of armed conflict.[6]

It is frequently assumed that the collapse of state structures, whether through defeat by an external power or as a result of internal chaos, leads to a vacuum of political power. This is rarely the case. The mechanisms through which political power are exercised may be less formalized or consistent, but basic questions of how best to ensure the physical and economic security of oneself and one's dependants do not simply disappear when the institutions of the state break down. Non-state actors in such situations may exercise varying degrees of political power over local populations, at times providing basic social services from education to medical care. Even where non-state actors exist as parasites on local populations, political life goes on. How to engage in such an environment is a particular problem for policy-makers in intergovernmental organizations and donor governments. But it poses far greater difficulties for the embattled state institutions and the populations of such territories.

Much discussion of "state failure" elides a series of definitional problems, most obviously about the nature of the state itself. If the state is understood as the vehicle for fulfilling a social contract, then state failure is the incapacity to deliver on basic public goods. If the state is defined by its capacity to exercise a monopoly on the legitimate use of force in its territory, state failure occurs when authority structures break down. Or if the state is constituted by its legal capacity, state failure is the incapacity to exercise such powers effectively.

Rather than choosing between these Lockean, Weberian, and juridical approaches to the state, it is argued here that such definitional questions are misleading. It is not generally the state that "fails"—it is the government or individual leaders. In extreme cases, the institutions of governance themselves may be severely undermined. But it is only through a more nuanced understanding of the state as a network of institutions that crises in governance may be properly understood and, perhaps, avoided or remedied. In many situations, the remedy will depend upon variables that are political rather than institutional, though the sustainability of any outcome depends precisely upon institutionalizing procedures to remove that dependence on politics and personality.

establishment of, viable political and socio-economic and cultural institutions capable of addressing the root causes of conflicts, as well as other initiatives aimed at creating the necessary conditions for sustained peace and stability": OECD, *Helping Prevent Violent Conflict, Development Assistance Committee Guidelines* (Paris: OECD, 2001), at 86, online: Organisation for Economic Co-operation and Development ‹http://www.oecd.org/dataoecd/15/54/1886146.pdf›.

6 Elizabeth M. Cousens, "Introduction," in Elizabeth M. Cousens & Chetan Kumar, eds., *Peacebuilding as Politics* (Boulder, CO: Lynne Rienner, 2001) 1 at 5-10.

The key actors in these situations are almost always local. Nevertheless, international actors may also play a critical role, if only in creating the opportunity for local actors to establish legitimate and sustainable governance. Sometimes creating such opportunities means holding back. Humanitarian and, to some extent, development assistance flows most freely in response to crisis, but it rarely addresses the underlying causes of either poverty or conflict. If it is not well managed, such assistance may in fact undermine more sustainable recovery by establishing relationships of dependence and by distorting the economy with unsustainable allocations of resources.

This article can only explore a very small number of these issues. It focuses, therefore, on the exceptional circumstances where the United Nations assumes some or all sovereign powers.[7] Whether such operations are an appropriate activity for the United Nations remains controversial, but the expanding practice through the 1990s and early 2000s suggests that even if greater capacity is not developed the demand is unlikely to diminish. The section that follows highlights some of the difficulties inherent in such a political project of thrusting democracy and good governance on a population; section two then outlines the prospects for improvement, with particular reference to the proposed Peacebuilding Commission of the United Nations. A survey of the practice shows significant improvement in technical areas such as staging elections; the Peacebuilding Commission may remedy some of the coordination problems and funding gaps that plague post-conflict operations. It is far from clear, however, that the political contradictions inherent in such operations are being adequately understood let alone addressed.

PROBLEMS

Is it possible to establish the necessary political and economic conditions for legitimate and sustainable national governance through a period of benevolent foreign autocracy under UN auspices? This contradiction between ends and means has plagued recent efforts to govern post-conflict territories in the Balkans, East Timor, Afghanistan, and Iraq. Such state-building operations combine an unusual mix of idealism and realism: the idealist project that people can be saved from themselves through education, economic incentives, and the space to develop mature political institutions; and the realist basis for that project in what is ultimately military occupation.

Much research has focused on the doctrinal and operational difficulties experienced by such operations.[8] This is a valuable area of research, but may obscure

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7 For a broader discussion of how states deal with crisis, see Simon Chesterman, Michael Ignatieff & Ramesh Thakur, eds., *Making States Work: State Failure and the Crisis of Governance* (Tokyo: United Nations University Press, 2005).

8 See, eg, Richard Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (Oxford: Oxford University Press, 2005); Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2004).

three sets of contradictions between means and ends that undermine such operations: the means are *inconsistent* with the ends, they are frequently *inadequate* for the ends, and in many situations the means are *inappropriate* for the ends.

Inconsistent

Benevolent autocracy is an uncertain foundation for legitimate and sustainable national governance. It is inaccurate and, often, counter-productive to assert that transitional administration depends upon the consent or "ownership" of the local population. It is inaccurate because if genuine local control were possible then a transitional administration would not be necessary. It is counter-productive because insincere claims of local ownership lead to frustration and suspicion on the part of local actors. *Clarity* is therefore required in recognizing: (a) the strategic objectives; (b) the relationship between international and local actors and how this will change over time; and (c) the commitment required of international actors in order to achieve objectives that warrant the temporary assumption of autocratic powers under a benevolent international administration.

In a case like East Timor, the strategic objective—independence—was both clear and uncontroversial. Frustration with the slow pace of reconstruction or the inefficiencies of the UN presence could generally be tempered by reference to the uncontested aim of independence and a timetable within which this was to be achieved. In Kosovo, failure to articulate a position on its final status inhibits the development of a mature political elite and deters foreign investment. The present ambiguity derives from a compromise that was brokered between the United States and Russia at the end of the NATO campaign against the Federal Republic of Yugoslavia in 1999, formalized in Security Council resolution 1244.[9] Nevertheless, it is the United Nations itself that is now blamed for frustrating the aspirations of Kosovars for self-determination. Many national and international observers have blamed lack of progress in resolving the issue of final status as a key factor in fuelling the violence that erupted in the province in March 2004.

Obfuscation of the political objective leads to ambiguity in the mandate. Niche mandate implementation by a proliferation of post-conflict actors further complicates the transition. More than five years after the Dayton Peace Agreement, a "recalibration" exercise required the various international agencies present in Bosnia and Herzegovina to perform an institutional audit to determine what, exactly, each of them did.[10] Subsidiary bodies and specialized agencies of the United Nations should in principle place their material and human resources at the direct disposal of the transitional administration: all activities should be oriented towards an agreed political goal, which should normally be legitimate and sustainable government. Ideally, the unity of civilian authority should embrace command of the military also.

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9 UNSC Res. 1244, UN SCOR, UN Doc S/RES/1244 (1999).

10 International Crisis Group, *Bosnia: Reshaping the International Machinery* (Sarajevo/Brussels: ICG Balkans Report No 121, 29 November 2001) at 13, online: International Crisis Group ‹http://www.crisisgroup.org/home/index.cfm?id=1495&l=1›.

In reality, the reluctance of the United States and other industrialized countries to put their troops under UN command makes this highly improbable. Coordination thus becomes more important, to avoid some of the difficulties encountered in civil-military relations in Afghanistan.

Clarity in the relationship between international and local actors raises the question of ownership. This term is often used disingenuously—either to mask the assertion of potentially dictatorial powers by international actors or to carry a psychological rather than political meaning in the area of reconstruction. *Ownership* in this context is usually not intended to mean control and often does not even imply a direct input into political questions.[11] This is not to suggest that local control is a substitute for international administration. As the operation in Afghanistan demonstrates, a "light footprint" makes the success of an operation more than usually dependent on the political dynamic of local actors. Since the malevolence or collapse of that political dynamic is precisely the reason that power is arrogated to an international presence, the light footprint is unsustainable as a model for general application. How much power should be transferred and for how long depends upon the political transition that is required; this in turn is a function of the root causes of the conflict, the local capacity for change, and the degree of international commitment available to assist in bringing about that change.[12]

Local ownership, then, must be the end of a transitional administration, but it is not the means. Openness about the trustee-like relationship between international and local actors would help locals by ensuring transparency about the powers that they will exercise at various stages of the transition. But openness would also help the states that mandate and fund such operations by forcing acknowledgement of their true nature and the level of commitment that is required in order to effect the transition that is required.

Clarifying the commitment necessary to bring about fundamental change in a conflict-prone territory is, however, a double-edged sword. It would ensure that political will exists prior to authorizing a transitional administration, but perhaps at the expense of other operations that would not be authorized at all. The mission in Bosnia was always expected to last beyond its nominal twelve-month deadline, but might not have been established if it had been envisaged that troops would remain on the ground for a full decade or more. Donors contemplating Afghanistan in November 2001 balked at early estimates that called for a ten-year, $25 billion commitment to the country. And in the lead up to the war with Iraq, the Chief of

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11 See Simon Chesterman, "The Trope of Ownership: Transfer of Authority in Post-Conflict Operations", in Agnes Hurwitz, ed., *Rule of Law Programming in Conflict Management: Security, Development and Human Rights in the 21st Century* (Boulder, CO: Lynne Rienner, 2006) [forthcoming].

12 Michael W. Doyle, "War-Making and Peace-Making: The United Nations' Post-Cold War Record," in Chester A. Crocker, Fen Osler Hampson & Pamela Aall, eds., *Turbulent Peace: The Challenges of Managing International Conflict* (Washington, DC: United States Institute of Peace Press, 2001) 529 at 546.

Staff of the US Army was similarly pooh-poohed by the leadership of the Defence Department when he testified to the Senate that several hundred thousand soldiers would be required for post-war duties.[13] Political considerations already limit the choice of missions, of course: not for lack of opportunity, no major transitional administration has been established in Africa, where the demands are probably greatest. The primary barrier to establishing transitional administration-type operations in areas such as Western Sahara, Somalia, and the Democratic Republic of the Congo has less to do with the difficulty of such operations than with the absence of political will to commit resources to undertake them.[14]

Resolving the inconsistency between the means and the ends of transitional administration requires a clear-eyed recognition of the role of power. The collapse of formal state structures does not necessarily create a power vacuum; as indicated earlier, political life does not simply cease. Constructive engagement with power on this local level requires both an understanding of culture and history as well as respect for the political aspirations of the population. Clarity will help here also: either the international presence exercises quasi-sovereign powers on a temporary basis or it does not. This clarity must exist at the formal level, but leaves much room for nuance in implementation.

Most obviously, assertion of executive authority should be on a diminishing basis, with power devolved as appropriate to local institutions. The transfer of power must be of more than symbolic value: once power is transferred to local hands, whether at the municipal or national level, local actors should be able to exercise that power meaningfully, constrained only by the rule of law. Unless and until genuine transfer is possible, consultation is appropriate but without the pretence that this is the same as control. Where international actors do not exercise sovereign power—because of the size of the territory, the complexity of the conflict, or a simple lack of political will—this is not the same as exercising no power at all. Certain functions may be delegated to the international presence, as they were in Cambodia and Afghanistan, and international actors will continue to exercise considerable behind-the-scenes influence either because of ongoing responsibilities in a peace process or as a gatekeeper to international development assistance. In either case, the abiding need is for clarity as to who is in charge and, equally important, who is *going* to be in charge.

Inadequate

International interest in post-conflict operations tends to be ephemeral, with availability of funds linked to the prominence of a foreign crisis on the domestic

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[13] Eric Schmitt, "Pentagon contradicts general on Iraq occupation force's size" *New York Times* (28 February 2003) A1.

[14] UN envoy James Baker is said to have been asked once by Polisario representatives why the United Nations was treating Western Sahara differently from East Timor. He replied to the effect that if the Sahrawis wanted to be treated like the Timorese they had best go find themselves an Australia to lead a military action on their behalf.

agenda of the states that contribute funds and troops. Both have tended to be insufficient. Funds for post-conflict reconstruction are notoriously supply- rather than demand-driven. This leads to multiplication of bureaucracy in the recipient country, inconsistency in disbursement procedures, and a focus on projects that may be more popular with donors than they are necessary in the recipient country. Reluctance to commit funds is surpassed only by reluctance to commit troops: in the absence of security, however, meaningful political change is impossible. This was confirmed in the most brutal way possible with the attacks on UN personnel in Baghdad on 19 August 2003.

