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The Protection of Human Rights under International Law: Will the U.N. Human Rights Council and the Emerging New Norm Responsibility to Protect Make a Difference

Keywords

Human Rights Law, International Law: History, Discrimination, United Nations, Banking, Globalization

MYRES S. MCDUGAL DISTINGUISHED LECTURE

**THE PROTECTION OF HUMAN RIGHTS UNDER INTERNATIONAL
LAW: WILL THE U.N. HUMAN RIGHTS COUNCIL AND THE
EMERGING NEW NORM “RESPONSIBILITY TO PROTECT” MAKE A
DIFFERENCE?**

VED P. NANDA *

I.

I will begin with a tribute to Professor Myres S. McDougal, who was the reason I went to Yale Law School. After receiving an LLM. at Northwestern with Professor Brunson McChesney as my advisor, my years at Yale (1962-65) were the most enjoyable of my student life. An inspiring teacher, a creative scholar, and a lifelong friend, Professor McDougal will always be my role model, and I am deeply honored to give this lecture, established at the University of Denver Sturm College of Law in my mentor's name.

Professor McDougal had attracted brilliant and creative minds to Yale – Harold Lasswell, Egon Schwelb, and Oscar Schachter, among others. Each one of these teachers left a lasting impact on me. Dr. Schwelb taught what I understand was the first ever course on international human rights law in any law school, when the only course materials available were UN documents related to draft international treaties on which Dr. Schwelb was working at the UN Headquarters. While taking that seminar I decided that when I started teaching I was going to introduce human rights as a separate course and my colleagues graciously permitted me to do so here at DU in the 1960s. My passion for human rights goes back to that period.

It is inherent in our being human that no matter who we are and where we live, we are entitled to the enjoyment of basic human rights and fundamental freedoms. And there is universal acceptance of the international law norm that human rights of all, irrespective of their sex, race, ethnicity, religion, language,

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social status, or political preferences and affiliations, must be protected and secured. However, notwithstanding the endorsement of human rights protections so eloquently expressed in the UN Charter, the Universal Declaration of Human Rights, the International Bill of Rights, and numerous treaties, the rhetoric does not match the stark reality. As gross and systematic violations of human rights, including genocide, war crimes, and crimes against humanity, are an everyday occurrence in so many parts of the world, our pious utterances and outcries of "never again" sound like empty slogans.

The killing fields of Cambodia, the genocides in Rwanda and Darfur, and severe violations of human rights in several other countries including Somalia, Haiti, Bosnia, Kosovo, Ivory Coast, Sierra Leone, Liberia, and the Congo, constantly remind us that the world community has yet to institute effective mechanisms to prevent and deter these shameful blots on humanity. Nor are there adequate means available to stop these tragedies once they unfold.

How do we explain this anomaly—numerous norms prescribing specific conduct, states consenting to such prescriptions, and still the ongoing, persistent, and systematic atrocities and violations blatantly in disregard of these norms all over the world? The problem no doubt lies with inadequate implementation, coupled with the lack of political will, for theoretical or perceptual differences today on how universal or culturally relative these rights are, or on their content, are rather muted. And the underlying cause remains the current state-centered international system, under which each state jealously guards its sovereignty and often invokes the doctrine of non-intervention in its internal affairs.

The twin challenges, therefore, for human rights scholars and practitioners, and for politicians and statesmen alike, are: (1) to ensure that the existing norms on human rights protection are further strengthened, that the existing institutional framework is made effective, and that there are adequate processes in place to provide suitable remedies to the victims and to bring the perpetrators to justice; and (2) to redouble our efforts to create a keen awareness of the enormity of the challenge and to establish a culture in which decision makers are motivated, and indeed compelled, to make sufficient resources available and to take the necessary action—multilateral, regional, bilateral, and even unilateral—to prevent atrocities and violations, to take effective action to stop and deter them, and to provide redress to the victims when such violations occur.

The preference is, of course, to prevent and deter violations of human rights and to respond effectively to stop them by non-forceful means, but, if it becomes necessary and only as a last resort, even by the use of force and in accordance with international law norms. Problems with unilateral use of force are well known. Abuses in the past remind us that they are likely in the future, as well, unless adequate safeguards exist. It is, however, regrettable that the world community failed to take effective action to address humanitarian disasters such as Rwanda and Darfur. Several countries have even shied away from calling them genocides because under the Genocide Convention states are obligated to prevent genocide and to punish the perpetrators.

These preliminary remarks set the stage for my discussion of a few recent developments the world community has undertaken to strengthen the existing international machinery for the protection of human rights. These are the establishment of the Human Rights Council to replace the U.N. Commission on Human Rights and the adoption of a new international law norm by the U.N., the *Responsibility to Protect*. I will, however, not comment on international humanitarian law, a very important subject indeed, especially in light of the abuses in Abu Ghraib and Guantánamo.

II.

The international human rights movement is of relatively recent origin. However, in a short time it has blossomed into a developed body of international human rights law, with the establishment of necessary institutions for its implementation and enforcement. As the movement is rooted in the world community's response to the excesses inflicted upon humanity by the Nazi and Fascist regimes during the Second World War, the founders of the United Nations ensured that the Charter would reflect the close relationship between international peace and security and international human rights. Thus, the first two goals embodied in the Preamble of the U.N. Charter are: "to save succeeding generations from the scourge of war" and "to reaffirm faith in fundamental human rights, the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small..."¹ Article 1 of the Charter lists among the purposes of the U.N. "[t]o achieve international co-operation in... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."²

Article 55 mandates that the United Nations promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."³ This is followed by a pledge by all U.N. Member States "to take joint and separate action in co-operation with the Organization for the achievement of" the purpose stated above.⁴

Although there was no provision in the U.N. Charter on protection of human rights, in 1946, soon after it was formed, the United Nations created the U.N. Commission on Human Rights.⁵ Also, the U.N. began work on drafting an instrument enumerating basic human rights, whose culmination was the Universal Declaration of Human Rights.⁶ The Declaration, adopted by the General Assembly as a resolution in 1948, specifies civil and political, as well as economic, social, and cultural rights. The next step was to codify these rights in a treaty form

1. UN Charter, PmbI.

2. *Id.* art. 1, para. 3.

3. *Id.* art. 55(c).

4. *Id.* art. 56.

5. *Id.* art. 68. Under art. 68 of the U.N. Charter, the U.N. Economic and Social Council (ECOSOC) was empowered to set up a commission "for the promotion of human rights."

6. Universal Declaration of Human Rights, G.A. Res. 217A(III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/818 (Dec. 10, 1948). *See generally*, Oscar Schachter, *The Genesis of the Universal Declaration: A Fresh Examination*, 11 PACE INT'L L. REV. 51 (1999).

because as a resolution of the General Assembly the Universal Declaration was not binding on states. The framers understood this, as Eleanor Roosevelt, the U.S. Representative on the U.N. Commission and its Chair, called the Declaration “a statement of principles... setting up a common standard of achievement for all peoples and all nations.”⁷ She further stated that the Declaration was “not a treaty or international agreement... impos[ing] legal obligations.”⁸ The process was protracted because of the ensuing Cold War and the resulting ideological conflict between the then-super powers the U.S. and the Soviet Union. Eventually, however, in 1966 negotiators agreed on two separate conventions, the International Covenant on Civil and Political Rights⁹ and the International Covenant on Economic, Social and Cultural Rights,¹⁰ both of which came into force in 1976. The Universal Declaration, together with the two covenants, is popularly known as the International Bill of Rights.¹¹

The period since 1976 has witnessed great strides in the development of international human rights law as an impressive body of norms, institutions, and procedures has transformed the subject. Regional human rights machinery exists in Europe, the Americas, and Africa, and is in the formative stage in Southeast Asia, complementing the U.N. machinery created to promote and protect human rights and to provide effective remedies. Customary international law has also played a significant role in this process.

It would have been inconceivable sixty years ago to envisage the development and progress of international human rights law we see today. To illustrate, numerous international agreements have created a wide range of international human rights norms, treaty bodies have been established to monitor implementation by member states of their treaty obligations, and an ever-growing body of soft law—emerging international human rights guidelines, principles, and norms—has developed. All these developments are of great significance for every student of international human rights law.

In the U.N. system, the Office of the High Commissioner for Human Rights, a part of the United Nations Secretariat, acts as the principal focal point of human rights research, education, public information, and human rights advocacy activities.¹² It offers leadership in educating and empowering individuals and assisting states in upholding human rights and supports the work of the U.N. human rights mechanisms, such as the Human Rights Council and the treaty

7. Eleanor Roosevelt, *quoted in* John Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, in *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 39, 50 (Evan Luard ed., 1967).

