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Norms, Institutions and UN Reform: The Responsibility to Protect

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THE RESPONSIBILITY TO PROTECT*

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

INTRODUCTION

"Reform" is an ambiguous term. 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 from the developing world "reform" means change in the decision-making processes of the Security Council, the Human Rights Council and the international financial institutions, 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,

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efficiency and transparency. For many international lawyers, " reform" is shorthand for normative evolution in 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 were 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 had been warning of the UN's possible irrelevance for a number of years.

The various 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 of reform in the UN.' While 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 replacement of the Human Rights Commission by a Human Rights Council. While the Peacebuilding Commission was established in December 2005 through parallel resolutions of the General Assembly and Security Council, the design of the Human Rights Council was left for subsequent negotiations. After protracted and highly contentious deliberations, the creation of the Council was finally approved by the UN General Assembly on March 15, 2006. The details of its operations are proving difficult to negotiate.

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 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. We argue that, ultimately, norm development is inextricably linked to the institutions that shape, interpret, and apply the norms.

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

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.' What Kosovo brought to the fore ' was a dual dilemma. First was the fundamental issue whether or not a norm of humanitarian intervention existed. Second was the question who could invoke the norm, only the Security Council or individual states? The latter issue was pointed out clearly 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.) Instead, the NATO partners argued a "moral duty" to act, or a "necessity" to act.

It was no accident that shortly after Kosovo the Canadian government promoted the creation of an independent International Commission on Intervention and State Sovereignty (ICISS).7 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. The responsibility to protect was not about rights at all, but about duties. The primary duty holder was the sovereign state, which should offer security and protection to its own citizens. The report emphasized the overriding importance of

a wide spectrum of proactive measures and assistance to local governments in discharging their responsibility to protect, as well as the importance of non-military forms of pressure. 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."

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. 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. It also suggested that if the Council failed to act 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.

This debate was made more complex and more divisive by the military action against Iraq in the wake of the attacks of September 11th, 2001, led by the United States and Britain without authorization by the Security Council. By November 2003, the worry over the "lack of agreement amongst Member States on the proper role of the United Nations in providing collective security"[8] prompted the UN Secretary General to create the High-level Panel on Threats, Challenges and Change. The panel was mandated to: (i) examine contemporary global threats and future challenges to international peace and security, including the connections between them; (ii) identify the contribution that collective action could make in addressing these challenges; and (ii) recommend the changes neces-4

sary to ensure effective collective action, including a review of the principal UN organs.'

The panel's report was published in December 2004."' With respect to the use of force for the protection of people, the report drew extensively on the ICISS recommendations. The panel specifically endorsed "the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort." 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. The panel also took up the ICISS suggestions regarding self-discipline of the permanent members in exercising the veto.

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." In addition, the 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". 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".

In his response to the report of the High-level Panel, the Secretary-General highlighted the question whether states have the right, or even obligation, to use force protectively to rescue citizens from genocide or comparable crimes against humanity. 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 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."

The Secretary-General then endorsed the calls for criteria in ICISS and the High-level Panel's report. 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." 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.

The concept of the responsibility to protect survived the difficult negotiations leading to the adoption of the Summit Outcome, in part due to significant diplomatic efforts by the Canadian government. However, 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". Although this formulation happily avoids sterile debates over the definition of genocide, it opens up new debates which may prove comparably frustrating over the existence of a "crime" triggering action. 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". The Security Council is authorized to take collective protection action under Chapter VII of the UN Charter on a "case by case basis" and "should peaceful means be inadequate and national authorities manifestly fail to protect their populations" from the listed international crimes.

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 pro tect...and its implications, bearing in mind the principles of the Charter and international law." Presumably, this phrase was intended as a reference 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 Summit Outcome document 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 sovereignty under conditions of international anarchy. Anarchy may not have been inevitable, and may even have been intentionally constructed, but it has been determinative nonetheless." 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 during the Cold War, made any incursion on the principles of sovereignty and non-intervention extraordinarily difficult.

Since the creation of the United Nations, and 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. 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 trans-boundary effects. States' domestic regulatory freedom is now routinely limited by the disciplines of international trade law.

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 reconsider 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.13 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 Summit Outcome, 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 Summit Outcome, 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. It created a clear "responsibility continuum" that envisaged action to prevent, to react, and to rebuild. The

use of force was a final step, taken only *in extremis.* Although the Summit Outcome document retains some flavour of prevention, the various aspects are not explicitly staged. Nor are they forcefully worded. In the sections 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." Moreover, and here the interplay between institutions and norms becomes important, the role of the Peacebuilding Commission is expressly limited to post-conflict situations. 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? Another option might be to make the new Human Rights Council the locus for discussion. However, and perhaps not surprisingly, the heavily negotiated resolution establishing the Council avoids direct reference to the concept of responsibility to protect. It remains to be seen how the Council will live up to its mandate to "contribute, through dialogue and cooperation, towards the prevention of human rights violations and to respond promptly to human rights emergencies."' 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 designed to assuage the concerns of many developing countries that the responsibility to protect could lead to an overly active and interventionist United Nations or even to interventions by individual states without Security Council approval. As currently understood, Art. 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. As indicated

above, the key limitation is that all responsibilities are triggered only in relation to international crimes. 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. Second, the possibility for collective intervention also exists only in the relatively narrow circumstances of international crime. This effect was probably intended, at least from the perspective of developing states, to prevent a resurrection of the "civilizing mission" of nineteenth century international law. 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. 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 Summit Outcome document limit the trigger to international crimes, but it also requires the actual commission of the crimes, not the threat.