The ephemeral nature of international interest in post-conflict operations is, unfortunately, a cliché. When the United States overthrew the Taliban regime in Afghanistan, President Bush likened the commitment to rebuild the devastated country to the Marshall Plan. Just over twelve months later, in February 2003, the White House apparently forgot to include *any* money for reconstruction in the 2004 budget that it submitted to Congress. Legislators reallocated $300 million in aid to cover the oversight.[15] Such oversights are disturbingly common: much of the aid that is pledged either arrives late or not at all. This demands a measure of artificiality in drafting budgets for reconstruction, which in turn leads to suspicion on the part of donors—sometimes further delaying the disbursement of funds. For example, $880 million was pledged at the Conference on Rehabilitation and Reconstruction of Cambodia in June 1992. By the time the new government was formed in September 1993, only $200 million had been disbursed, rising to only $460 million by the end of 1995. The problem is not simply one of volume: Bosnia has received more per capita assistance than Europe did under the Marshall Plan, but the incoherence of funding programmes, the lack of a regional approach, and the inadequacy of state and entity institutions have contributed to it remaining in financial crisis.[16]

Many of these problems would be reduced if donors replaced the system of voluntary funding for relief and reconstruction for transitional administrations with assessed contributions, which presently fund peacekeeping operations. The distinction between funds supporting a peacekeeping operation and those providing assistance to a government makes sense when there is some form of indigenous government, but it is arbitrary in situations where the peacekeeping operation *is* the government. Given existing strains on the peacekeeping budget, however, such a change is unlikely. A more realistic proposal would be to pool voluntary contributions through a trust fund, ideally coordinated by local actors or a mixed

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15 Paul Krugman, "The martial plan" *New York Times* (21 February 2003) A27; James G. Lakely, "Levin criticizes budget for Afghanistan; Says White House isn't devoting enough to rebuilding" *Washington Times* (26 February 2003) A04. Aid was later increased further: David Rohde, "US said to plan bigger Afghan effort, stepping up aid" *New York Times* (25 August 2003) A3.

16 See, e.g., International Crisis Group, *Bosnia's Precarious Economy: Still Not Open for Business* (Sarajevo/Brussels: ICG Balkans Report No 115, 7 August 2001), online: International Crisis Group ‹http://www.crisisgroup.org/home/index.cfm?id=1494&l=1›.

body of local and international personnel, perhaps also drawing upon private sector expertise. At the very least, a monitoring mechanism to track aid flows would help to ensure that money that is promised at the high point of international attention to a crisis is in fact delivered and spent. The experience of Afghanistan suggests that there is, perhaps, some learning taking place in this area, though even during one of the greatest outpouring of emergency relief fund in recent history—in response to the tsunami that struck the Indian ocean region on 26 December 2004—Secretary-General Kofi Annan felt compelled to remind donor governments that "We have often had gaps in the past [between pledges and actual donations] and I hope it is not going to happen in this case."[17] The use of PricewaterhouseCoopers to track aid flows also points to a new flexibility in using private sector expertise to avoid wastage and corruption.

Parsimony of treasure is surpassed by the reluctance to expend blood in policing post-conflict territories. In the absence of security, however, meaningful political change in a post-conflict territory is next to impossible. Unless and until the United Nations develops a rapidly deployable civilian police capacity, either military tasks in a post-conflict environment will include basic law and order functions or these functions will not be performed at all. The military—especially the US military—is understandably reluctant to embrace duties that are outside its field of expertise, but this is symptomatic of an anachronistic view of UN peace operations. The dichotomy between peacekeeping and enforcement actions was always artificial, but in the context of internal armed conflict where large numbers of civilians are at risk it becomes untenable. Moreover, as most transitional administrations have followed conflicts initiated under the auspices or in the name of the United Nations, inaction is not the same as non-interference—once military operations commence, external actors have already begun a process of political transformation on the ground. And, as the Independent Inquiry on Rwanda concluded, whether or not a peace operation has a mandate or the will to protect civilians, its very presence creates an expectation that it will do so.[18]

A key argument in the Report of the Panel on UN Peace Operations, known as the Brahimi Report, was that missions with uncertain mandates or inadequate resources should not be created at all:

> Although presenting and justifying planning estimates according to high operational standards might reduce the likelihood of an operation going forward, Member States must not be led to believe that they are doing something useful for countries in trouble when—by under-resourcing

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17 Scott Shane and Raymond Bonner, "Annan nudges donors to make good on full pledges" *New York Times* (7 January 2005) A12.

18 *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, UN Doc. S/1999/1257 (1999) at 51, Online: United Nations ‹http://www.un.org/Docs/journal/asp/ws.asp?m=S/1999/1257›; *Report of the Panel on United Nations Peace Operations* (Brahimi Report), UN Doc. A/55/305-S/2000/809 (2000), at para 62, online: United Nations ‹http://www.un.org/peace/reports/peace_operations/›.

> missions—they are more likely agreeing to a waste of human resources, time and money.[19]

This view finds some support in the report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, which called for the "responsibility to rebuild" to be seen as an integral part of any intervention. When an intervention is contemplated, a post-intervention strategy is both an operational necessity and an ethical imperative.[20] There is some evidence of this principle now achieving at least rhetorical acceptance—despite his aversion to "nation-building", President Bush stressed before and during operations in Afghanistan and Iraq that the United States would help in reconstructing the territories in which it had intervened.

More than rhetoric is required. Success in state-building, in addition to clarity of purpose, requires time and money. A lengthy international presence will not ensure success, but an early departure guarantees failure. Similarly, an abundance of resources will not make up for the lack of a coherent strategy—though the fact that Kosovo has been the recipient of twenty-five times more money and fifty times more troops, on a per capita basis, compared with Afghanistan, goes some way towards explaining the modest achievements in developing democratic institutions and the economy.[21]

Inappropriate

The inappropriateness of available means to desired ends presents the opposite problem to that of the inadequacy of resources. While the question of limited resources—money, personnel, and international attention—depresses the standards against which a post-conflict operation can be judged, artificially high international expectations may nevertheless be imposed in certain areas of governance. Particularly when the United Nations itself assumes a governing role, there is a temptation to demand the highest standards of democracy, human rights, the rule of law, and the provision of services.

Balancing these against the need for locally sustainable goals presents difficult problems. A computerized electoral registration system may be manifestly ill-suited to a country with a low level of literacy and intermittent electricity, but should an international NGO refrain from opening a world-class clinic if such levels of care are unsustainable? An abrupt drop from high levels of care once the crisis and international interest passes would be disruptive, but lowering standards early implies acceptance that people who might otherwise have been treated will suffer.

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19 Brahimi Report, *ibid.* at para. 59.

20 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, December 2001), at paras. 2.32, 5.1-5.6, online: International Commission on Intervention and State Sovereignty ‹http://www.iciss.ca/report-en.asp›.

21 See James Dobbins *et al.*, *America's Role in Nation-Building: From Germany to Iraq* (Santa Monica, CA: RAND, 2003) at 160-166.

This was the dilemma faced by the International Committee of the Red Cross, which transferred control of the Dili National Hospital to national authorities in East Timor almost a year before independence.

Although most acute in areas such as health, the issue arises in many aspects of transitional administration. In the best tradition of autocracies, the international missions in Bosnia and Kosovo subscribed to the vast majority of human rights treaties and then discovered *raisons d'état* that required these to be abrogated. Efforts to promote the rule of law tend to focus more on the prosecution of the highest profile crimes of the recent past than on developing institutions to manage criminal law in the near future. Humanitarian and development assistance is notorious for being driven more by supply than demand, with the result that those projects that are funded tend to represent the interests—and, frequently, the products and personnel—of donors rather than recipients.[22] Finally, staging elections in conflict zones has become something of an art form, though more than half a dozen elections in Bosnia have yet to produce a workable government.

Different issues arise in the area of human resources. Staffing such operations always takes place in an atmosphere of crisis, but personnel tend to be selected from a limited pool of applicants (most of them internal) whose skills may be irrelevant to the tasks at hand. In East Timor, for example, it would have made sense to approach Portuguese-speaking governments to request that staff with experience in public administration be seconded to the UN mission. Instead, it was not even possible to require Portuguese (or Tetum or Bahasa Indonesia) as a language. Positions are often awarded for political reasons or simply to ensure that staff lists are full—once in place, there is no effective mechanism to assess an individual's suitability or to remove him or her quickly if this proves warranted. A separate problem is the assumption that international staffs who do possess relevant skills are also able to train others in the same field. This is an entirely different skill, however, and simply pairing international and local staff tends to provide less on-the-job training than extended opportunities to stand around and watch—a problem exacerbated by the fact that English tends to be used as the working language. One element of the "light footprint" approach adopted in Afghanistan that is certainly of general application is the need to justify every post occupied by international staff rather than a local. Cultivating relations with Diaspora communities may help address this problem, serving the dual function of recruiting culturally aware staff and encouraging the return of skilled expatriates more generally.

The "can-do" attitude of many people within the UN system is one of the most positive qualities that staffs bring to a mission. If the problem is getting a hundred tons of rice to ten thousand starving refugees, niceties of procedure are less important than getting the job done. When the problem is governing a territory,

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22 See generally Shepard Forman & Stewart Patrick, eds., *Good Intentions: Pledges of Aid for Postconflict Recovery* (Boulder, CO: Lynne Rienner Publishers, 2000).

however, procedure is more important. In such circumstances, the "can-do" attitude may become a cavalier disregard for local sensibilities. Moreover, many staffs in such situations are not used to criticism from the population that they are "helping", with some regarding it as a form of ingratitude. Where the United Nations assumes the role of government, it should expect and welcome criticism appropriate to that of the sort of political environment it hopes to foster. Security issues may require limits on this, but a central element in the development of local political capacity is encouraging discussion among local actors about these matters—apart from anything else, it enhances the legitimacy of the conclusions drawn. International staffs sometimes bemoan the prospect of endless consultation getting in the way of their work, but in many ways that conversation is precisely the point of their presence in the territory.

Just as generals are sometimes accused of planning to re-fight their last war, so the United Nations experiments in transitional administration have reflected only gradual learning. Senior UN officials now acknowledge that, to varying degrees, Kosovo got the operation that should have been planned for Bosnia four years earlier, and East Timor got that which should have been sent to Kosovo. Afghanistan's very different "light footprint" approach draws, in turn, upon the outlines of what Lakhdar Brahimi argued would have been appropriate for East Timor in 1999.

The United Nations may never again be called upon to repeat operations comparable to Kosovo and East Timor, where it exercised sovereign powers on a temporary basis. Even so, it is certain that the circumstances that demanded such interventions will recur. Lessons derived from past experiences of transitional administration will be applicable whenever the United Nations or other international actors engage in complex peace operations that include a policing function, civilian administration, development of the rule of law, establishment of a national economy, the staging of elections, or all of the above. Learning from such lessons has not, however, been one of the strengths of the United Nations.

However, even more important than learning from past mistakes, is learning about future circumstances. Modern trusteeships demand, above all, trust on the part of local actors. Earning and keeping that trust requires a level of understanding, sensitivity, and respect for local traditions and political aspirations that has often been lacking in transitional administration. How that trust is managed will, in large part, determine its legacy.

Transitional administration will remain an exceptional activity, performed on an ad hoc basis in a climate of institutional and political uncertainty. But in those rare situations in which the United Nations and other international actors are called upon to exercise state-like functions, they must not lose sight of their limited mandate to hold that sovereign power in trust for the population that will ultimately claim it.

PROSPECTS

If there is a single generalizable lesson to be learned from the recent experience of state-building, whether as transitional administration or preventing state failure, it

is modesty. The challenges before the United Nations community now are not, therefore, to develop grand theories or a revivified trusteeship capacity. Rather, what are required are workable strategies and tactics with which to support institutions of the state before, during, and after conflict. As indicated earlier, doing this effectively requires clarity in three areas: (a) the strategic aims of the action; (b) the necessary institutional coordination to put all actors—especially security and development actors—on the same page; and (c) a realistic basis for evaluating the success or failure of the action.