8. *Id.*

9. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20 (1978), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976).

10. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (*entered into force* 3 Jan. 1976).

11. Nadine Strossen, *United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the U.S. Bill of Rights*, 24 U. TOL. L. REV. 203, 203 (1992).

12. The website is <http://www.ohchr.org>, for more information.

bodies. Equally important, it promotes both the universal ratification and the implementation of the major human rights treaties and respect for the rule of law and ensures the enforcement of universally recognized human rights norms.

As I have previously written on the role of the Office of the High Commissioner and the need to strengthen it,¹³ I will not revisit that subject here. Also, while the development of human rights norms through treaties, customary international law and “soft law,” and the existing machinery for implementation and enforcement of international human rights are indeed most important subjects, I leave their review for another day.

III.

The U.N. Human Rights Council was established on March 15, 2006, to replace the U.N. Human Rights Commission.¹⁴ During the first two decades of its existence, the Commission was without authorization to provide any redress to those who communicated that their human rights had been violated. This changed in 1967 when ECOSOC authorized it to examine relevant information pertaining to gross violations of human rights and to conduct studies of situations which revealed a consistent pattern of violations.¹⁵ But as the communications and complaints remained confidential the Commission could not refer to their substance nor did it have any guidelines to consider or analyze those communications. Consequently, three years later, in 1970, ECOSOC did provide procedures for considering and analyzing such communications.¹⁶ Under this complaints mechanism, which remained confidential, submissions were authorized by individuals, groups, or nongovernmental organizations (NGOs). The Commission could consider allegations of widespread patterns of gross violations of human rights in any country.

In addition, thematic procedures were also instituted to address broader human rights issues, ranging from disappearances, torture, arbitrary detention, and extrajudicial executions, to the right to health, education, and the welfare of internally displaced persons and minorities. The country-specific procedures and thematic procedures are together called “special procedures,” and they establish mechanisms to address either specific country situations or thematic issues in all parts of the world.¹⁷ They are undertaken by either an individual, who is called a special rapporteur, special representative of the Secretary-General, or an

13. Ved P. Nanda, *2005 Sutton Colloquium: Foreword: The Global Challenge of Protecting Human Rights: Promising New Developments*, 34 *DENV. J. INT'L L. & POL'Y* 1, 7-10 (2006).

14. The Human Rights Council was established by G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Mar. 15, 2006).

15. ECOSOC Resolution 1235 provided the authorization. ECOSOC Res. 1235, at 17, U.N. ESCOR, 42nd Sess. Supp. No. 1, U.N. Doc. E/4393 (June 6, 1967).

16. ECOSOC Res. 1503, at 8, U.N. ESCOR, 48th Sess., Supp. No. 1A, U.N. Doc. E/4832/Add.1 (May 27, 1970).

17. UN WATCH, REFORM OR REGRESSION: AN ASSESSMENT OF THE NEW HUMAN RIGHTS COUNCIL 23 (Sept. 6, 2006), available at <http://www.unwatch.org/atf/cf/%7B6DEB65DA-BE5B-4CAE-8056-8BF0BEDF4D17%7D/Reform%20or%20Regression%206%20Sept%202006.pdf> [hereinafter UN Watch, *Reform or Regression*].

independent expert, or a working group, usually composed of five members (one from each region).¹⁸

For several years before its replacement by the Human Rights Council, the Commission's work had come under increasing scrutiny, especially by human rights NGOs. While there was general support and appreciation for the thematic procedures, the Commission faced severe criticism for its seeming obsession with singling out one country, Israel, for condemnation, while showing little concern with egregious violations elsewhere. According to the U.N. Watch, 30 percent of the Commission's resolutions between 1946 and 2006 condemning human rights violations by specific states were against Israel and that percentage had risen to almost 50 in the few years preceding the establishment of the Human Rights Council.¹⁹ In 2005, the Commission adopted eight resolutions under country procedures, four against Israel and the combined total of four against all other states in the world, one each against Belarus, Cuba, Myanmar, and North Korea.²⁰

The Commission's credibility had been undermined by such selective condemnation. To illustrate, then-Secretary-General Kofi Annan noted in his March 2005 report to the General Assembly that:

the Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others.... As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.²¹

Similarly, a task force of the American Bar Association's Section on International Law, on which I served, stated in its August 2005 report: "The standing of the Commission was severely compromised by the selection of Libya as chair, the re-election of Sudan as a member in the midst of the genocide in Darfur, and the shameful failure of the Commission last year to adopt a resolution clearly condemning that genocide."²²

Several reform proposals addressing the Council's size, functions, composition, criteria for membership and members' responsibilities, election

18. As to the range and scope of the mandates, mechanisms, and responsibilities under these procedures, see, e.g., the report of the Commission's concluding session (13-27 Mar. 2006). U.N. Econ. & Soc. Council [ECOSOC], U.N. Comm'n on Human Rights, *Report on the Sixty-Second Session*, at 1-4, Supp. No. 3, U.N. Doc. E/2006/23, E/CN.4/2006/122 (Mar. 13-27, 2006).

19. UN Watch, *Reform or Regression*, supra note 17, at 6 n.3.

20. *Id.*

21. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 182, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*].

22. Task Force on Reform of the United Nations Commission on Human Rights, A.B.A. Standing Comm. on Law and Nat'l Sec., *Replacing the Commission on Human Rights with a Human Rights Council*, 2005 A.B.A. Sec. Int'l. Law Rep. 9 [hereinafter ABA Report].

process, and status in the U.N. system were made, most calling for a smaller and more nimble body to be elected directly by the General Assembly.²³

In establishing the Human Rights Council, the General Assembly enhanced the Commission's status by creating it as a subsidiary organ of the Assembly instead of being a subsidiary body of the Economic and Social Council.²⁴ It is smaller in size, comprising 47 members, compared with the 53-member Commission, and elected directly by a majority vote of the General Assembly.²⁵ Members are to "uphold the highest standards in the promotion and protection of human rights," and every country is subject to universal periodic review of its human rights obligations and commitments.²⁶ Under the Resolution, the Council's work is to be guided by the principles of "universality, impartiality, objectivity, and non-selectivity, constructive international dialogue and cooperation...."²⁷

The establishment of the Council was consequently widely hailed. Secretary-General Annan said the establishment of the Council would be "remembered as a historical achievement," and he exhorted the Council member to bring about "a change in culture [to replace] the culture of confrontation and distrust, which pervaded the Commission in its final years, [by] a culture of cooperation and commitment, inspired by mature leadership."²⁸ In his address to the opening session of the Council, the President of the U.N. General Assembly, Jan Eliasson, said, "We are entering a new chapter in the United Nations' work on human rights."²⁹ Human rights NGOs welcomed the creation of the new Council.³⁰

After a review of the Council's first regular session in June 2006 and its first two special sessions in July and August of that year, I found the record to be mixed. On the positive side, it had adopted a draft convention on enforced disappearances and a draft declaration on the rights of indigenous peoples, and had decided to continue the work of the Commission on special procedures and to establish a working group to "develop the modalities of the universal periodic review mechanism."³¹

23. Among many suggestions, see for example those by Human Rights Watch and Amnesty International cited in UN WATCH, *Reform or Regression*, *supra* note 17, at 8 n.12; ABA Report, *supra* note 22, at 10, 14-15; Task Force on the United Nations, U.S. Inst. of Peace, AMERICAN INTERESTS AND UN REFORM: REPORT OF THE TASK FORCE ON THE UNITED NATIONS, 34-35, June 2005; Secretary-General, Address to the Commission on Human Rights (April 7, 2005), in *In Larger Freedom*, *supra* note 21, at App. 1, ¶ 6.

24. G.A. Res. 60/251, *supra* note 14, ¶ 1.

25. *Id.* ¶ 7.

26. *Id.* ¶¶ 9, 5(e).

27. *Id.* ¶ 4.

28. Secretary-General, Address to the Human Rights Council on 19 June 2006, available at www.un.org/apps/sg/printsgstats.asp?nid=2090.

29. Jan Eliasson, Statement at the first session of the Human Rights Council, Geneva (June 19, 2006), available at <http://www.un.org/webcast/unhrc/statements/hrc060619pgae.pdf>.