Leaving aside the issue of limitations on the scope of the responsibility to protect, the very creation of any set category of offenses 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 conjunction with the accountability regime envisaged in the Statute of the International Criminal Court (ICC), 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:5

On the negative side of the ledger, the mere existence of accepted categories justifying collective action may not prevent

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 Summit Outcome 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. 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." The Summit Outcome 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." 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. '16 It was then adopted and expanded by a 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." 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 Summit 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. 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. As noted earlier in this paper, the inclusion of the responsibility to protect in the Summit Outcome was in part the result of the concerted diplomatic efforts of some governments, notably the Canadian government and the then Canadian Prime Minister. It could therefore be seen as the culmination of successful norm entrepreneurship. But it could also be argued that the inclusion of the responsibility to protect in the Summit 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 dismiss the Summit Outcome as mere

"cheap talk." 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 Summit Outcome. 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, notably the crisis in Darfur, 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 that include civil society actors. However, the Summit Outcome 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 Summit Outcome, 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.

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. [2]0 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, 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 ICC 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.

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 over how to enhance the legitimacy and effectiveness of the Council. The problem that we want to emphasize 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 Summit Outcome 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. That said, the endorsement of the concept by the 2005 UN Summit has certainly provided opportunities for further norm entrepreneurship and for exerting new pressure on the Security Council to act. For example, on May 26, 2006, three leading non-governmental human rights organizations, Amnesty International, Human Rights Watch and the International Crisis Group, sent a letter to members of the Security Council, reminding them of the Council's recent endorsement of the responsibility of states to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and demanding that the Council fulfill its responsibility to protect Sudanese civilians from further attacks.21 The Council had called upon the Parties to the Darfur Peace Agreement of May 5, 2006, to meet their commitments and to facilitate access for UN planners to prepare the deployment of UN troops. However, concrete action on the ground still remains elusive at the time of writing. Prolonged inaction is a familiar challenge for the Security Council. 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. Security Council inaction in the face of an acknowledged responsibility to protect is bound to push these linkages further into the spotlight.

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 Summit Outcome 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.

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 may exist with reference to the new Human Rights Council. However, it is too early to tell whether or not the Council will emerge as an important vehicle for early warning or for the discussion of preventive action.

For now, all the eggs of responsibility to protect appear to 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." But we also agree that we "cannot be content with incomplete successes." 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.

ENDNOTES

1 In Larger Freedom: Towards development, security and human rights for all Report by the Secretary-General, UN Doc. A/59.2005, 21 March 2005, para. 11. (hereinafter In Larger Freedom)

2 UN General Assembly, *2005 World Summit Outcome,* UN Doc A/RES/60/1 (24 October 2005); at <http://www.un.org/summit2005/documents.html> (hereinafter Summit Outcome).

3 By a vote of 170 states in favour, 4 against (Israel, Marshall Islands, Palau, United States), and 3 abstentions (Belarus, Iran, Venezuela). The new Council will have 47 members, elected by the General Assembly. The first elections took place on May 9, 2006 and the first session will take place on June 19, 2006.

4 See *e.g. J. L.* Holzgrefe & R. 0. Keohane, eds., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003).

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

6 See e.g. Javier Solana, Secretary-General of NATO, Press Statement, NATO Press Release 040 (1990), reprinted in Jeffrey L. Dunoff, et al., *International Lawï Norms, Actors, Process* (2002) 892.

7 International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect,* December 2001; at www.dfait-maeci.gc.ca/iciss-ciise/report-en.asp.

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

9 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, at www.un. org/News/Press/docs/2003/sga857.doc.htm.

10 See *A more secure world: our shared responsibility,* Report of the High-level Panel on Threats, Challenges and Change, UN. Doc. A/59/565 (29 November 2004); at http://www.un.org/secureworld.

11 Some commentators argue that these criteria are already part of the existing international law on the use of force. See e.g. Mary Ellen O'Connell, "The Counter-Reformation of the Security Council," (2005) 2 *Journal of International Law and International Relations* 107.

12 See Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics," (1992) 46 *International Organization* 391.

13 Anne-Marie Slaughter, "Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform," (2005) 99 *American Journal of International Law* 619, at 627.

14 See UN General Assembly Resolution 60/251, UN Doc. A/RES/60/251 (3 April 2006).

15 See generally Margo Kaplan, "Using Collective Interests to Ensure Human Rights: An Analysis of the Articles on State Responsibility," (2004) 79 *New York University Law Review* 1902.

16 On the concept of "norm entrepreneurship," see Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change," (1998) 52 *International Organization* 887 (norm entrepreneurs are governmental or non-governmental actors who work to launch and promote new international norms, including legal norms).

17 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.

18 See, generally, Jutta Brunnee and Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law," (2000) 39 *Columbia Journal of Transnational Law*.

19 See Thomas Risse, "'Let's Argue!' Communicative Action in World Politics," (2000) 54 *International Organization* 1, at 8.

20 Resolution 3314 (XXIX) of 14 December 1974.

21 See Amnesty International, "Sudan: UN Security Council must meet 'responsibility to protect' civilians," News Release AFR 54/019/2006; at http://www.amnesty. ca/resource_centre/news/. For the Security Council's endorsement of the responsibility to protect, see Resolution 1674 (2006), UN Doc. S/RES/1674 (28 April 2006).