Strategy

The accepted wisdom within the UN community, articulated most recently in the Brahimi Report, is that a successful UN peace operation should ideally consist of three sequential stages. First, the political basis for peace must be determined. Then a suitable mandate for a UN mission should be formulated. Finally, that mission should be given all the resources necessary to complete the mandate.[23] The accepted reality is that this usually happens in the reverse order: member states determine what resources they are prepared to commit to a problem and a mandate is cobbled together around those resources—often in the hope that a political solution will be forthcoming at some later date.

Strategic failure may affect all levels of an operation. The most common types of failures are at the level of overall mandate, in the interaction between different international actors with competing or inconsistent mandates, and in the relationship between international and national actors on the ground.

Kosovo's uncertain final status, for example, has severely undermined the ongoing peace operation there, contrasting starkly with the simplicity of East Timor's transition to independence. Clarity concerning the political trajectory of a territory under transitional administration is essential, but lack of strategy will also undermine efforts to prevent the collapse of state institutions. In Afghanistan, prioritising the military strategy at times undermined the professed political aims—most prominently in decisions to support warlords for tactical reasons in the hunt for al Qaeda even as they undermined Hamid Karzai's embryonic government in Kabul.

A second level at which strategic failure may take place is when different actors have competing or inconsistent mandates. Security actors are a notorious example of this—with the independence of the NATO-led KFOR in Kosovo and the ISAF in Afghanistan at times undermining the authority of the international civilian presence. Ensuring a single chain of command would be desirable, but runs against the received wisdom that the United Nations is incapable of waging war. A more achievable goal would be bringing the political process into line with development assistance. The United Nations has done this rhetorically in the term "peacebuilding",[24] but without creating any capacity to focus political attention,

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23 Brahimi Report, *supra* note 17 at paras. 9-83.

24 See *supra* note 4.

design policy and strategy, and oversee operations in this area. (The proposed Peacebuilding Commission is considered in the next sub-section.)

As indicated by the discussion on political trajectory and ownership, international actors have sometimes been less than effective at managing expectations and relationships with national actors. Clarity about respective roles—and about the final authority of the population in question to determine its own future once a territory is stabilized and no longer regarded as a threat to international peace and security—would help. Where there is no existing legitimate governance structure in place, or if there are competing structures, the concept of "shadow alignment" may be helpful. This requires an assessment of available formal and informal policies and systems that can be built on, adapted, and reformed. The aim is to avoid a legacy of diverted institutions that may undermine the development of legitimate and accountable structures.[25]

Reference to strategy should not be misunderstood as suggesting that there is some template for governance that can be applied across cases. Instead, clarity about the purposes of engagement and the respective responsibilities of international and national actors provides a framework for developing a coherent strategy that takes the state itself as the starting point.

Coordination and the Peacebuilding Commission

The High-Level Panel on Threats, Challenges, and Change rightly criticized the UN experience of post-conflict operations as characterized by "countless ill-coordinated and overlapping bilateral and United Nations programmes, with inter-agency competition preventing the best use of scarce resources."[26] Its key recommendation to remedy this situation was the call for a Peacebuilding Commission to be established as a subsidiary organ of the UN Security Council under article 29 of the UN Charter.[27]

This new body was to have four functions. First, it would identify countries that are under stress and risk sliding towards state collapse. Second, it would organize, "in partnership with the national Government, proactive assistance in preventing that process from developing further". Third, it would assist in the planning for transitions between conflict and post-conflict peacebuilding. Fourth, it would marshal and sustain the efforts of the international community in post-conflict peacebuilding over whatever period may be necessary. Other guidelines mapped out institutional and procedural considerations, including the need for the

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25 *Achieving the Health Millennium Development Goals in Fragile States*, Abuja: High-Level Forum on the Health MDGs (2004) at 21, online: High-Level Forum on the Health MDGs ‹http://www.hlfhealthmdgs.org/Documents/FragileStates.pdf›.

26 *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) at para 38, online: United Nations ‹http://www.un.org/secureworld/ report.pdf› [High-level Panel Report].

27 *Ibid*. at paras 261-265.

body to be small and flexible, considering both general policy issues and country-by-country strategies. It was to include representatives of the Security Council, the Economic and Social Council, the International Monetary Fund and the World Bank, donor countries, troop contributors, and regional organizations—as well as national representatives of the country under consideration.[28] A Peacebuilding Support Office would integrate system-wide policies and strategies, develop best practices, and provide support to field operations. Among other functions, the office would submit twice-yearly early warning analyses to the Peacebuilding Commission to help it in organizing its work.[29]

The Commission was generally considered to be one of the more positive ideas to come from the High-Level Panel and appeared likely to be adopted by the membership of the United Nations. When the Secretary-General drew upon this to present his own vision of the Peacebuilding Commission in his "In Larger Freedom" report of March 2005, he specifically removed any suggestion of an early warning function—presumably under pressure from governments wary that they might be the ones under scrutiny.[30] This essentially dropped the first two of the High-Level Panel's four functions, but the Secretary-General elaborated on how the other two might work in practice:

> A Peacebuilding Commission could perform the following functions: in the immediate aftermath of war, improve United Nations planning for sustained recovery, focusing on early efforts to establish the necessary institutions; help to ensure predictable financing for early recovery activities, in part by providing an overview of assessed, voluntary and standing funding mechanisms; improve the coordination of the many post-conflict activities of the United Nations funds, programmes and agencies; provide a forum in which the United Nations, major bilateral donors, troop contributors, relevant regional actors and organizations, the international financial institutions and the national or transitional Government of the country concerned can share information about their respective post-conflict recovery strategies, in the interests of greater coherence; periodically review progress towards medium-term recovery goals; and extend the period of political attention to post-conflict recovery.[31]

Two essential aspects of how the commission would function were left unresolved: what its membership would be, and to whom it would report—the Security Council or the Economic and Security Council. These ended up paralysing debate on the Commission in the lead up to the September 2005 World Summit and were deferred for later consideration. The World Summit Outcome document

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28 *Ibid*. at paras. 264-265.

29 *Ibid.* at paras. 266-267.

30 In Larger Freedom, *supra* note 1 at para. 115.

31 *Ibid*. at para. 115.

broadly endorsed the Secretary-General's view of the Peacebuilding Commission as essentially limited to mobilizing resources for post-conflict reconstruction:

> The main purpose of the Peacebuilding Commission is to bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery. The Commission should focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and support the development of integrated strategies in order to lay the foundation for sustainable development. In addition, it should provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations, develop best practices, help to ensure predictable financing for early recovery activities and extend the period of attention by the international community to post-conflict recovery.[32]

In one sense, the evolution of the Peacebuilding Commission is a fairly typical example of ideas and norms being diluted as they move through the policy and intergovernmental waters. Early warning died a fairly quick death even before reaching the summit. A second attempt by the High-Level Panel to strengthen early warning by creating a Deputy Secretary-General for Peace and Security was dropped entirely.[33] The outcome document of the 2005 Summit did resolve to develop early warning systems for natural disasters, in particular tsunamis, but early warning of man-made disasters was the subject for a more tepid call for the international community to support the United Nations in developing such a capability at some point in the unspecified future.[34]

On the post-conflict responsibilities of the Peacebuilding Commission, its role in planning and formulating strategy was more subtly undermined. The High-Level Panel had seen it as assisting in the "planning" for the transition from conflict to post-conflict.[35] The Secretary-General limited it to improving "United Nations planning for sustained recovery".[36] By the Summit, it was limited to "advis[ing] on and propos[ing] integrated strategies".[37] The Peacebuilding Support Office, meanwhile did not receive the requested twenty new staff or any new responsibilities beyond assisting and supporting the Commission by drawing upon existing resources within the Secretariat.[38]

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32 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› [World Summit Outcome].

33 High-Level Panel Report, *supra* note 26 at paras. 98, 293-294.

34 World Summit Outcome, *supra* note 32 at paras. 56(f), 138.

35 High-Level Panel Report, *supra* note 26 at para. 264.

36 In Larger Freedom, *supra* note 1 at para. 115.

37 World Summit Outcome, *supra* note 31 at para. 98.

38 *Ibid*. at para 104.

Far from being a new Trusteeship Council, then, the Peacebuilding Commission begins to look more like a standing pledging conference, one of the most important forms of coordination for donors that currently exists.[39] If it can succeed in sustaining attention on a post-conflict situation beyond the current limits of foreign policy attention deficit disorder, the Peacebuilding Commission will have achieved a great deal. It is less clear that this additional layer of coordination will assist in how these new resources are spent.

Problems of coordination tend to arise at three levels: (a) the strategic level (for example, the final status of Kosovo); (b) the operational level (for example, competing donor agencies in Bosnia); and (c) the national level (for example, getting international actors to sign onto a national development framework in Afghanistan). The problem with the Peacebuilding Commission proposal is that its establishment under the Security Council (or the Economic and Social Council) may see it fall somewhere between (a) and (b)—lacking the authority to challenge the Security Council in New York and lacking a field presence to ensure operational cohesion on the ground. Much will, of course, depend on how the proposed commission functions. If it acts as an operational body that can bring key stakeholders—importantly including the International Financial Institutions, troop contributors, donor governments, and national representatives—onto the same page in terms of the security, humanitarian, political, and economic priorities and sequencing for a territory, it may avoid the wasted resources seen in previous operations. At the very least if it can force the United Nations to speak with one voice on post-conflict

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[39] Stewart Patrick, "The Donor Community and the Challenge of Postconflict Recovery" in Shepard Forman & Stewart Patrick, eds., *Good Intentions: Pledges of Aid for Postconflict Recovery* (Boulder, CO: Lynne Rienner Publishers, 2000) 35 at 40-41. In the absence of funds that can be disbursed quickly to a recovery process, significant external resources typically arrive only after such a conference, which brings donor states, UN agencies, and the International Financial Institutions together with local representatives to evaluate proposed reconstruction plans. The relative transparency of these meetings reduces the temptation of donors to 'free ride' on the efforts of others. More subtly, by involving disparate actors in providing support for post-conflict recovery as a form of public good, the pledging conference encourages the notion of a "donor community", bound by certain ethical obligations towards the recovering state. Pledging conferences also enable donors to shape and publicize recovery plans jointly, which may increase domestic support for foreign assistance as part of an international effort. For recipients, pledging conferences offer the opportunity to focus the minds of donors on a crisis and to gain public assurances that some of their needs will be met. While these aspects are positive, pledging conferences often bear the trappings of political theatre. Donors may make grand gestures that in reality double-count resources previously committed to a country, or which cannot be delivered promptly. In addition, mediating different donor interests through a conference does not remove the problems caused by the inconsistency of those interests. Donors continue to avoid controversial areas like security sector reform, preferring to fund items that will gain recognition and prestige. Finally, despite the public nature of the pledges made, there is no consistent monitoring process to ensure that pledges are realistic and transparent.

reconstruction—rather than being represented variously by the departments and specialized agencies—it will have achieved a significant improvement. But the key component required is some body that is able to speak truth to power: unless the commission (or the proposed Peacebuilding Support Office) is able to advise the Security Council against dysfunctional mandates or unrealistic strategies it will not fulfil its lofty aspirations.

If it is to be successful, two additional coordination dynamics need to be addressed. The first is the problem of coordination across time. This embraces both the conflicting time-tables of internationals (diminishing interest and thus reduced resources after 18 to 24 months) and locals (increasing absorptive capacity and the ability to use resources most productively only after the crisis period has passed), as well as the tension between demands for quick impact and gap-filling projects versus the development of sustainable institutions. The second coordination dynamic is the emergence of local actors as an independent political force. Consultation through an instrument such as the Peacebuilding Commission would be helpful, but not if it complicates the more important consultative mechanisms on the ground that manage day-to-day political life in the post-conflict territory. The most important aspect of this second dynamic is, once again, clarity: clarity about who is in charge at any given time, but also clarity about who will be in charge once the attention of the international community moves on.