30. See, e.g., Press Releases of March 15, 2006, cited in UN WATCH, *Reform or Regression*, *supra* note 17, at 8 n.12.

31. U.N. Human Rights Council, *Report to the General Assembly on the First Session of the Human Rights Council*, at 22, 32, 58 & 73 (June 30, 2006) (establishment of the working group on universal periodic review at 22; Convention text in Annex at 32; text of Declaration in Annex at 58; and

On the negative side, the Council again singled out Israel for censure, requesting the relevant Special Rapporteurs to report on the "Israeli human rights violations in occupied Palestine" to the next session of the Council.³² I had then concluded:

The Council's decisions and actions regarding Israel demonstrate that it is continuing to follow the one-sided approach which was a hallmark of the Commission's activities and a major reason for its replacement. Major international human rights NGOs including Amnesty International, Human Rights Watch, and Human Rights First have uniformly condemned the Council's approach. Furthermore, it is hard to explain the Council's indifference to the tragedy in Darfur, for it did not take any action on the subject, although some statements were made by a few countries at the Council meeting.³³

The Council, however, did adopt a text on Darfur at its second session in November 2006,³⁴ which noted "with concern the seriousness of the human rights and humanitarian situation in Darfur," and called on "all parties to put an immediate end to the ongoing violations of human rights and international humanitarian law."³⁵ It is ironic that the Council welcomed "the cooperation established by the Government of the Sudan with the Special Rapporteur on the situation of human rights in the Sudan,"³⁶ when it had been quite evident for several years that the Sudanese government had not been cooperating with the United Nations to stop the ongoing atrocities perpetrated by the Janjaweed.

The following month, as a promising development, the Council at its fourth special session decided to dispatch a High-Level Mission appointed by the Council president to assess the human rights situation in Darfur.³⁷ The Mission could not visit Darfur as the Sudanese authorities refused to issue a visa to one of its

regarding extension of the Commission's mandates, mechanisms, functions and responsibilities at 73).

32. U.N. Human Rights Council, *Report to the General Assembly on the First Session of the Human Rights Council*, at 22, U.N. Doc. A/HRC/1/L.10/Add.1 (July 5, 2006) (The Council took no decision and no action against any country other than Israel. On the Council's decisions on Israel in its first and second special sessions, see U.N. Human Rights Council, *Report on the First Special Session of the Human Rights Council*, at 3, U.N. Doc. A/HRC/S-1/3, (July 18, 2006) (S-1/Res.1 Human Rights Situation in the Occupied Palestinian Territory)); U.N. Human Rights Council, *Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Guinea, Indonesia, Iran (Islamic Republic of), Jordan, Kuwait, Kyrgyzstan, Lebanon, Libyan Arab Jamahiriya, Malaysia, Morocco, Pakistan, Palestine, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic and Tunisia: Draft Resolution, The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations*, at 1-2, U.N. Doc. A/HRC/S-2/L.1 (Aug. 9, 2006).

33. Ved Nanda, *New U.N. Initiatives for the Protection of International Human Rights* 16 (manuscript to be published in a forthcoming book on human rights by Toda Institute, Honolulu, 2007 (manuscript is on file with the author)).

34. U.N. Human Rights Council, *Report to the General Assembly on the Second Session of the Human Rights Council*, at 2/115 (Darfur), U.N. Doc. A/HRC/2/L.11/Add.1 (Nov. 28, 2006).

35. *Id.* at ¶ 2.

36. *Id.* at ¶ 5.

37. U.N. Human Rights Council, *Summary Record of the 4th Meeting*, at 2, ¶4, U.N. Doc. A/HRC/S-4/SR.4 (Jan. 23, 2007).

members. Hence it produced its report based upon visits to neighboring countries and interviews with humanitarian agencies and African Union officials working in Darfur.³⁸ The report concluded that the human rights situation in Darfur

remains grave, and the corresponding needs profound. The situation is characterized by gross and systematic violations of human rights and grave breaches of international humanitarian law. War crimes and crimes against humanity continue across the region. The principle pattern is one of a violent counterinsurgency campaign waged by the government of Sudan in concert with Janjaweed/militia, and targeting mostly civilians. Rebel forces are also guilty of serious abuses of human rights and violations of humanitarian law.... [T]he government of the Sudan has manifestly failed to protect the population of Darfur from large-scale international crimes, and has itself orchestrated and participated in these crimes. As such, the solemn obligation of the international community to exercise its *responsibility to protect* has become evident and urgent.³⁹

Among specific recommendations of the Mission was one for the Security Council to deploy a proposed U.N./African Union peacekeeping/protection force.⁴⁰ The Mission's recommendation for the Sudanese government included the government's ceasing all support for the Janjaweed/militia forces, cooperating fully in the deployment of the proposed hybrid peacekeeping force and with prosecutors at the International Criminal Court, and holding accountable all perpetrators of human rights violations.⁴¹

The Council took note of the report at its March 2007 session and adopted a resolution expressing deep concern

regarding the seriousness of the ongoing violations of human rights and international humanitarian law in Darfur, including armed attacks on the civilian population and humanitarian workers, widespread destruction of villages, and continued and widespread violence, in particular gender-based violence against women and girls, as well as the lack of accountability of perpetrators of such crimes.⁴²

The Council further decided to establish an experts group on Sudan, which is to work with the African Union and the Sudanese government.⁴³

38. For the report of the Mission see U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/101*, U.N. Doc. A/HRC/4/80 (Mar. 9, 2007).

39. *Id.* at ¶ 76 (emphasis in original).

40. *Id.* at ¶ 77(d).

41. *Id.* at ¶ 77(d)-(e).

42. U.N. Human Rights Council, *Report to the General Assembly on the Fourth Session of the Human Rights Council*, at 13, ¶¶ 2-3, U.N. Doc. A/HRC/4/L.11/Add.1 (Mar. 30, 2007).

43. *Id.* at ¶¶ 6-7.

In a detailed 71-page report submitted to the Council at its fifth session in June 2007, the experts group reiterated the gravity of the situation in Darfur.⁴⁴ The report provided a roadmap for addressing human rights violations there. It recommended that the government of Sudan fulfill its earlier commitments and take immediate action to restore order and to secure human rights in the Darfur region.⁴⁵ While the Council deferred action on the report,⁴⁶ it nonetheless welcomed the report, requesting the group of experts to continue its work for six months and to submit an update at the next session of the Council in September 2007 and a final report at the Council's following session.⁴⁷

Another promising development related to the Council is the election of its membership in May 2005, and the General Assembly's rejection of Belarus for failing to meet the basic criteria for election to the Council because of its poor human rights record. Instead, the Assembly elected Bosnia-Herzegovina.⁴⁸

As the Human Rights Council concluded its fifth session on June 18, 2007, and its organizational meeting four days later,⁴⁹ this marked the end of the Council's first year of operation. The first year's report card still shows a mixed record. The Council's country-specific mandates for Belarus and Cuba were

44. U.N. Human Rights Council, *Report to the General Assembly on the Fifth Session of the Human Rights Council*, U.N. Doc. A/HRC/5/L.10 (July 9, 2007).

45. The experts group report was presented to the Council by the Special Rapporteur on the Situation on Human Rights in the Sudan and chairperson of the group of experts on June 13, 2007, U.N. Doc. A/HRC/5/L.10, para. 51, 9 July 2007. For the text of the report, see U.N. Doc. A/HRC/5/6, 8 June 2007. The experts group made a number of specific recommendations to the government of Sudan aimed at protection of the civilian population, including internally displaced persons. To illustrate, the experts group called upon the government of Sudan to

[i]ssue and enforce clear orders to the armed forces and any militias under Government's control that it is prohibited to make civilians or civilian objects (including cultivated land and livestock) the target of attacks or to launch indiscriminate attacks (including burning of villages and aerial bombardments); that such attacks can amount to war crimes and crimes against humanity, that suspects, including bearers of command responsibility, will be investigated and brought to justice, and that any immunities would be waived.

Id. at ¶ 51; U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* at 12, U.N. Doc. A/HRC/5/6 (June 8, 2007) (Recommendation I.1.1); U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* at 44, ¶ 26, U.N. Doc. A/HRC/5/6 (June 8, 2007).

46. U.N. Human Rights Council, *Report to the General Assembly on the Fifth Session of the Human Rights Council*, at ¶ 63, U.N. Doc. A/HRC/5/L.10 (July 9, 2007); U.N. Human Rights Council, *Report to the General Assembly on the Fifth Session of the Human Rights Council*, at 56, § 5/102, U.N. Doc. A/HRC/5/L.11 (June 18, 2007).

47. Follow-up to resolution 4/8 of 30 March 2007 adopted by the Human Rights Council at its 4th session entitled "Follow-up to decision S-4/101" of 13 December 2006 adopted by the Council at its 4th special session entitled "Situation of human rights in Darfur," U.N. Human Rights Council, *Report to the General Assembly on the Organizational Meeting of the Human Rights Council*, at 4, § OM/1/3, U.N. Doc. A/HRC/OM/1/L.11, (June 20, 2007) (adopted without a vote).