Evaluation and Exit Strategies

In his April 2001 report on the closure or transition of complex peacekeeping operations, UN Secretary-General Kofi Annan warned that the embarrassing withdrawal of peacekeepers from Somalia should not be repeated in future operations. "No Exit Without a Strategy", the report was called.[40] For the UN Transitional Administration in East Timor (UNTAET), elections provided the basis for transfer of power to local authorities; they also set in place political processes that would last well beyond the mission and the development assistance that followed. In Kosovo, where the UN operation was determinedly called an "interim" administration, the absence of an agreed end-state has left the territory in political limbo. Reflection on the absence of an exit strategy from Kosovo, following on the apparently endless operation in Bosnia and Herzegovina, led some ambassadors to the Security Council to turn the Secretary-General's phrase on its head: "No strategy", the rallying cry went, "without an exit."

East Timor presents two contradictory stories in the history of UN peace operations. On the one hand, it is presented as an outstanding success. In two and a half years, a territory that had been reduced to ashes after the 1999 referendum on independence held peaceful elections and celebrated independence. On the other hand, however, East Timor can be seen as a series of missed opportunities and

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[40] *No Exit Without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations*, Report of the Secretary-General, UN Doc. S/2001/394 (2001), online: United Nations ‹http://daccess-ods.un.org/TMP/3169153.html›.

wastage. Of the UN Transitional Administration's annual budget of over $500 million, around one-tenth actually reached the East Timorese. At one point, $27 million was spent annually on bottled water for the international staff—approximately half the budget of the embryonic Timorese government, and money that might have paid for water purification plants to serve both international staff and locals well beyond the life of the mission. More could have been done, or done earlier to reconstruct public facilities. This did not happen in part because of budgetary restrictions on UN peacekeeping operations that, to the Timorese, were not simply absurd but insulting. Such problems were compounded by coordination failures, the displacement of local initiatives by bilateral donor activities, and the lack of any significant private sector investment. When East Timor (now Timor-Leste) became independent, it did so with the dubious honour of becoming the poorest country in Asia.[41]

Evaluations of the UN operation in Cambodia (1992 to 1993) varied considerably in the course of the mission and have continued to do so with the benefit of hindsight. Prior to the 1993 election, prophecies of doom were widespread, with questions raised about the capacity of the United Nations to complete a large military and administrative operation.[42] Immediately after the election was held with minimal violence, Cambodia was embraced as a success and a model for future such tasks.[43] Subsequent events suggested that these initially positive evaluations were premature. Many commentators outside the United Nations now regard the UN Transitional Authority in Cambodia (UNTAC) as a partial failure, pointing to the departure from democratic norms in the 1997 coup. Within the United Nations, UNTAC continues to be regarded as a partial success. The important variable is how one views the political context within which UNTAC operated. If the purpose of the mission was to transform Cambodia into a multiparty liberal democracy in 18 months, it clearly did not succeed. If, however, one takes the view that Hun Sen—who had led Cambodia from 1979 and later seized power from his coalition partners in a coup four years after the 1993 elections—was always going to be the dominant political force in Cambodia, and that the purpose of the mission was to mollify the exercise of that power through introducing the language of human rights to Cambodian civil society, fostering the establishment of a relatively free press, and taking steps in the direction of a democratic basis for legitimate government, the mission was indeed a partial success.

Two lessons were (or should have been) learned in Cambodia. The first was to underscore the fragility of complex peace operations. Even though UNTAC was, at the time, the largest and most expensive operation in UN history, it still faced enormous difficulties in bringing about a fundamental change in the psyche of the country. Without peace and security, and without the rule of law, democratic

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41 "Getting Ready for Statehood" *The Economist* (13 April 2002) 64.

42 See, e.g., William Branigin, "U.N. performance at issue as Cambodian vote nears" *Washington Post* (20 May 1993) A25.

43 "A UN success in Cambodia" *Washington Post*, (18 June 1993) A24.

processes may in themselves be unsustainable. Providing these foundations, if it was possible at all, would have required a more sustained commitment to remaining in Cambodia after the elections. The counterfactual is hypothetical as there was no willingness before or after the vote for UNTAC to remain beyond the completion of its mandate.

Secondly, the aftermath of the UN engagement in Cambodia—the 1997 coup, the flawed elections in 1998—began to raise questions about the relative importance of democracy. Though it may not be directly traceable to Cambodia, a shift began to occur in the rhetoric that saw "good governance" sometimes replace democracy in the peacebuilding and development jargon.[44]

Clarity about the objectives of an operation, then, may be helpful—even if it requires a retreat from the rhetoric that justifies the expenditure of resources for a peace effort. Often it will not be possible—even if it were desirable—to transform a country over the course of eighteen months into, say, Canada. Instead, perhaps the most that can be hoped for is to create the conditions in which a vulnerable population can start a conversation about what kind of country they want theirs to be.

CONCLUSION

In his book *In My Father's House*, Kwame Anthony Appiah notes that the apparent ease of colonial administration generated in some of the inheritors of postcolonial nations an illusion that control of the state would allow them to pursue as easily their much more ambitious objectives. Once the state was turned to the tasks of massive developments in infrastructure, however, it was shown wanting: "When the postcolonial rulers inherited the apparatus of the colonial state, they inherited the reins of power; few noticed, at first, that they were not attached to a bit."[45]

Given the fraught history of so many of the world's states, it is not remarkable that some states suffer basic crises in their capacity to protect and provide services for a population—on the contrary, it is remarkable that more do not. As indicated in the introduction, discussion of such institutional crises frequently suggests that, when a state "fails", power is no longer exercised within

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[44] "Good governance" was an intentionally vague term that spoke less to the formal structures of government than how a state is governed. The term "governance" itself emerged within the development discourse in the 1990s as a means of expanding the prescriptions of donors to embrace not merely projects and structural adjustment but government policies. Though intergovernmental organizations like the World Bank and the International Monetary Fund are technically constrained from referring to political processes as such, "governance" provides a convenient euphemism for precisely that. See, e.g., Goran Hyden, "Governance and the Reconstitution of Political Order" in Richard Joseph. ed., *State, Conflict and Democracy in Africa* (Boulder, CO: Lynne Rienner, 1999) 179.

[45] Kwame Anthony Appiah, *In My Father's House: Africa in the Philosophy of Culture* (New York: Oxford University Press, 1992) at 266.

the territory. In fact, the control of power becomes more important than ever—even though it may be exercised in an incoherent fashion.

Engagement with such states requires, first and foremost, understanding the local dynamics of power. The much-cited Weberian definition of the state as claimant to a monopoly of the legitimate use of force is less a definition of what the state *is* than what it *does*. The legitimacy and sustainability of local power structures depends, ultimately, upon local actors. Certain policies can help—channelling political power through institutions rather than individuals, and through civilians rather than the military; imposing term limits on heads of state and government; encouraging and regulating political parties—but their implementation depends on the capacity of local leaders to submit themselves to the rule of law, and local populations to hold their leaders to that standard.

For international actors, a troubling analogy is to compare engagement with weak states to previous models of trusteeship and empire. Current efforts at state-building attempt—at least in part—to reproduce the better effects of empire (inward investment, pacification, and impartial administration) without reproducing its worst features (repression, corruption, and confiscation of local capacity). This is not to suggest nostalgia for empire or that such policies should be resurrected. Only two generations ago, one-third of the world's population lived in territory considered non-self-governing; the end of colonialism was one of the most significant transformations in the international order since the emergence of sovereign states. But the analogy may be helpful if it suggests that a realistic assessment of power is necessary to formulate effective policies rather than effective rhetoric.

States cannot be made to work from the outside. International assistance may be necessary but it is never sufficient to establish institutions that are legitimate and sustainable. This is not an excuse for inaction. Action is necessary, if only to minimize the humanitarian consequences of a state's incapacity to care for its vulnerable population. Beyond that, however, international action should be seen first and foremost as facilitating local processes, providing resources and creating the space for local actors to start a conversation that will define and consolidate their polity by mediating their vision of a good life into responsive, robust, and resilient institutions.

Introducing New Orders and Modes: Lessons from Machiavelli

CATHERINE LU*

> [N]othing brings so much honor to a man rising newly as the new laws and the new orders found by him.
>
> Machiavelli, *The Prince*[1]

Simon Chesterman has provided us with a rich discussion of the problems and prospects of United Nations post-conflict reconstruction efforts in a variety of contemporary cases involving violent conflict or widespread political, social and economic dysfunction or collapse. In reading his advice to UN state-builders, I was reminded of another civil servant of the early sixteenth century, a Florentine who gained fame or, more accurately, infamy with the posthumous publication of *The Prince*. My comments will draw on Machiavelli's insights about introducing "new orders and modes"[2] in contexts of post-conflict reconstruction, prompting the question of whether United Nations officials and bureaucrats involved in such endeavours might benefit from having, besides the usual compilation of United Nations reports, protocols and manuals, a copy of Machiavelli's infamous tract on their desks.

The Prince deals explicitly with the founding of new political orders, and Machiavelli notes that "nothing is more difficult to handle, more doubtful of success, nor more dangerous to manage, than to put oneself at the head of introducing new orders."[3] Contemporary cases confirm the normality of failed political foundings; as Chesterman notes, "around half of all countries that emerge from war lapse back into it within five years."[4] Once one appreciates the extraordinary difficulties that attend post-conflict reconstruction processes, and acknowledges that the outcomes of UN peacebuilding efforts through the 1990s have hardly been encouraging, one might be forgiven for asking why the United Nations must assume any role at all in the post-conflict reconstruction of states. Could the UN, for example, defend a policy of nonintervention or abandonment?

This resolution to the problems of post-conflict reconstruction is morally indefensible and practically misguided for several reasons. Morally speaking, it

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1 Niccolò Machiavelli, *The Prince*, 2nd ed. trans. by Harvey C. Mansfield (Chicago: University of Chicago Press, 1998) at 103-104. All subsequent references to Machiavelli are taken from this text.

2 *Ibid.* at 23

3 *Ibid.* at 23

4 Simon Chesterman, "From State Failure to State-Building: Problems and Prospects for a United Nations Peacebuilding Commission," (2006) 2:1 J. Int'l L. & Int'l Rels. (current volume), at 155. All subsequent quotations by Chesterman refer to the article in the current volume.

would be difficult for the United Nations to follow a policy of nonintervention or abandonment without undermining the legitimacy of the society of states itself. This is because state failure, collapse or dysfunction do not just happen overnight; they do not develop in an international social, political or economic vacuum, but typically involve a wide-ranging set of international factors and conditions, such as the historical legacies of colonialism and Cold War politics, or the impact of the global economic structure. The legitimacy of an international order of sovereign states is dependent on how that order deals with state failures and dysfunctions that are not isolated expressions of national deviance, but typically conditions generated or mediated by the development of that international order itself.[5] Furthermore, a policy of leaving failed states or post-conflict societies to fend for themselves would negate the very idea of international society or community, which it must surely be a duty of the United Nations to protect and promote.

Practically speaking, disengagement is not really possible; under contemporary world conditions, the interconnection between international and domestic political structures means that whatever the UN does or does not do will have some impact on any given state's reconstruction efforts. Nonintervention thus ought not to be confused with neutrality with respect to outcomes. This means that the answer to the inadequacies of international agents, institutions and mechanisms for post-conflict reconstruction cannot be that these international efforts can be abandoned, but that they must be *transformed*. The United Nations therefore cannot avoid doing the hard work of developing an account of the appropriate normative framework principles for post-conflict reconstruction, of devising the appropriate international institutions, and of cultivating the right kinds of international and domestic state-builders, to assist societies emerging from state failure, collapse or dysfunction.

Machiavelli supports active engagement as expressive of an ideal of human autonomy, arguing that while it may seem that human affairs are wholly slave to chance, in order "that our free will not be eliminated, I judge that it might be true that fortune is arbiter of half of our actions, but also that she leaves the other half, or close to it, for us to govern."[6] He likens fortune to

> one of these violent rivers which, when they become enraged, flood the plains, ruin the trees and the buildings, lift earth from this part, drop in another … And although they are like this, it is not as if men, when times are quiet, could not provide for them with dikes and dams so that when they rise later, either they go by a canal or their impetus is neither so wanton nor so damaging. It happens similarly with fortune, which demonstrates her power where virtue has not been put in order to resist her and therefore

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5 For more on this theme, see my forthcoming book: Cathering Lu, *Just and Unjust Interventions in World Politics: Public and Private* (UK: Palgrave Macmillan, 2006).

6 *Supra* note 1 at 98.

> turns her impetus where she knows that dams and dikes have not been made to contain her.[7]

In a Machiavellian spirit, we would acknowledge that while there can be no guarantee for successful outcomes, the United Nations, with the aid of its member states and global civil society organizations, must nevertheless assume responsibility for helping to build the dikes and dams—or background principles, conditions and contexts—that would alleviate the worst effects of state failure or dysfunction, and positively facilitate the development of "responsive, robust, and resilient" domestic agents and structures of governance in the reconstruction phase.[8]

In his advice to those engaged in the risky business of building new orders and modes, Chesterman echoes Machiavelli in emphasizing the "importance of local context—history, culture, individual actors."[9] Knowledge of the local culture, history and dynamics of power[10] and "understanding, sensitivity and respect for local traditions and political aspirations"[11] are crucial for effective transitional administration. This emphasis on context leads both Chesterman and Machiavelli to warn against the idea that one can devise sure-fire strategies of state-building that would fit all cases. Indeed, one would be disappointed if one looked to *The Prince* for lessons in the form of step-by-step guidelines for producing successful political outcomes. Although the work is full of generalized prescriptions and draws on rich historical examples, the astute reader notices that *The Prince* cannot be read to offer a point-by-point manual for state-building, since much of the advice turns out to be inconsistent.[12] There is no recipe that can guarantee political success—indeed, according to Machiavelli, no political actor should "ever believe that it can always adopt safe courses; on the contrary, it should think it has to take them all as doubtful."[13] Similarly, Chesterman warns that his discussion of strategy "should not be misunderstood as suggesting that there is some template for governance that can be applied across cases."[14] A reliance on familiar templates or signifiers of legitimate and accountable government, such as elections and criminal prosecutions, without an appreciation of the local context and background conditions, leads too often to hollow achievements. Thus Chesterman notes that "staging elections in conflict

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7 *Ibid.* at 98-99.

8 *Supra* note 4 at 175.

9 *Supra* note 1 at 2.

10 *Ibid.* at 7.

11 *Ibid.* at 12.

12 See also Angelo M. Codevilla, "Words and Power," in Machiavelli, *The Prince*, trans. by Codevilla (New Haven: Yale University Press, 1997), at xxvii.

13 *Supra* note 1 at 91.

14 *Supra* note 4 at 168.

zones has become something of an art form, though more than half a dozen elections in Bosnia have yet to produce a workable government."[15]

A contextualist approach to problems of state-building naturally also draws attention to the gaps between professed ideals and experienced realities. In this vein, Chesterman argues that instead of "grand theories", the UN needs "workable strategies and tactics,"[16] and "that a realistic assessment of power is necessary to formulate effective policies rather than effective rhetoric."[17] This focus on effectiveness of course reminds us again of Machiavelli's demand for "effectual truth", and his criticism that "many have imagined republics and principalities that have never been seen or known to exist in truth; for it is so far from how one lives to how one should live that he who lets go of what is done for what should be done learns his ruin rather than his preservation."[18] Chesterman similarly counsels against setting unrealistic and locally unsustainable goals: "Often it will not be possible—even if it were desirable—to transform a country over the course of eighteen months into, say, Canada. Instead, perhaps the most that can be hoped for is to create the conditions in which a vulnerable population can start a conversation about what kind of country they want theirs to be."[19]

One of the necessary background conditions emphasized by both Chesterman and Machiavelli is security. Although the ideal state may be characterized by its adherence to democratic procedures, human rights, the rule of law, and the provision of social services, no meaningful political development towards this ideal is possible in the absence of security. Chesterman argues that the UN needs to develop "a rapidly deployable civilian police capacity," warning that the problem of lack of troop commitment, or policing commitment, makes all other efforts much more doubtful of reaching their mark. Similarly, Machiavelli argued that "all the armed prophets conquered and the unarmed ones were ruined."[20] The point here is not that overwhelming force can dictate political success, but that nothing can be achieved without it.

Machiavelli's emphasis on the importance of power and his critique of moral idealism account for popular portrayals of him as a cynical realist who dismissed the practical relevance of all moral constraints and glorified the nearly unbridled pursuit of power. The civil servant, who was himself tortured after a regime change, most infamously discussed "cruelties badly used or well used,"[21] and declared that "it is necessary to a prince, if he wants to maintain himself, to learn to

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15 *Ibid.* at 165.

16 *Ibid.* at 167.

17 *Ibid.* at 175.

18 *Supra* note 1 at 61.

19 *Supra* note 4 at 174.

20 *Supra* note 1 at 24.

21 *Ibid.* at 37.

be able not to be good, and to use this and not use it according to necessity."[22] Furthermore he seems to show no respect for the rule of law in arguing that a "prudent lord … cannot observe faith, nor should he, when such observance turns against him, and the causes that made him promise have been eliminated."[23] Interestingly, Chesterman finds this Machiavellian advice being followed in some contemporary cases: "the international missions in Bosnia and Kosovo subscribed to the vast majority of human rights treaties and then discovered *raisons d'état* that required these to be abrogated."[24] Does Machiavellian realism necessarily lead to the forfeiture of all moral ideals and principles?

I think this conclusion is unsupportable if one reads Machiavelli as a moral contextualist, rather than a moral cynic. His arguments in *The Prince* pertain to political action in the highly nonideal circumstances that define moments of political founding. Theorizing in a nonideal context must pay attention to effectiveness and the consequences of policies. It is striking that John Rawls, the most distinguished liberal political philosopher of the twentieth century, draws similar conclusions in his account of the role of nonideal theory. According to Rawls, although ideal theory articulates our ultimate aims and goals and thereby provides a reference point for nonideal theory, the latter "asks how this long-term goal might be achieved, or worked toward, usually in gradual steps. It looks to policies and courses of action that are morally permissible and politically possible as well as likely to be effective."[25] Echoing Machiavelli, Rawls argues that the challenge of establishing just or decent domestic political institutions "calls for political wisdom, and success depends in part on luck," and that it is "essentially a matter of political judgment and depends upon a political assessment of the likely consequences of various policies."[26]

The importance of political judgement draws our attention to the agents of political change. Chesterman observes that in contexts of post-conflict reconstruction, "the remedy will depend upon variables that are political rather than institutional."[27] In the nonideal circumstances of post-conflict reconstruction, that are mainly defined by weak, defective or inoperable institutions, the virtues and defects of individuals assume greater political significance. Rawls thus describes the "ideal of the statesman": "the statesman is an ideal, like that of the truthful or virtuous individual." Statespersons "manifest strength, wisdom, and courage," and "guide their people in turbulent and dangerous times."[28] The ideal of the

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22 *Ibid.* at 61.

23 *Ibid.* at 69.

24 *Supra* note 4 at 165.

25 John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), at 89.

26 *Ibid.* at 93.

27 *Supra* note 4 at 157.

28 *Supra* note 25 at 97.

statesperson, according to Rawls, includes "moral elements."[29] Such a leader must look to safeguarding the permanent legitimate interests of a well-ordered people, and be guided by the overall aim of bringing about "a world in which all peoples accept and follow the (ideal of the) Law of Peoples."[30] Even on Rawls' account, however, cruelty, in the form of direct bombings of civilians in times of war, may be well-used, if it is necessary to defeat a greater evil.[31] It is in this spirit that one should interpret Machiavelli's advice on cruelty; acutely aware of the dangers of all political action in turbulent times, he observes, "in the order of things it is found that one never seeks to avoid one inconvenience without running into another; but prudence consists in knowing how to recognize the qualities of inconveniences, and in picking the less bad as good."[32]

To recognize accurately the "qualities of inconveniences," the astute political leader must also be able to gather accurate information about the local context. Machiavelli observes that a wise prince must avoid flatterers, and "should be a very broad questioner, and then, in regard to the things he asked about, a patient listener to the truth; indeed, he should become upset when he learns that anyone has any hesitation to speak it to him."[33] In a similar vein, Chesterman argues that the UN Peacebuilding Commission must be "able to speak truth to power: unless the commission (or the proposed Peacebuilding Support Office) is able to advise the Security Council against dysfunctional mandates or unrealistic strategies it will not fulfil its lofty aspirations."[34]

By now it should be apparent that sensitivity to context must translate into a degree of versatility in the ideal state-builder. Machiavelli observes that political founders typically come to ruin because they do not change their "mode of proceeding."[35] The Machiavellian prince must "know well how to use the beast and the man," and how to use different beasts, such as the lion and the fox.[36] In effect, the skilful political leader must have a versatile nature, and be able to adapt to changing contexts, but according to Machiavelli, few leaders may

> be found so prudent as to know how to accommodate himself to this [variability], whether because he cannot deviate from what nature inclines him to or also because, when one has always

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29 *Ibid.* at 98.

30 *Ibid.* at 89.

31 Rawls is highly critical of the bombing of Dresden in February 1945, and the fire-bombing of Japanese cities and atomic bombings of Hiroshima and Nagasaki (*supra* note 25 at 99-101).

32 *Supra* note 1 at 91.

33 *Ibid.* at 95.

34 *Supra* note 4 at 172.

35 *Supra* note 1 at 100.

36 *Ibid.* at 69.

> flourished by walking on one path, he cannot be persuaded to depart from it. And so the cautious man, when it is time to come to impetuosity, does not know how to do it, hence comes to ruin: for if he would change his nature with the times and with affairs, his fortune would not change.[37]

Thus "when fortune varies and men remain obstinate in their modes, men are happy while they are in accord, and as they come into discord, unhappy."[38]

It is an open question whether the modern bureaucratic culture in which United Nations officials are embedded—with its standard operating procedures and institutional constraints—is capable of producing the great statespersons that Rawls, Machiavelli and Chesterman all recognize are needed for successful political action in turbulent times of transition.[39] Rawls argues that the "failure of statesmanship rests in part on and is compounded by the failure of the public political culture."[40] Although he is more concerned with failures that involve the neglect of moral constraints in times of war, his arguments about the importance of contextual political judgment in nonideal conditions could also support a critique of the insensitivity to context produced by the excessive rigidity of procedures and norms that characterizes modern bureaucratic institutions.

Machiavelli makes clear that political foundings constitute the most difficult and thereby the greatest of political achievements: "When these things have been founded well and have greatness in them, they make [the founder] revered and admirable."[41] The Machiavellian prince is driven not only by instincts of survival, but also by the desire to achieve such glory. Perhaps the United Nations, in taking on the tasks of post-conflict state-building, seeks some of that glory. In contemporary world conditions, as Chesterman has observed, successful state-building requires the joint coordinated efforts of international and domestic actors, not to mention global civil society actors; thus, the pursuit of such glory cannot be a zero-sum game. Of course, Chesterman is right that states "cannot be made to work from the

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37 *Ibid.* at 100.

38 *Ibid.* at 101.

39 I thank Rory Stewart for bringing out this point.

40 *Supra* note 25 at 102.

41 *Supra* note 1 at 104.

outside,"[42] and that international actors are never sufficient for establishing legitimate and sustainable domestic institutions. Still, it may seem that even to play its supportive role effectively, the United Nations will need its share of Machiavellian princes.

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42 *Supra* note 4 at 175.

The UN at Sixty: Celebration or Wake?