48. *Human Rights Council Election (17 May 2007)*, www.un.org/ga/61/elect/hrc.

49. U.N. Human Rights Council, *Report to the General Assembly on the Organizational Meeting of the Human Rights Council*, U.N. Doc. A/HRC/OM/1/L.11 (June 22, 2007).

discontinued under political pressure, thus eliminating independent experts reviewing their human rights records, while the remaining mandates, which address human rights in Burma, Burundi, Cambodia, the Democratic Republic of Congo, Haiti, Liberia, North Korea, the Occupied Palestinian Territories, Somalia, and Sudan, were renewed.⁵⁰ All mandates are to be further reviewed by the Council.⁵¹ The Council continues its disproportionate focus on Israel and its agenda has singled out one situation, *Palestine and Other Occupied Arab Territories*, for the Council's attention, disregarding so many other human rights situations needing special attention, as well.⁵²

On the positive side, the Council's institution-building process has had a favorable outcome. Its new institutional machinery includes the universal periodic review mechanism, the special procedures, an Advisory Committee replacing the Commission's Subcommission, and the complaint procedure replacing the confidential 1503 procedure. The universal periodic review of the human rights record of every country begins with the initial members of the Council to be reviewed first,⁵³ The existing 38 special procedures—mechanisms which address either specific country situations or thematic issues in all parts of the world and are considered the most responsive, flexible, and effective mechanisms within the UN human rights system—are retained. And special procedure mandate-holders will be appointed under an agreed process and set criteria to ensure that individuals with the highest standard of expertise, experience, independence, and impartiality are selected.⁵⁴ Further, the mandate-holders are subject to a code of conduct aimed at strengthening their capacity and the effectiveness of the system.⁵⁵

The Council's advisory committee will function as a think-tank of the Council and will be composed of 18 experts elected by the Council who will serve in their

50. U.N. Human Rights Council, *Report to the General Assembly on the Fifth Session of the Human Rights Council*, at 38-44 (Appendices I-II), U.N. Doc. A/HRC/5/L.11 (June 18, 2007) [hereinafter Human Rights Council's Report on the Fifth Session].

51. *Id.* at 13-15.

52. *Id.* at 25 (agenda item 7). During its Sixth Session, the Council adopted two resolutions critical of Israel. Resolutions 6-18 and 6-19, adopted on September 28, 2007, U.N. Doc. A/HRC/6/L.11 (October 5, 2007). The Council held a Sixth Special Session, at which it again adopted a resolution on Israel, calling for "urgent international action to put an immediate end to the grave violations committed by the occupying Power, Israel, in the Occupied Palestinian Territory . . ." U.N. Doc. A/HRC/S-6/L.1, operative para. 2 (January 23, 2008). US President George W. Bush in his address to the U.N. General Assembly on September 25, 2007, said:

The United States is committed to a strong and vibrant United Nations. Yet the American people are disappointed by the failures of the Human Rights Council. This body has been silent on repression by regimes from Havana to Caracas to Pyongyang and Tehran -- while focusing its criticism excessively on Israel. To be credible on human rights in the world, the United Nations must reform its own Human Rights Council.

Available at www.whitehouse.gov/news/releases/2007/09/20070925-4.html.

53. Human Rights Council's Report of the Fifth Session, *supra* note 50, at 4-11 (Annex 1).

54. *Id.* at 11-15.

55. *Id.* at 45-55 (which includes Resolution 5/2 adopted by the Council and the text of the code of conduct).

personal capacity.⁵⁶ The confidential complaint procedure, based on the previous "1503 procedure," will address consistent patterns of reliably attested gross violations of all human rights, will be more victim-oriented, and will be assisted by two working groups.⁵⁷ The Council is to meet regularly throughout the year and will hold special sessions when needed, according to the newly established rules of procedure.⁵⁸

It is in this context that several human rights NGOs, including Amnesty International, Human Rights Watch, the Carter Center, Open Society Institute, and World Federalist Movement, wrote to Secretary of State Condoleezza Rice, urging the United States to work with other U.N. member states to make the Council strong and effective:

The disappointments of the Council's first year—such as the discontinuation of consideration of Iran and Uzbekistan under the 1503 procedure and the failure of the Council to address comprehensively the situations in Lebanon and the Occupied Palestinian Territories—should spur the United States not to disengagement, but to greater engagement....

The United States, together with other countries, must invest greater political capital and more staff and resources into making the Council an effective forum for the promotion and protection of human rights. With its long tradition of leadership in human rights, it has an important role to play in helping to ensure that the Council will become the success that the victims of human rights violations all over the world badly need it to be.⁵⁹

As this discussion shows, the Council has failed to meet the expectations of those who envisaged the dawn of a new era of human rights protection with its formation. The United States is reportedly considering withdrawal of its funding for the Council to show its disapproval of the Council's actions.⁶⁰ However, the positive aspects noted above demonstrate as well that if members of the Council with strong commitment to human rights make concerted efforts and human rights NGOs keep a vigilant eye and continue to exert pressure, the Council could conceivably reach its potential, which was so eloquently articulated in the General Assembly Resolution establishing it.

56. *Id.* at 15-18. The advisory council replacing the former Sub-Commission on the Promotion and Protection of Human Rights will be established to support the Council's work.

57. *Id.* at 19-24.

58. *Id.* at 32-37. For the final version of the Human Rights Council's Report to the General Assembly on the Fifth Session of the Council, see U.N. Doc. A/HRC/5/21 (Aug. 7, 2007).

59. *Amnesty International USA Joint Letter*, July 9, 2007, www.amnestyusa.org/document.php?lang=e&id=ENGUSA20070716001.

60. See Betsy Pisik, *U.N. Panel Faces Loss of U.S. Funding*, WASH. TIMES., Sept. 11, 2007, at A01.

IV.

The tension between sovereignty and human rights lies at the heart of the Responsibility to Protect concept. Sovereignty, of course, remains sacrosanct in the Westphalian state-centered system. Sovereign equality and territorial integrity are cardinal principles enshrined in the U.N. Charter.⁶¹ Thus, the Charter mandates non-intervention in a state's internal affairs⁶² and prohibits the use of unauthorized force⁶³ as means to ensure that there is no infringement on state sovereignty. The human rights movement—the development and growth of human rights norms, institutions, and processes outlined earlier—lays claim to its genesis in the U.N. Charter, as well.

Reconciling these competing considerations continues to be a daunting task. The struggle began soon after the founding of the United Nations. Apartheid in South Africa, Unilateral Declaration of Independence in Southern Rhodesia, and the expulsion of Asians from Uganda were among the initial challenges the U.N. faced. The genocide in Cambodia led by the Khmer Rouge and the Pol Pot regime intensified the tension. There were other instances.

The debate centered on the concept of humanitarian intervention—coercive intervention by military action against a state to protect people in that state suffering or threatened with genocide and other massive violations of human rights. Invoking articles 2(4) and 2(7) of the U.N. Charter, critics reject unilateral humanitarian intervention, asserting that it is a prohibited intrusion on state sovereignty. Proponents, on the other hand, contend that in order to protect the human rights of those suffering or threatened with genocide and massive violations of that nature, even unilateral use of force is permissible under article 2(4) when the Security Council is paralyzed, there is inaction on the part of regional organizations, and the force is used as a last resort. I should note that humanitarian intervention has indeed been abused in the past and many states with colonial experiences perceive it as undermining their sovereignty and suspect that it is likely to be abused by powerful states. The validity of humanitarian intervention has been challenged on both doctrinal and policy grounds.

During the 1990s the international community helplessly watched grievous assaults on human security. No effective measures were taken to prevent or respond to the genocide in Rwanda and mass murders and other crimes against humanity in many other countries. Critics failed to present any desirable and feasible alternative to humanitarian intervention, and voices seeking international action to protect those suffering from heinous acts within their countries were met with silence. Thus the pertinent question was: how should the international community protect those who need protection within a state when the government is unable to protect them or is complicit?

61. U.N. Charter art. 2, para. 1.

62. *Id.* at para. 7.

63. *Id.* at para. 4.

It is in response to these tragic events of the 1990s that then UN Secretary-General Kofi Annan addressed the dilemma of humanitarian intervention in his Millennium Report to the General Assembly in April 2000.⁶⁴ After noting his 1999 call to member states “to unite in the pursuit of more effective policies to stop organized mass murder and egregious violations of human rights,” he acknowledged the controversy his comments had generated.⁶⁵

He stated the critics’ concerns—that the concept could “become a cover for gratuitous interference in the internal affairs of sovereign states”; that “it might encourage secessionists movements deliberately to provoke governments into committing gross violations of human rights in order to trigger external interventions”; and that “there is little consistency in the practice of intervention ... except that weak states are far more likely to be subjected to it than strong ones.”⁶⁶ He then recognized the importance of these arguments and of the principles of sovereignty and non-interference, which offer “vital protection to small and weak states,” but said, “to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?”⁶⁷

He added that, while humanitarian intervention “is a sensitive issue, fraught with political difficulty and not susceptible to easy answers,”

[w]here such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community. The fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished.⁶⁸

I quote Kofi Annan extensively here because the genesis of the Responsibility to Protect concept is in response to his challenge, which he subsequently reiterated for the Security Council members. That was in his address to the General Assembly in 2003, in which he urged the Council members

to engage in serious discussions of the best way to respond to the threats of genocide or other comparable massive violations of human rights.... Once again this year, our collective response to events of this type—in the Democratic Republic of the Congo and in Liberia—has been hesitant and tardy.⁶⁹

64. The Secretary-General’s Millennium Report, *We the Peoples: The Role of the United Nations in the Twenty-First Century*, 47–48, U.N. Doc. A/54/2000 (Apr. 3, 2000), available at www.un.org/millennium/sg/report/ch3.pdf.

65. *Id.* at 47.

66. *Id.* at 47–48.

67. *Id.* at 48.

68. *Id.*

69. The Secretary-General’s Address to the General Assembly, Sept. 23, 2003, www.un.org/apps/sg/printsgstats.asp?nid=517.

In September 2005, the U.N. World Summit, which brought together heads of state and government from almost all member states, answered the Secretary-General's call by accepting each individual state's "responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes...."⁷⁰ The Summit further resolved:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means... to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council,... on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁷¹

Before analyzing the nature of the commitment, it would be useful to provide the context to the Summit agreement. A number of factors combined to prompt several initiatives by think-tanks⁷² and governments in search for an effective response to massive violations of human rights within many states in the 1990s in which the government either failed to prevent the violations or was involved in causing the harm. These factors included the ineffective international response and the Secretary-General's challenge to the international community.

The governments of Denmark,⁷³ The Netherlands,⁷⁴ Sweden,⁷⁵ and the United States⁷⁶ were among those engaged in this quest. Also, during the mid 1990s the Special Representative of the Secretary-General on Internally Displaced Persons, Francis Deng, had already redefined sovereignty as responsibility.⁷⁷ It was, however, a report entitled "The Responsibility to Protect," of the International Commission on Intervention and State Sovereignty (ICISS), established by the

70. World Summit Outcome, G.A. Res. 60/1 ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter Summit Outcome Document].

71. *Id.* at ¶ 139.

72. See, e.g., COUNCIL ON FOREIGN RELATIONS, HUMANITARIAN INTERVENTION: CRAFTING A WORKABLE DOCTRINE (Alton Frye ed., 2000).

73. DANISH INSTITUTE OF INTERNATIONAL AFFAIRS, *Humanitarian Intervention: Legal and Political Aspects* (1999).

74. ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS AND ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW, *Humanitarian Intervention* (2000).

75. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (Oxford University Press 2000).

76. U.S. DEPARTMENT OF STATE, INTER-AGENCY REVIEW OF U.S. GOVERNMENT CIVILIAN HUMANITARIAN AND TRANSITION PROGRAMS (2000), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB30/index.html#doc>.

77. Francis M. Deng, *Frontiers of Sovereignty*, 8 LEIDEN J. INT'L L. 249 (1995); FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (The Brookings Institution 1996).

government of Canada in cooperation with a group of major foundations, which proved most influential in shaping the concept.⁷⁸

Rejecting the traditional language of the sovereignty-intervention debate—the “right of humanitarian intervention”⁷⁹ or the “right to intervene”—the Commission shifted the debate to focus instead on the “responsibility to protect,” suggesting that the proposed change reflected “a change in perspective, reversing the perceptions inherent in the traditional language.”⁸⁰ The Commission clarified that the term “the responsibility to protect” implies focusing on the point of view not of those who may be considering intervention but of those seeking or needing support.⁸¹ It explained that the Responsibility to Protect comprises three distinct responsibilities—the responsibility to prevent;⁸² the responsibility to react, which may include in extreme cases military intervention;⁸³ and the responsibility to rebuild after military intervention.⁸⁴ It further explained that the primary responsibility to protect “rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.... Thus, the [concept] is more of a linking concept that bridges the divide between intervention and sovereignty....”⁸⁵

The Commission conducted roundtable discussions around the world and consulted a wide range of academic experts. In light of its goal of providing a new

78. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Dec. 2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf> [hereinafter ICISS Report].

79. There is voluminous literature on humanitarian intervention. See, e.g., HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J.L. Holzgrefe & Robert O. Keohane eds., 2003); V.S. Mani, *Humanitarian Intervention Today*, 313 RECUEIL DES COURS (2005); SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER (1996); FERNANDO TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1996); Mohammed Ayoob, *Third World Perspectives on Humanitarian Intervention and International Administration*, 10 GLOBAL GOVERNANCE 99 (2004); Ruth E. Gordon, *Intervention by the United Nations: Iraq, Somalia and Haiti*, 31 TEX. INT'L L. J. 43 (1996); Christopher C. Joyner, “The Responsibility to Protect”: Humanitarian Concern and the Lawfulness of Armed Intervention, 47 VA. J. INT'L L. 693 (2007); Richard B. Lillich, *The Role of the U.N. Security Council in Protecting Human Rights in Crisis Situations: U.N. Humanitarian Intervention in the Post-Cold War Era*, 3 TUL. J. INT'L & COMP. L. 1 (1995); James A.R. Nafziger, *Humanitarian Intervention in a Community of Power*, 22 DENV. J. INT'L L. & POL'Y 219 (1994); Ved Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti -- Revisiting the Validity of Humanitarian Intervention Under International Law, Pt. I*, 20 DENV. J. INT'L L. & POL'Y 305 (1992); Ved Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia -- Revisiting the Validity of Humanitarian Intervention Under International Law, Pt. II*, 26 DENV. J. INT'L L. & POL'Y 827 (1998); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000); Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 Mich. J. Int'l L. 883 (1995); Thomas G. Weiss, *The Sunset of Humanitarian Intervention? Responsibility to Protect in a Unipolar Era*, 35 SECURITY DIALOGUE 135 (2004).

80. ICISS Report, *supra* note 78, at ¶ 2.29.

81. *Id.*

82. *Id.* at ¶ 3.1-3.43.

83. *Id.* at ¶ 4.1-4.43.

84. *Id.* at ¶ 5.1-5.31.

85. *Id.* at ¶ 2.29.

approach to military intervention on human protection grounds, the Commission proposed a “just cause threshold” for such intervention to be “serious and irreparable harm” to human beings, such as “large scale loss of life, actual or apprehended, with genocidal intent or not,” or “large scale ‘ethnic cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.”⁸⁶

Next, the Commission enumerated four precautionary principles to guide the use of force once the above-mentioned threshold has been reached: (1) right intention, the primary purpose of which must be to “halt or avert human suffering”;⁸⁷ (2) last resort—military intervention can only be justified when all diplomatic and non-military avenues have been explored;⁸⁸ (3) proportional means—military intervention should be the minimum necessary to achieve the humanitarian goal;⁸⁹ and (4) reasonable prospects of success in halting or averting the suffering that justified the intervention, “with the consequences of action not likely to be worse than the consequences of inaction.”⁹⁰

As to the right authority to authorize military intervention, the Commission identified the U.N. Security Council, suggesting that “[t]he task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.”⁹¹ On the use of the veto by the five Permanent Members of the Security Council, the Commission said that they should agree not to use it where their vital state interests are not at stake if otherwise there is majority support for such action.⁹²

In case of inaction by the Security Council, the Commission offered alternative options—the “Uniting for Peace” procedure, under which the General Assembly considers the matter in an emergency special session;⁹³ action by regional organizations “subject to their seeking subsequently authorization from the Security Council”; or other means by concerned states “to meet the gravity and urgency of [the] situation,” in which case “the stature and credibility of the United Nations may suffer....”⁹⁴

The response to the Commission’s proposal was initially mixed among states⁹⁵ as well as nongovernmental organizations⁹⁶ and scholars.⁹⁷ It is

86. *Id.* at ¶ 4.18-4.19.