Transcript of the JILIR Conference: UN at 60
Closing Session

Participants: Kenneth Abbott, Jutta Brunnée, Martha Finnemore, Diego Garcia-Sayán, Paul Heinbecker, Stephen Toope

Stephen Toope:

We are going to start by asking the panel what they think we can learn from the various processes that led up to the recent UN Summit and its Outcome Document. Just to remind you, we have already discussed some of the processes today, including the International Commission on Intervention and State Sovereignty (ICISS), a government sponsored but independent commission. We also discussed internal UN reform discussions, the High Level Panel Report, the Secretary General's response and subsequent negotiations. The questions underlying this are: Why did some ideas succeed and many others fail, and what can we learn from this? What processes need to be engaged now so that we can move forward with some hope of success?

Diego Garcia-Sayán:

One possible answer is that it is very difficult to change and to strengthen a multilateral organization like the UN in a context of broad global disequilibrium because there is a tendency for distrust to prevail between the parties. For instance, the proposal made by the International Commission regarding the responsibility to protect made the very important point that the veto would not be always exercised in a context in which there is a clear majority intention to intervene to protect, in the context of genocide or gross human rights violations. That proposal was maybe unrealistic within this context of distrust between the parties; it would not succeed and did not succeed. At the same time this question also has to do with the use of force. How will force be used in difficult contexts where, as we have heard in the last panel, it is very difficult to answer the question of whether the decision to intervene in the context of genocide or gross human rights violation should be taken, be implemented? With what equipment? With what logistical and economic resources? How will it work in a context in which countries are very reluctant to send troops; in a context in which it is not only a question of peace enforcement but also peace building, which involves the military, the police and civilians? In the specific political context of this global disequilibrium, this is a question that still remains to be discussed.

Kenneth Abbott:

There are three characteristics of the processes leading up to the Summit that are unusual and may have contributed to its outcome. I don't think we understand any of these features all that well at the moment. First, this was a very extensive normative process. The documents leading up to the Summit are full of the reiteration of norms, changes of norms, calls for the development of new norms, the adoption of norms that have been generated in other places, and so on. And yet, this was almost entirely a non-state process. The High Level Panel was created by the

Secretary General and made up of private experts. The Secretary General himself is a non-state actor of a different sort. The Millennium Project, which produced suggestions for norms on development, was chaired by an academic. So this was completely different from treaty making, completely different from customary international law-making through state practice, completely different from G8 decisions, completely different from all the legal positivist methods of rule-making. Query: what is going to be the effect of this process? I don't think we understand it. It could have long-term effects in terms of reconceptualizing interests and identities. In the short-term it could lead states to push back, regardless of the content.

The second characteristic of this process is that it looks like what I would call a constitutional convention, in the sense that at one moment they took on the full range of issues and norms, the full range of UN programs, all the principal organs, and many other institutions. That's not an easy thing to do within a country, as Machiavelli famously told us, and neither is it an easy thing to do in an international organization. I can think of two methods that would make it work; I'm not sure that either was applicable here. One would be to create a sort of package deal, in which you include something for everybody and are able to get consensus on the constitution as a result. The other, which we understand much less well, would be to go through the process at what is sometimes called a 'constitutional moment'. The millennium may have been a constitutional moment, but it's not clear that this was a constitutional moment. We do not understand clearly when such moments come around, or whether you can 'create' them.

The third characteristic is that this whole process, and even the Summit Outcome Document, did something that other UN summits have also done, most famously at the 1992 Earth Summit with the creation of the concept of 'sustainable development'. That is, they took concepts that were previously thought of as belonging to separate fields and brought them together as one integrated concept. 'Human security' does the same thing. And the Summit was the apotheosis of this approach—it took all of these issues and said they are really all part of 'collective security'. Issues that different organizations work on, different national ministries, different epistemic communities, different academic disciplines, were all lumped together in the new understanding of security. It makes it quite hard to deal with the result.

I'm not sure what the lessons are, but I think these are all characteristics of the Summit process that influenced the outcome, and may have continuing influence.

Martha Finnemore:

One of the notable things about our conversation today, and about these processes we have been discussing, is how detached they are from domestic politics. Actors pushing these agendas understand themselves to be international or transnational, and function at that level. Connections down into the domestic politics, particularly of powerful member state countries, are difficult for the UN. This is clear from conversations about the UN in US domestic politics. Neither the institutional mechanisms, nor, I would argue, the mindset, exist in the UN to build those roots into domestic politics and national publics. If you want to have meaningful UN

reform that will have broad-based support in countries that have been active and engaged—or countries that one wants to be active and engaged—in the UN, you need to build a constituency for this.

There are some mechanisms to do this. There has been an interesting initiative to connect parliamentarians to UN operations. Ann Florini at the Brookings Institution has been involved in this. There have been other initiatives as well. Building these kinds of connections between the UN and publics in member states would have a couple of effects. First, it would build support for international-level governance within national-level governing bodies. This is obviously useful because, ultimately, the resources and the mandate at the international level have to have some roots at the national level. So international governance needs national support, but the process flows both ways. You also want to spread some of these international norms and educate these domestic actors about what is in it for them. How would you reshape a national interest? Well one way to do that, if you were the UN, is to become engaged with, and converse with national-level political actors of consequence.

Paul Heinbecker:

I have a different take on some of this altogether. First of all, why did some ideas pass and some fail? Some were better than others. For one thing, they were timelier. I think it is fair to say that the two things that people point to as having been successes, the responsibility to protect and the Peace Building Commission 'flew in' under the fratricidal warfare that was going on with respect to all of the other issues, and came out the other end more or less untouched. The state at the beginning of the responsibility to protect was the government of Canada; it created the ICISS. That government just didn't put that report out on the table; it maintained an interest in it; it set up an office to promote it. I went to the UN, and I promoted it for four years. My successor, Allan Rock, came and promoted it, and when the crunch time came in the negotiations, the Canadian Prime Minister phoned other leaders and persuaded them that they should endorse this idea. So there was a very strong role being played there by the government of Canada and virtually none of the other issues had that kind of support. I think that that is another reason why it passed.

I guess that the second point is that Bolton, in his 750 amendments, caused a lot of fratricidal effects. Things that the US wanted they didn't get because they made it pretty clear to everybody else that the things *they* wanted the US was not going to agree to. So, that kind of fratricidal warfare probably played into our hands a little bit. The last thing I'll say is for those who are seeing the glass 5 per cent full and 95 per cent empty—that is basically how I see it—remember the Brahimi Report experience. For those who followed it, it was a report on how to make peacekeeping work. And in fact, in the first go-round we didn't get very far on it. There was all kind of opposition. But, about two years later, when we looked back and did the tally, we had managed to pass just about all of it. So maybe there is a lesson there also for this issue, although the agenda here was larger.

Kenneth Abbott:

I think we should also talk about another broad issue: what do we do now? It's not clear that we have talked about that very much. I think we need a diagnosis of what happened on the way in, and of what were the dominant characteristics of the process—whether it was last-minute bargaining or the nature of the norms—before we can decide how to go forward. We certainly haven't gotten consensus on what that diagnosis should be.

A couple of points I would like to make in terms of how we move forward. First, the preparatory documents for the Summit—if you read all of them and listened to all of the discussion today—they are all about the UN. They were supposed to be about the UN—that was their mandate. But if you read other documents on UN reform that have been issued in the US—for example, there was the Congressionally mandated Gingrich-Mitchell commission on UN reform, and Representative Hyde has a bill on UN reform—you see that these people, who are influential opinion leaders and legislators, see the UN as one forum, one organization, through which the US can work in order to achieve its national interests and promote its values. There might also be other organizations that aren't part of the UN system, there may be bilateral means of pursuing these interests, there are the infamous 'coalitions of the willing', there has been discussion of creating a group of 20, and so on.

My impression from these documents is that the High Level Panel and others working on the Summit didn't give adequate attention to the other institutions that are out there. Partly to deal with the very different US perspective on this, and partly because it's a good idea, we need to think of global governance as more than just the UN. One way forward would be to approach the whole problem as what I would call an exercise in 'networked governance'. By and large, coming out of the Summit, the UN organs don't have a strong mandate to do very much in a centralized, organized way. But there is plenty of room in those documents for liaising with other organizations, with state representatives and legislators, with people from specialized ministries within states and the specialized agencies they deal with, to figure out how to move these norms forward.

Second, this is especially true because of the way these norms were formulated, by lumping disparate issue-areas together. The High Level Panel did quite a good job of rationalizing that formulation, but we don't fully understand all of these normative interconnections. In the short term, I would like to see institutionalized some processes of learning and dialogue through which we can begin to investigate what it means to bring all these issues together and treat them all as security issues. This dialogue should involve non-state actors on a broad scale. It should include civil society and it should involve the academic community. If we think the High Level Panel and its formulation of norms were good things, then we ought to have more conferences like this, and we ought to institutionalize other ways to figure out what this all means and how we can pursue it.

Jutta Brunnée:

Do any of the other panellists want to pick up on this before we move forward?

Diego Garcia-Sayán:

The resolution adopted in September says that countries are prepared to take collective action in a timely and decisive manner. That raises two levels of questions. First, will the issue be taken up by the Security Council at all, in a context in which there is great reluctance by its members to act in that sort of situation because this may lead to the involvement of the country that takes part in the decision? Second, the crucial question is, if we are reading closely the wording 'in a timely and decisive manner', this means that the UN is prepared, or should be prepared, to intervene in that way, which requires more than has been done in successful operations. I took part in the operation in El Salvador in the 1990s, and it succeeded mainly because of the will of the El Salvadorians, the guerrillas and the government, to achieve peace. Of course, the UN was crucial in that process, but without such a decision from the Salvadorians, the success of more than 2,000 people in a mission combining the military, civilians and police in such a small country would not have occurred. In a context in which there is genocide, gross human rights violations, in which there is evidently a lack of political will to achieve a peaceful agreement, much more is needed from the UN, including very well trained and equipped military personnel, police and civilians to implement tribunals, guaranteed public security and so on. My main concern here is *how* the decision is made, and whether there is a veto or not. Maybe one way to follow up on what has just been said, would be to promote and sponsor a strong coalition between certain countries and non-state actors to create some sort of political pressure so that the appropriate decision is made. Maybe that's the way to follow up this specific case that we are discussing.

Jutta Brunnée:

Paul, did you want to offer a guess about how we get the glass from 5 per cent full to a little bit fuller, to pick up on your earlier point?

Paul Heinbecker:

One of the lessons that I draw from this experience is that we can't seem to make these major transformations absent extraordinary motivation, such as having suffered 60 or 70 million people killed beforehand in war. In other words, short of war, the system is just not going to respond because there is just no consensus that things need to be changed in such a dramatic way. I think the lesson I've drawn from this is that we should be disaggregating what needs to be done. We should be focusing on a few things, and we should be trying to get some change on those things that are manageable. I think those are the lessons I draw from the success with R2P and the Peace Building Commission. Admittedly they are both timely ideas, and the lesson is that these specific innovations can be accomplished if you put the resources to it, if the intellectual underpinning is reasonably good, and if you are persistent. Change across the board, though, is just too difficult.

Jutta Brunnée:

How do we bring non-state actors into the system 'in all their complexity', as Philip Alston put it yesterday? He placed great emphasis on accountability issues, and when he talked about disaggregating non-state actors he seemed to suggest that different solutions, different strategies, may be needed depending on the actor we

are dealing with, be they non-governmental organizations, transnational corporations, private armies or terrorists. At the other end of the spectrum, he said less about the benefits of law that might accrue to non-state actors. As a human rights lawyer, I assume he took these for granted, but it may be worth talking a bit about what opportunities there are for giving greater standing to non-state actors.

Martha Finnemore:

Let me make two quick points. One is that I think you would get fundamental political and academic disagreement about whether global governance of this kind is desirable. So, before we start doing all this, let's think about why we are doing it. It is not clear to me that having an international legal system that is going to deal directly with all non-state actors in all their many forms is a good thing. Listening to Philip Alston yesterday, I suspect that international lawyers and international relations people would ask this question in a different way and with different goals. The difference might be one of intellectual stance, but I think that it probably has normative implications. Alston, as I understood his remarks, was interested in the legal status of these things, and in the legal treatment of them. International relations scholars would probably ask much more basic questions like: Who are these actors? How many of them are there? What are they doing? What kind of capacities do they have? For example, with private security companies, the answer is 'we don't know'. The US government does not know how many there are. Certainly in that arena there would be huge disagreement about whether you would want to develop international law and apply it to deal with those actors.