87. *Id.* at ¶ 4.33.

88. *Id.* at ¶ 4.37.

89. *Id.* at ¶ 4.39.

90. *Id.* at XII; *see also id.* at ¶ 4.41.

91. *Id.* at xii.

92. *Id.* at 51.

93. *Id.* at xiii.

94. *Id.*

95. *See generally* Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT’L AFFAIRS 143, 151 (2006) [hereinafter *Whither the Responsibility to Protect*].

96. *See* William R. Pace and Nicole Deller, *Preventing Future Genocides: An International Responsibility to Protect*, 36.4 WORLD ORDER 15, 21 (2005).

97. *See, e.g.,* Mohammed Ayoob, *Third World Perspectives on Humanitarian Intervention and*

noteworthy that the Constitutive act which created the African Union authorizes the A.U. to undertake humanitarian intervention, although the A.U. has never used this authority.⁹⁸ Also, the language of authorization is accompanied with qualifications and is conceivably ambiguous.⁹⁹

Kofi Annan established a High-Level Panel in September 2003 with the task of examining the challenges to international peace and security and the contribution the United Nations could make in addressing those challenges more effectively.¹⁰⁰ A year later, the panel endorsed what it said was the “emerging norm” of a collective international responsibility to protect, which was “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.”¹⁰¹

The Panel did not identify alternative sources of authority when the Security Council fails to act but focused instead on making the Security Council “work better than it has.”¹⁰² It endorsed the ICISS’s “just cause” threshold and its precautionary principles. However, it added “serious violations of international humanitarian law, actual or imminently apprehended” to the Commission’s list.¹⁰³ It renamed the basic criteria of legitimacy—seriousness of threat, proper purpose, last resort, proper means, and balance of consequences.¹⁰⁴ It recommended that the Security Council and the General Assembly should adopt declaratory resolutions embodying these guidelines for authorizing the use of force.¹⁰⁵ In his March 2005 report, Kofi Annan accepted the Panel’s recommendations.¹⁰⁶

International Administration, 10 GLOBAL GOVERNANCE 99, 104-10 (2004); S. Neil MacFarlane, *et al.*, *The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?*, 25 THIRD WORLD Q. 977, 979-81 (2004); Joelle Tanguy, *Redefining Sovereignty and Intervention*, 17 ETHICS & INT'L AFFAIRS 1419 (Spring 2003); David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World*, 18 BYU J. PUB. L. 1 (2003); Jennifer Welsh, *et al.*, *The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty*, 57 INT'L J. 489 (2002).

98. See generally *Whither the Responsibility to Protect*, *supra* note 95, notes 57-70 and accompanying text. Article 4 recognizes the “right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.”

99. *Id.*

100. Press Release, Secretary-General, Secretary-General Names High Level Panel to Study Global Security Threats and Recommend Necessary Changes, U.N. Doc. SG/A/857 (Apr. 11, 2003).

101. U.N. General Assembly, *A More Secure World, Our Shared Responsibility -- Report of the High-Level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565, para. 203 (Dec. 2, 2004).

102. *Id.* para. 198.

103. *Id.* para. 207a.

104. *Id.* para. 207a-e.

105. *Id.* para. 208.

106. Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005 (Mar. 2005).

In June 2005, an influential report entitled *American Interests and UN Reform*¹⁰⁷ was released by a bi-partisan task force established under the initiative of the U.S. Congress. It recommended that the U.S. government “should affirm that every sovereign government has a ‘responsibility to protect’ its citizens and those within its jurisdiction from genocide, mass killing, and massive and sustained human rights violations.”¹⁰⁸ It further urged the U.S. government to call on the U.N. Security Council and General Assembly to affirm such responsibility of every sovereign government.¹⁰⁹ The report said that if the government fails to provide protection, “it forfeits claims to immunity from intervention... if such intervention is designed to protect the at-risk population.” In such a case, the “collective responsibility of nations [under the Security Council auspices] to take action cannot be denied.”¹¹⁰

Under the task force’s recommendations, the Security Council’s failure to act “must not be used as an excuse by concerned members to avoid protective measures.... Those engaged in mass murder must understand that they will be identified and held accountable.”¹¹¹ This implies that member states’ use of force in extreme cases would be valid even outside the U.N. framework. To illustrate, the report specifically recommended that the U.S. propose to the Security Council that it impose sanctions, including economic sanctions authorized under the U.N. Charter, to stop genocide and mass murder. If these measures do not succeed, the Security Council should consider authorizing military intervention. And what if it does not do so? The task force’s answer: “[If] the Security Council is derelict or untimely in its response, states—individually or collectively—would retain the ability to act.”¹¹²

All these reports were available to member states before the World Summit met in September 2005. As already mentioned, the Summit endorsed the emerging norm and the responsibility of each individual state to provide protection, and called upon the international community to assume responsibility to help to protect populations from the specified crimes—genocide, war crimes, ethnic cleansing, and crimes against humanity—and to support the U.N. in establishing an early warning capability.¹¹³

The timing, however, was not propitious. The Iraq invasion had resulted in Saddam Hussein’s overthrow but Iraq continued to suffer from insurgency, violence, and terrorism. One of the rationales for the invasion of Iraq by the United States and United Kingdom was that Saddam Hussein was guilty of perpetrating gross violations of human rights, especially by committing atrocities on the Kurds in the North and the Shiites in the South, and the use of military force

107. Task Force on the United Nations, *American Interests and UN Reform*, U.S. Institute of Peace, 2005.

108. *Id.* at 29.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 32. See generally *id.* at 31-32.

113. Summit Outcome Document, *supra*, note 70, para. 138-139.

to topple his regime was aimed at protecting the population from further abuse. That undoubtedly was a misuse of the concept.

According to Gareth Evans, co-chair of the ICISS and president of International Crisis Group, this misuse was the “biggest inhibitor of all to the ready acceptance of [the Responsibility to Protect] as an operating principle.”¹¹⁴ He argues that even if the threshold issue of the seriousness of the security threat to Iraq’s population might have been met, the others, especially that “the results of military action would not be worse than taking no action,” was certainly not satisfied,¹¹⁵ for at the time of the invasion that judgment could not responsibly have been made.

The Document did not include massive violations of human rights or any similar formulation as part of the threshold, thus raising the threshold for intervention. Nor did it contain a provision to the effect that the Security Council has the *obligation* to intervene with the use of force if the national government fails to provide protection, although it recognized the international community’s responsibility through the United Nations to use “appropriate diplomatic, humanitarian and other peaceful means” for this purpose.¹¹⁶ As to the use of force, the states agreed that they are “prepared to take collective action” through the Security Council or regional organizations “on a case-by-case basis... [if] national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”¹¹⁷

The Summit Document thus reflects some states’ resistance to give a blank check to the Security Council to undertake military intervention and on the other hand some states’ unwillingness to assume an obligation to act as was recommended by the ICISS. To illustrate, in his address to the General Assembly on September 15, 2005, President Hugo Chávez of Venezuela challenged the Responsibility to Protect doctrine by asking, “Who is going to protect us? How are they going to protect us?” He called it a “very dangerous” concept that “shape[s] imperialism [and] interventionism” in the attempt “to legalize the violation of the national sovereignty.”¹¹⁸

In response to the Revised Draft Outcome Document,¹¹⁹ which was released on August 10, 2005, then U.S. Ambassador to the United Nations John Bolton wrote a letter to the President of the General Assembly on August 30, 2005. In it he argued that member states have no obligation or responsibility “of a legal character” to intervene, rejecting the suggestion “that either the United Nations as

114. Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT’L L.J. 703, 717 (2006) [hereinafter *Responsibility to Protect*].

115. *Id.* at 717-18.

116. *Id.*

117. *Id.* at 715.

118. President Hugo Chávez, Speech at 70th UN General Assembly, New York (Sept. 15, 2005), available at www.embavenez-us.org/news.php?nid=1745.

119. Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly, U.N. Doc. A/59/HLPM/CRP.1/Rev. 2 (Aug. 10, 2005) [hereinafter *Revised Draft Outcome Document*].

a whole, or the Security Council, or individual states, have an obligation to intervene under international law.”¹²⁰

The Document removed the proposed recommendation from the Draft Outcome Document that called on Permanent Security Council members to refrain from using the veto in cases involving the specified violations.¹²¹ It may be recalled that the ICISS had suggested that the Security Council’s Permanent Members should abstain from the use of the veto in such cases unless their vital interests are involved.¹²² Opponents to any restraint on the use of the veto fall into two camps—those who consider the veto as a tool to prevent interventionism and those who consider any constraint on the veto as limiting their freedom of action. Nor was there any mention in the Document of criteria or standards to guide states in determining when force may be used. Also, the agreement fails to provide any guidance on who has the responsibility to protect if the Security Council does not act because of the use of veto or for any other reason.