Diego Garcia-Sayán:

One question is whether there is some possibility that the UN might play a central role in the international arena. I am not too optimistic about that possibility, but I am sure that the UN could be more relevant than it is right now. If there is a strategy of inclusiveness with the main non-state actors it is very difficult to find homogenous and unique criteria. Maybe one of the many criteria that we can use is to focus on the difference between those non-state actors that are linked to work under a legal framework and operate openly (for example, NGOs, transnational corporations, et cetera), and those non-state actors that act against the legal system, like terrorist groups. Of course there may be some groups and organizations that live in a sort of grey zone. For example, some guerrilla movements in some countries after some years become the government; maybe they were illegal, but they were never terrorists, they were just technically on the 'wrong' side at that moment. In the international system we have had, and continue to have, some areas in which non-state actors play a decisive role, for instance, the ILO, where entrepreneurs, patrons and trade unions play essential roles in the decision-making process.

Yesterday, Philip Alston mentioned the norms adopted by the sub-commission several years ago to regulate business and corporations. Maybe we can adopt two levels of analysis. First, what should be the role of some of these 'legal' non-state actors in the reform of the UN system? For instance, what should be the role of corporations and trade unions in redesigning the organization and objectives of the economic and social council (ECOSOC)? The decision that George Soros may be making today about any matter is much more important than all the decisions

made in a year by ECOSOC. Be sure of that. So the question of to what extent should we begin to involve these actors, opens a lot of further questions.

Second, specifically in the area of human rights, of course, it is a key matter to discuss whether oppositional armed groups or terrorist groups may be held accountable in regional or UN human rights monitoring bodies. I think this is very difficult, not only legally, but even as a practical matter. How can they be sent a letter, a fax or an email? Where they are located? How are they to be held legally responsible as official actors? But of course, in areas such as the responsibility of corporations regarding human rights, there have been already some very important steps taken that can be followed up, and, if the norms exist, where the world community through the UN expects some clear accountability from these kinds of corporations.

Kenneth Abbott:

I think you are right that Professor Alston was mainly talking about the status of non-state actors. I understood him to be talking much of the time about non-state actors as targets, as it were, as actors whose behaviour one wants to influence with mechanisms of global governance and international law. I know less about the international legal status of multinational corporations, but as many of you know there are some fascinating exercises in global governance aimed specifically at bringing international standards to bear on multinational corporations or other non-state actors. Professor Alston mentioned some of those. The UN Global Compact is a very prominent initiative of the Secretary General. The OECD has its Guidelines for Multinational Enterprises. The ILO also has guidelines for multinational enterprises. There are even guidelines for the human rights practices of private security companies. Most of these standards have been formulated in multi-stakeholder processes, in which various non-state actors, often including the business groups themselves, have input into the formulation of the norms and the administration of the system. I think this is going to form a much larger part of the global governance universe.

In terms of the participation of non-state actors, rather than non-state actors as targets, we have traditionally talked about this in terms of consultative status with ECOSOC or other kinds of formal participation. But there are also a number of remarkable public/private partnerships, some of which are formal organizations, but many of which are informal collaborative bodies, doing incredible work. In international health, for example, partnerships work on everything from polio eradication to the development of vaccines. And there are similar initiatives on the environment and development. In a world where norms are being clumped together and we have to think about the interactions among the disparate fields, this type of model is a natural part of the networking approach I discussed before.

One last point on accountability. It's been clear all day that if you want to guarantee a laugh in this crowd, all you have to say is 'John Bolton'. I have no more positive feelings about Bolton than those of you who have been laughing at the name. However, one should not underestimate Bolton intellectually. He has written some penetrating articles in which he raises serious questions about the validity of global governance. This might be diametrically opposed to what I just suggested,

but I would single out one point from the many he has made. That is that much of global governance is an elite process. You look at the High Level Panel, and you see an awful lot of norms formulated by what is sometimes called an alliance between experts and true-believers. The average person is not consulted.

Apart from the accountability of any individual non-governmental organization, I think we need to worry about the democratic legitimacy of the whole process and figure out responses to this question, instead of just trying to brush somebody like Bolton aside. What does civil society represent, who does it represent, is it taking a 'second bite of the apple' internationally, having lost the fight to influence governments through domestic democratic processes, as Bolton alleges? Bolton says that allowing NGO's to participate at the international level actually undercuts democratic governance in states, because it gives some actors a second bite at the apple. I don't know the answer to all these questions, but I think we have to confront them and not simply dismiss the messenger.

Jutta Brunnée:

Paul, you spoke earlier about disaggregating the issues to focus on something that is doable. Do you see anything in the non-state actor context that you would consider particularly important and doable?

Paul Heinbecker:

I have one very narrow comment to make on non- state actors and that is to be careful what you wish for. I've seen the National Rifle Association be very effective in New York at the UN; I've seen far right religious groups that have disproportionate influences at processes in the UN. I think the idea that somehow it's necessarily a good thing to have non-state actors involved, and that you can count on them to be constructive, is probably incorrect. At the same time, I do recognize that as Lloyd Axworthy has said, he didn't feel any particular public pressure to reform the UN, and if we were not feeling that very much in Canada, then you can imagine what it must have felt like in Uganda. The point is that no one really managed to mobilize international public opinion on behalf of UN reform. It was basically left up to the states, and they did what they do best, which is disagree with each other. I would say one thing about the L-20: If we had created the L-20 in time I have no doubt that we would have been much farther down the road on UN reform and we would have gotten much more out of it. There is no institution that is above the UN, or the IMF or the WB, that has a bird's eye view on how well things are working, and the L-20 could have given the world that. And the L-20 we are talking about is one where you have China, India, Brazil, South Africa, Nigeria, as well as G8 and other countries. If you can get a consensus in that group, or if you can get close to a consensus in that group, you are much further ahead than trying to introduce it to the 191 members of the General Assembly and trying to get consensus there. So I think it was an opportunity missed. It was a good idea and it remains a good idea. We will see whether there is any appetite for it in the coming months.

Stephen Toope:

While we're disaggregating things, I wonder whether we should do a better job of disaggregating the UN. We've had hints of that in the discussion already. Simon

Chesterman talked about the differences between governance and management aspects of the UN, and we can also go right back to the first panel this morning where we had discussions that were in many ways implicitly revolving around some of the subsidiary organs or specialized agencies of the UN, like the UNDP. We've also had discussions of post-conflict peace building. One of the issues that seemed to emerge right from the beginning of the discussion was the extent to which we really should see the UN as a coordinating body and what the challenges of that conception are. Ngaire Woods indicated that there were real risks in policy coordination. But to what extent should the UN be seen primarily as a coordinating body and to what extent is it actually a program delivery mechanism? Do we have to look at it in very different ways depending on which of those aspects we may be focusing upon?

Martha Finnemore:

The political scientist in me says this is an empirical question. We academics should go study it. The UN should ask it and they should go study it. Then, the UN has to decide how to deploy its resources. There are track records in these areas and the UN often knows quite a bit about these track records. The IMF and the Bank—they know what they do well and what they do badly because they study it. There is a lot to be said for decentralization, but whether the UN should coordinate or whether decentralizing international action is a good thing are empirical questions. Good management always involves knowing when to lead and when to stand back and get out of the way.

Paul Heinbecker:

One of the things that has been running through the discussion that I think illustrates the difference among views, is what the UN is about and what the UN Security Council is about. And I think it is pretty clear that if you examine the approaches taken by the US government to this reform process, the issue is the extent to which the UN can be made an instrument of US foreign policy, the extent to which it serves the purposes of US foreign policy. But some other governments really do see it as a forum; a place where you can come in and sort things out. It is not an instrument you can use, so much as a place where you come and try to resolve problems. And I don't think I heard those two functions in the way you were describing coordination and program delivery. I have no doubt whatsoever that the UN is good at some program delivery in some very difficult spots. Jim Dobbins has done a review of successful peacebuiding cases and he has found the UN actually to be quite successful. I mean, it's the old Churchill comment: the UN is the worst organization we have, save for all the others. And I think that there is something to be said for that.

The UN is a multifaceted thing; it has a lot of sides to it and it does a lot of things that you wouldn't want it to stop doing, though you might want it to do them better. But I don't think you can categorize it very readily into that kind of organization. I think it has all of that, and what I fear, as one hears more and more the discussion of decentralization, is that we'll spin off UNESCO, we'll spin off the WHO, and so on. What you lose is more than the sum of the parts, and I'm not sure that the heart of international law can be preserved in that circumstance. And I

think that one should be very careful in that we are in an innovative mode and some feel we can now create a new kind, several kinds of institutions; something that is made for the twenty-first century. We could have coalitions of the willing on the avian flu and coalitions of the willing on something else and it would all be disaggregated wit Washington always the hub. I think that at the end of the day if we do that, we will have lost the capability to consult, and to some extent conform and to cooperate.

Kenneth Abbott:

I just want to put out one idea. There is this concept of subsidiarity, which has come up a couple of times. There is another very interesting literature — the 'global public goods' literature—which meshes very nicely with the idea of subsidiarity. The notion here is that we should first try to determine whether particular issues can be dealt with by individual state action. Even many global public goods can be created through a summation process: if each state does its part, you don't need international action to produce the global public good; it will be supplied by the sum of the individual actions of states. If states are doing this adequately, or if the major states are making a large enough contribution on their own, you may not need any international action at all.

With issues like avian flu, you might expect that each country would respond out of self-preservation. However, there is often a problem with this approach when certain countries are unable to do their part. In those cases, where there is a weak-link problem, other states may need to provide technical assistance, financial assistance, or other types of intervention to strengthen the weak links for the benefit of all.

Then there might be issues where all that is needed is to provide an international forum where countries can come and work out solutions to a problem. And finally, there may be some issues to which you need a centralized international solution, or even a coercive international solution, as under Chapter VII. Coordination is relevant to this, because coordination amounts moving an issue up to a higher plane, taking action on a higher plane.

Diego Garcia-Sayán:

Following up on that approach, maybe one of the criteria is to answer the question of what has worked and what hasn't worked in past years. For instance, it is obvious that the UN has been crucial in certain areas like attention to refugees and refugee protection as a whole. It's difficult to imagine such areas without the UN. In other areas, it may be more important to promote coordination, for instance, with regional organizations and, of course, increasing positive coordination that exists. For instance, at the inter-American level, cooperation between the WHO and the Pan-American Health Organization is very important because it facilitates fundraising for the Pan-American Health Organization, and as everybody knows, they are supplementing the work of the WHO. So right now, the Pan-American Health Organization's budget is as big as the OAS as a whole, which gives you an idea of the success story of coordination in the health area.

I think there should be more debate about how coordination with, for example, ECOSOC, may play a role in economic and social areas with all the relevant actors. What does this mean exactly, when we are thinking about corporations, about trade unions, and NGOs, in a context in which international finance organizations are the ones that have the lead in these areas of economic and social matters? And to what extent can ECOSOC be rebuilt, in the sense that coordination with all relevant actors, including multilateral financial institutions, will open the possibility, for instance, for dialogue and for communication with trade unions or corporations that doesn't always exist in bilateral communication between multilateral financial institutions and governments. Maybe there is room for the UN and ECOSOC to play a more substantial role than the ones that they play now in that very crucial area.

QUESTIONS FROM THE FLOOR

Question 1 (Ellen Hey):

A lot of this conference has been about the position of the United States at this time. I also suggest that we must ask ourselves why the United States is in this position. Europe is terribly divided. I think the vote in France and the Netherlands over the constitution has probably made it even more inward looking. Yesterday they were discussing the possibility of European and Latin American countries cooperating more closely. And when I hear the discussion, one of the things I took from the current discussion is that there should be room for dialogue for creating pressure, and I think it's fair to say that there is a responsibility for other countries. Europe is part of the problem here. Maybe also Latin America. There are responsibilities to be taken and this is a theme that needs to be explored more in this context. It is fine to bash the hegemon, but that doesn't get us much further because the US is in that position and is going to be in that position for a while.