Skeptics may not find much that is new in the Summit Outcome Document. They could argue that it adds nothing substantial regarding the use of military force, since the Security Council is authorized under the Charter to use force and the Council has interpreted the qualifier “a threat to international peace and security” pretty broadly. And the language “prepared to take collective action” gives a great deal of leeway to member states.¹²³ Furthermore, the determination of when a state is “manifestly failing to protect [its] populations” can be subject to varying interpretations.¹²⁴

What the skeptics miss is the importance of the solemn core declaration, reached by consensus among member states that each state has the responsibility to protect its populations from violations of the specified human rights. To accept sovereignty as responsibility represents a major shift from the traditional notion of sovereignty as connoting complete control. Thus no longer can a government hide behind the shield of sovereignty, claiming non-intervention by other states in its internal affairs, if it fails to protect the people under its jurisdiction from massive violations of human rights. The states also agreed on a “just cause” threshold and reaffirmed the Security Council’s predominant role for protection purposes when a state fails in its obligation.

Indeed, many of the ICISS’s recommendations, especially the guidelines on when legitimately to intervene, were left out in order to ensure the adoption of a consensus document. But the result is an important first step, which should be considered in the nature of a framework agreement. Of course, much more needs to be done before the concept can be operationalized.

120. Letter from John R. Bolton, U.S. Representative to the U.N., to members of the General Assembly (Aug. 30, 2005), available at <http://www.responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=219>.

121. Revised Draft Outcome Document, *supra* note 121.

122. ICISS Report, *supra* note 80, para. 6.21.

123. Summit Outcome Document, *supra* note 72, at para. 139.

124. *Id.*

V.

The Security Council took its first step by reaffirming the “provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document Regarding the Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity” in its Resolution 1674 of April 28, 2006, on the protection of civilians in armed conflict.¹²⁵ Two months later, then U.N. Under-Secretary-General Jan Egeland said at a Security Council meeting,

We as the U.N., and you as the Security Council, now have the responsibility to protect as reaffirmed in Resolution 1674. There are too many times when we still do not come to the defence of civilian populations in need [as] we appear to wash our hands of our humanitarian responsibilities to protect lives.”¹²⁶

Subsequently, on August 31, 2006, the Security Council called for the rapid deployment of U.N. peacekeepers in Darfur in its Resolution 1706, which incorporated the doctrine as it referred to the “responsibility of the Government of the Sudan, to protect civilians under threat of physical violence.”¹²⁷

The General Assembly and the Security Council must adopt guidelines to determine when threats to civilian populations rise to the level requiring Security Council action. Also, guidelines on the legitimate use of force need to be established by these bodies. These are essential prerequisites for the implementation and enforcement of the doctrine. A case in point is the Darfur crisis, which has been ongoing since early 2003. The U.S. President has characterized the atrocities in Darfur, in the words of the Bush administration, “by their rightful name: genocide.”¹²⁸ Similarly, the U.S. Congress has also called the situation genocide.¹²⁹

There is no dearth of reliable reports on the gravity of the situation in Darfur.¹³⁰ For example, in his July 2006 report to the U.N. Security Council on

125. Resolution 1674 of April 28, 2006 on the Protection of Civilians in Armed Conflict, U.N. Doc. S/RES/1674, para. 4, April 28, 2006.

126. Statement of Under-Secretary-General Jan Egeland at the open meeting of the Security Council on the Protection of Civilians in Armed Conflict, 28 June 2006, available at <http://ochaonline.un.org/HumanitarianIssues/ProtectionofCiviliansinArmedConflict/DocumentsLibrary/tabid/1142/Default.aspx>.

127. U.N. Doc. S/RES/1706, para. 12(a), Aug. 31, 2006. For a review of earlier U.N. resolutions on Darfur, see generally Alex J. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq*, 19 ETHICS & INT'L AFFAIRS 31 (2005).

128. The White House, *President Bush Discusses Genocide in Darfur, Implements Sanctions*, available at www.whitehouse.gov/news/releases/2007/05/print/20070529, May 29, 2007 [hereinafter *Bush Implements Sanctions*] (adding 31 Sudanese companies to those already under economic sanctions and targeting sanctions against individuals, as well).

129. Darfur Peace and Accountability Act of 2006, P.L. 109-344, 120 Stat. 1869, 1873, at §4(1). In his address to the U.N. General Assembly on September 25, 2007, President Bush reiterated that the atrocities in Darfur amount to genocide: “In Sudan, innocent civilians are suffering repression -- and in the Darfur region, many are losing their lives to genocide.” Available at www.whitehouse.gov/news/releases/2007/09/20070925-4.html.

130. See, e.g., Report of the International Commission of Inquiry on Darfur to the United Nations

Darfur, Kofi Annan stated, after providing a brief history of the conflict in the region:

The notorious Janjaweed, coupled with militia attacks and indiscriminate air bombardment, contributed to the razing and burning of villages, the rape of girls and women, the abduction of children and the destruction of food and water resources. The result has been death, devastation and destruction in Darfur, with more than 200,000 civilian casualties, more than 2,000,000 people displaced in their homes and condemned to misery, and millions more having their livelihoods destroyed.¹³¹

He further added that the Darfur crisis threatens regional peace and security and that cross-border violence between the Sudan and Chad has exacerbated the humanitarian crisis in the region.¹³²

A year later, the Secretary-General's Report on Darfur¹³³ noted continuing violence and insecurity in Darfur. According to the report, violence against the African Union mission and the United Nations mission, as well as the NGO community in Darfur, had increased. The Secretary-General noted that earlier in 2007 the government of Sudan carried out several air bombardments in Northern and Southern Darfur, ground attacks had occurred against civilian villages, systematic sexual and gender-based violence had continued against the female population of Darfur, attacks against aid workers and their assets had become a daily occurrence,¹³⁴ and in the first seven months of 2007 more than 150,000 people had been newly displaced.¹³⁵

In November 2006, as mentioned earlier, the Human Rights Council appointed a High-Level Mission to assess the human rights situation in Darfur,¹³⁶ which submitted a report concluding that the international community has a solemn obligation to exercise its responsibility to protect the people of Darfur.¹³⁷ Subsequently the Council also adopted a resolution in March 2007 expressing deep concern regarding the serious situation in Darfur and established an Experts Group on Sudan, which reiterated the gravity of the situation in Darfur at the Council's

Secretary-General, Geneva, Jan. 25, 2005, available at www.reliefweb.int/library/documents/2005/ici-sud-25feb; Monthly Reports of the Secretary-General on Darfur to the Security Council, such as those cited in notes 133-136, *infra*; Crisis Group, *Crisis in Darfur* (updated May 2007), available at www.crisisgroup.org/home/index.cfm?id=3060&l=1; International Crisis Group, *Getting the UN into Darfur*, Africa Briefing No. 43, Oct. 12, 2006; U.S. Department of State, *Country Reports on Human Rights Practices -- 2006, Sudan*, Mar. 6, 2007, available at state.gov/g/drl/rls/hrrpt/2006/78759.

131. U.N. Security Council, Report of the Secretary-General on Darfur, U.N. Doc. S/2006/591, para. 4 (28 July 2006).

132. *Id.*

133. U.N. Security Council, Report of the Secretary-General on Darfur, U.N. Doc. S/2007/462 (27 July 2007).

134. *Id.* paras. 2-24.

135. *Id.* paras. 2-23.

136. *Supra* note 38.

137. *Supra* notes 38-41.

meeting in June 2007.¹³⁸ In its report to the next Council meeting in September 2007, the Experts Group concluded that the Sudan government had only partially implemented its prior recommendations.¹³⁹

Let me mention other notable developments related to the Darfur situation. Efforts to press universities' retirement and pension funds and states to divest from companies doing business in Sudan or with the government of Sudan have been ongoing since 2004.¹⁴⁰ The United States further strengthened the sanctions regime¹⁴¹ it had earlier imposed against Sudan.¹⁴² Several NGOs are actively promoting the wider acceptance and operationalization of the Responsibility to Protect principle and its application to the Darfur crisis.¹⁴³ In February 2007 the prosecutor requested the International Criminal Court to summon before the Court a Sudanese government official (Minister of State for the Interior) and a Janjaweed officer, charging them with crimes against humanity.¹⁴⁴ Also, the International Court of Justice ruled in *Bosnia and Herzegovina v. Serbia and Montenegro*,¹⁴⁵ that the 1995 massacre of 8,000 Bosnian Muslim men and boys in Srebrenica was an act of genocide. In doing so, the Court established an important precedent: that a state in a position to prevent genocide must act to stop it. Under this rationale Sudan may be held responsible to halt the genocide in the Darfur region.¹⁴⁶

On July 31, 2007, the Security Council adopted Resolution 1769,¹⁴⁷ reaffirming paragraphs 138 and 139 of the Summit Outcome Document on the Responsibility to Protect. It established a United Nations and African Union

138. *Id. Supra* notes 45-47 and the accompanying text.