Question 2 (Mary Ellen O'Connell):

When you look at world politics, it isn't just a world of states with international institutions. There is a world of what we might call global civil society. Many of the failings that have happened in terms of failed states and such don't happen just because of failed political structures and authority and leadership but also because of opportunistic private actors. So, if you accept that there are private and public sources of injustice, oppression and so on, and the UN is concerned basically about a global order that is responsive to the concerns of common humanity, then it has to be able to fight oppression from both of these sources. In that sense, what I argue in terms of global governance is not that these private actors have to now become accountable according to the same standards. The idea is that none can be granted agency without some form of accountability, at least in terms of claims of common humanity. The reason why I think the UN needs a policy about this in terms of the standing and agency and accountability of non-state actors is, if you look at any context, like humanitarian intervention, the UN faces various types of problems of powerful states trying to control civil society actors. For example, in the US-led intervention in Iraq, they have tried to control humanitarian aid agencies by saying: you must display our flag or you must spend funding in a certain way. What is the

UN's stance on this? Is it acceptable for a state to do that when it's involved in a humanitarian intervention or peace building? So, the UN has to have some normative account of the relationship between public and private actors. I argue it should adopt a liberal cosmopolitan conception where it should try to enable a relatively free and independent global civil society and also help it maintain its independence in the face of powerful controlling state actors but at the same time it has to be able to discipline some of the powerful global civil society actors, such as pharmaceutical companies, in the name of state interest in, for example, providing basic access to essential medicines. My basic point is that there need to be principles that ought to guide the relationship between the state and non-state actors, and the UN ultimately has a role to play in that.

Responses from Panel:

Diego Garcia-Sayán:

Maybe the issue of strengthening multilateralism in the reform of the UN should be a matter for strategic cooperation between Canada, Europe and Latin America. Theoretically, it's not the best base in which we can find coincidences between Europe, Latin American and Canada. Nevertheless this has not happened, maybe because of a lack of leadership in that process. Maybe another answer could be that there is a generalized pessimism about the fact that something good can be done in a context of global big and obvious disequilibrium and that it is preferable to wait for another, better moment without confronting any specific country. So maybe this can be seen as an explanation and at the same time as a possibility of an absolutely crucial area where there could be more cooperation and more communication. It may be that in the case of Latin America, if an open dialogue between Europe, Canada and Latin America is put in force to discuss this matter, I am sure that that would create better conditions so that inside Latin America some more awareness would be created to deal substantially more with the issue of UN reform.

Martha Finnemore:

I have just two quick responses. First, to Ellen Hey, I think you put your finger on something crucial here. You mentioned a general lack of willingness to step up and do some of this UN reform, that Europe is inward looking, and that it wasn't clear that the Latin Americans were going to do this (the Americans we've already talked about). To me, this lack of connection—this lack of widespread public demand—is going to limit how much reform you are going to get. Reform will continue to be an elitist process. The elites can all go to lunch on what was done in September. We will all have meetings and conferences and we'll hobnob amongst ourselves, but to get robust solutions you have to motivate people inside countries. Europe has to be less inward-looking and start putting these kinds of issues on the agenda. Certainly, the Americans have to sort out what kind of international position they are going to take, and become more constructive players in this. Motivating civil society in the elite transnational sense isn't the key to reform; motivating domestic societies, though, would have important consequences and is essential for anything like sweeping or lasting reform.

Second, as to the claim that the UN is concerned to establish global order and fight injustice—global order is exactly what the fight is about, and not everybody would say that it is the UN's job to establish order. There is an actual political fight about that, so what you say is not uncontroversial. That was my only point. The reason a lot of reform gets stymied is precisely because the normative position I see you putting forward is not 'mom and apple pie'. There are people who would disagree.

Paul Heinbecker:

I have three concluding comments. One is that it is a little surprising in a room full of lawyers talking about the UN and the Security Council that we didn't actually get into the role of the Security Council as legislator. Increasingly, the Security Council is acting under Chapter VII of the Charter and is making decisions which are supposed to be the law of the land of all of those 191 countries who signed up to the Charter. There is some very far reaching stuff there. Some of it has to do with terrorism. But, there is potentially more there than that. A corollary is that a lot of the reason that things happen in the Security Council is that, contrary to the public image, it is the organ of the UN that works the best. It really is much more capable than others, and every time I hear pleas for reform of the ECOSOC, I am reminded of the time I accompanied our then Finance Minister and now Prime Minister to a meeting of ECOSOC. The Ambassador of Cameroon gave a press conference with our Finance Minister and decided that he should speak for 25 of the 30 minutes. So the possibility of persuading our Finance Minister that there might be something useful in ECOSOC was gone forever. And he is in a no less powerful position today. So if I could start the slate clean, I would just throw ECOSOC out. I would just plain write it out of the Charter. I would get rid of it before I would try to reform it.

Second, on support for the UN and the idea of generating that support, it is an interesting thing, but there is probably more public support in the US for the UN than there is in most countries. It may be a mile wide and an inch deep but it's nonetheless there. The polling that has been done about attitudes about the UN in the Muslim countries in particular shows way lower numbers. The UN is almost held in the same regard as the US itself is, and probably for the same reason.

The last thing is the oil-for-food program has not come up so far, the importance of reforming UN management hasn't been a subject for discussion, which perhaps is normal given who we are, but I would just add that I think the oil-for-food scandal has been a) greatly exaggerated b) enormously dangerous and c) perhaps the worst case of a double standard that's been perpetrated on the UN in a long time. I look forward to the day when Mr. Bremmer explains what happened to the $9 billion that was given to him by the UN oil-for-food program when the Coalition Provisional Authority took over. The CPA cannot account for what it did with the money.

Kenneth Abbott:

I would say three things. One, we didn't talk today about UN management reform. Two, we also didn't talk at all about financing the system. If you read, especially, the High Level Panel Report, it's full of phrases like: 'this program needs to be fully resourced'. Peace building and peacekeeping, health and development, they all need to be fully resourced, but there is virtually no discussion in there about where these resources are supposed to come from. There are a lot of innovative ideas out there, most of them aimed at funding for development rather than funding for the whole system. That's a subject for another day but it's a very important one.

Three, on how to proceed from here, I would at this point suggest that the constitutional convention approach has basically been a failure. If I were at the UN, what I would do now is to pick out the specific issues that have the greatest momentum, in the public eye and among the member states that have the strongest mandate, and drive on those issues so that we at least get something accomplished. Some issues that might be considered for this are, obviously, creating and strengthening the Human Rights Council and the peace-building organizations. Then I would suggest working on some health issues and some aspects of development, both of which still seem to me to have quite a bit of momentum and public support behind them.

In conclusion, just because the 'constitutional convention' hasn't really succeeded doesn't mean that the normative process is over. I would return to the notion that all of us can participate in trying to move this process forward, on a more incremental basis, trying to achieve some of the goals set out in these reports. Even though it may still be a somewhat elite process, it doesn't have to be an inter-state process, or a process driven by UN officials.

Jutta Brunnée:

We would like to thank all of you. Stephen and I had discussed earlier how best to close the session. What we thought we would do is pull out some themes that struck us as resonating through the discussions yesterday and today, focusing on themes that relate to thinking about how to move forward. These themes are not necessarily in order of priority, although I will say that the first one does take a priority position in that it is a theme that came up throughout our discussions: legitimacy. Legitimacy was highlighted by virtually all speakers as central to the reform enterprise, both in terms of the continued process that we are embarking on and in terms of the outcomes of that process. In the discussion of legitimacy issues, accountability and transparency came up frequently. Ellen Hey mentioned these aspects with respect to international organizations and, in particular, the Security Council. We also heard that preventing state failure implicates the legitimacy of the entire society of states, which in turn relates to the questions regarding the role of the use of force in this context. We heard from Colonel Horn, I think very persuasively, that these questions involve two significant challenges, one concerning the ability to mobilize combat power, the other the ability to make very complex and often times very quick assessments on how best to use it. Paul Heinbecker just mentioned that we never got to talking about the Security Council in that context. In light of this comment, let me add a related, overarching theme that emerged from

our discussions. Something that several of our panelists mentioned was that the Security Council may find itself in an increasingly difficult situation if more and more issues are "uploaded" to it as "security" issues. I think the point that Paul Heinbecker just made about a "legislative" role of the Council puts these difficulties in the spotlight as well. More generally speaking, the more we make issues matters of security and high politics, there is a very real possibility that the existing legitimacy challenge for the Security Council will actually be exacerbated, and that the distance between its formal power to bind and its actual ability to influence may grow. In short, this is an issue cluster that also needs to remain on the table.

A second theme, and one that we've had a good discussion on, is the challenge of the diversity of actors, including the questions of what that diversity means for various processes, and for international law in terms of entitlements, rights, standing, or accountability. In the latter context, I think it is important that it is not necessarily the case that non-state actors need to have full legal status; one could think about different ways to bring them into the legal arena, through both soft law and hard law methods. I would also add to that it may be a matter of thinking, in the context of hard law, how one best conceptualizes non-state actor issues. Take the example of terrorists and the debate on whether we should be thinking about them as individual criminal actors or whether we should be incorporating then into an interstate war model.

Stephen Toope:

We also thought that the theme of spelling out challenges honestly, that Liz Dowdswell emphasized, is important. The idea that there is no iconic status here for the UN or any other organization is really important to pursue. I think this goes to the finance and management questions, which have to be explicitly on the table. We think that the High-level Panel did a pretty good job at that but subsequently the discussion has been lost and we think it really does have to be recaptured. Bertie Ramcharan phrased the same point somewhat differently by asking: what can the UN actually deliver? So that strategic question always has to be at the forefront.

The fourth theme which has come forward powerfully on this panel is: how do you engage publics? How do you try to help domestic populations understand the role of the UN and help them to care? That goes to a whole set of questions that John Bolton has raised, as Ken Abbott pointed out. These include the commitment to popular sovereignty, and whether or not international institutions can in fact engage at the level of popular sovereignty; and whether it's possible to have accountability, questioning whether international institutions may not have to be entirely elite driven. This is a fundamental set of questions for any reform process going forward.

Jutta Brunnée:

Issue five is related to standards. What came out of Philip Alston's remarks yesterday and also some of the discussions today was the idea that international standards need to be applied equally to all actors. For example, in the human rights context, it shouldn't always be certain countries, mainly developing countries, that are being scrutinized. While Philip Alston thus stressed the need for consistent

application of standards, he also noted the need to contextualize standards so that developed countries would not necessarily be held to the same standards as developing countries. However, in today's discussion on the use of force it was Mary-Ellen O'Connell's observation that it was important that we have fixed standards that are indeed applied equally to all. It seems that the problem of standards relates to the issue of due diligence also. For example, as much as we want to make non-state actors more accountable, it does seem that it remains equally important to hold states to their due diligence obligations. Here I would just point to some of the comments made by Bertie Ramcharan, who noted that in preventing state failure it is crucially important to focus on state level action, albeit against the backdrop of basic principles of international solidarity and cooperation.

Stephen Toope:

Sixth, a lot of people talked about whether some of what we saw in the reform process is going to be this year's crop of ideas, which may have replaced other good ideas that were last year's crop of ideas. A question that we would close with, and it has particular relevance within Canada, is the question how central the responsibility to protect concept is. We actually saw versions of the concept being invoked in terms of public health, in terms of the national protections systems of human rights and in environmental protection. But of course, in the Outcome document, the right-to-protect concept is actually quite constrained and limited in its meaning. It is focused on extreme human rights situations. How useful is right-to-protect as a framing concept? Is it a fundamental challenge to the notion of sovereignty that is now going to get picked up and used and applied in varied ways in different contexts? We think that it is a concept that is going to be very interesting to track over the next while. And with that, I will say thank you for wonderful contributions by all the participants.