139. For the Report of the Panel of Experts, see Letter dated 10 September 2007 from the Panel of Experts on the Sudan addressed to the Chairman of the Security Council Committee established pursuant to resolution 1591 (2005) concerning the Sudan, U.N. Doc. S/2007/584, Annex, at 2. "The Panel has determined that the governments of Chad and the Sudan have failed to fully implement the . . . provisions of resolutions 1591 (2005) and 1672 (2006)." *Id.* at 3. "The Government of the Sudan has abjectly failed to take the necessary steps to protect and fulfil the human rights of individuals in Darfur, notwithstanding the security and access constraints that the Government experiences in certain parts of Darfur." *Id.* at 5. See Human Rights Watch, UN: Rights Council Should Set Benchmarks for Sudan -- Darfur Experts' Report is Basis for Assessing Progress, Sept. 24, 2007, at 1, available at hrw.org/english/docs/2007/09/24/sudan16943_txt. In a briefing paper, *Ten Steps for Darfur: Indicators for Evaluating Progress in the HRC Group of Experts Process*, Human Rights Watch outlines actions drawn from the recommendations compiled by the Group of Experts to improve the human rights situation in Darfur, available at www.hrw.org/backgrounder/un/sudan0907/.

140. See, e.g., Sam Graham-Felson, *Divestment and Sudan*, THE NATION, May 8, 2006.

141. Bush Implements Sanctions, *supra* note 130.

142. Darfur Peace and Accountability Act of 2006, *supra* note 131; Executive Order: Blocking Property of and Prohibiting Transactions with the Government of Sudan, Oct. 13, 2006, available at www.whitehouse.gov/news/releases/2006/10/print/20061013-14.

143. See, e.g., Responsibility to Protect/Engaging Civil Society, www.responsibilitytoprotect.org, and Save Darfur, www.savedarfur.org.

144. International Criminal Court, ICC-02/05, *Situation in Darfur, Sudan*, 27 Feb. 2007, available at www.icc-cpi.int/cases/Darfur.

145. IC Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. General List No. 91 (Feb. 26 Feb).

146. See Ved Nanda, *Bosnia Ruling a Victory for International Law*, DENVER POST, Feb. 28, 2007, at B7.

147. S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007).

hybrid peacekeeping force consisting of 19,555 military personnel and more than 6,000 police.¹⁴⁸ Thus, it is to augment the 7,000 African Union peacekeepers already in Darfur, which are underfinanced and poorly equipped, thus unable to provide protection to the people in Darfur.

Acting under Chapter VII of the U.N. Charter the Security Council authorized this hybrid peacekeeping force in Darfur “to take the necessary action” in order to protect their personnel and aid workers’ freedom of movement, to prevent the disruption of the Darfur Peace Agreement and to protect civilians.¹⁴⁹ However, because of the lack of consensus among the Permanent Members, especially the opposition of China, the force is not authorized to disarm the Janjaweed militia or to seize illegal weapons.¹⁵⁰ Nor did the resolution contain a threat of sanctions against the government of Sudan if it failed to cooperate as it has done on numerous occasions in the past.¹⁵¹

Subsequently, in September 2007 U.N. Secretary-General Ban Ki Moon visited Sudan, Chad, and Libya. He announced that peace negotiations between the Sudanese government and the Darfur rebels would begin in Libya on October 27 under the auspices of the U.N.-A.U. envoys to Darfur, Jan Eliasson and Salim Ahmed.¹⁵² However, the peace talks faltered, as several rebel groups boycotted them.¹⁵³

The grave situation in Darfur continues. In a statement issued on January 11, 2008, on behalf of the U.N. Security Council on January 11, 2008, the President of the Council condemned “in the strongest possible terms the January 7 attack by elements of the Sudanese Armed Forces, as confirmed by the United Nations African Union Mission in Darfur (UNAMID) on a UNAMID supply convoy.”¹⁵⁴ He added: “The Council expresses concern about the deterioration of security and humanitarian conditions in Darfur and calls upon the UN and all member states to facilitate the rapid and complete deployment of UNAMID.”¹⁵⁵

148. *Id.* para. 2.

149. *Id.* para. 15.

150. In *id.* para. 9, the authorization is simply to “monitor” arms.

151. *But see* Gordon Brown, Prime Minister of Britain, and Nicolas Sarkozy, President of France, *We are Pushing and Pushing to Save the Darfuris*, THE TIMES (London), Aug. 31, 2007 at 19 (“If progress is not made on security, the ceasefire, political process and humanitarian access, we will work together for further sanctions against those who fail to fulfill their commitments, obstruct the political process or continue to violate the ceasefire.” They further added, “It is the combination of a ceasefire, a peacekeeping force, economic reconstruction and the threat of sanctions that can bring a political solution to the region -- and we will spare no efforts in making this happen.”)

152. Ban Ki-Moon, *What I Saw in Darfur; Untangling the Knots of a Complex Crisis*, WASHINGTON POST, Sept. 14, 2007, at A13.

153. *See, e.g.* Barney Jopson, *Darfur Rebels’ Disunity Leads Only to Disarray*, FINANCIAL TIMES (London), October 31, 2007, at 8: “Boycotts threatened to scuttle the process before it had begun but it is clear that, even if all the rebels had come, their disparate diagnoses of Darfur’s problems would make it hard to find common demands to put to Sudan’s government.”

154. Statement by the President of the Security Council, U.N. Doc. S/PRST/2008/1 (January 11, 2008).

155. *Id.*

Jan Eliasson, U.N. Special Envoy for Darfur, told the Security Council in an open meeting on February 8, 2008: "Over the last few months, the security and humanitarian situation in Darfur and the region has dramatically deteriorated, most recently through events related to Chad."¹⁵⁶ At the same meeting, the UNAMID Force Commander "voiced his strong concern over reported Government attacks against villages... in Western Darfur, with initial information indicating that many houses have been burned and lives lost. There have also been reports of aerial bombings in Silea village."¹⁵⁷ UNAMID is the hybrid United Nations and African Union peacekeeping operation, which formally took over peacekeeping responsibilities from the AU mission in the Sudan on December 31, 2007.¹⁵⁸ On February 9, 2008, UNAMID and the Sudanese government signed the Status of Forces Agreement, which provides the legal framework to allow the peacekeepers to operate.¹⁵⁹

VI.

Clearly the government of Sudan is "unwilling or unable" to provide protection to people in Darfur who have continued to suffer brutal repression for four years. Under the Responsibility to Protect principle, in such a case the international community should assume that responsibility, which it has not yet done. What is obviously absent in implementing the principle is not only operational capacity but even more important, political will and commitment.¹⁶⁰

Until the Security Council establishes guidelines on whether the threshold is met and on whether the use of military force is warranted, questions will continue to be raised as they have been with respect to Darfur. The task awaiting the Security Council remains that of translating the concept into a practical and enforceable tool.

Let me conclude by reiterating that a dramatic, indeed revolutionary, change has taken place with the international community's focusing sharper attention on international human rights issues around the world. We can be rightfully proud of this historic achievement in creating the essential norms, as well as the implementation machinery. What is still sorely lacking is the implementation and enforcement of those norms by states as the major actors that matter. That remains the unfinished agenda.

156. U.N. News Service, *Darfur: Ongoing Violence Thwarting Peace Prospects, Say Top UN Officials*, available at www.un.org/apps/news/printnews.asp?nid=25562. The Darfur crisis has adversely affected the region. Tens of thousands of refugees from Darfur have sought protection in Chad. In early February, an attack by Chadian rebels, armed by Sudan, on the capital of Ndjamena, was repulsed. See *Chad -- A Regime Saved, for the Moment*, ECONOMIST, February 9, 2008, at 53; Lydia Polgreen, *Chad Capital Under Curfew Days After Coup Effort Failed*, N.Y. TIMES, February 8, 2008, at A6.

157. *Id.*

158. Statement by President of the Security Council, *supra* note 154.

159. U.N. News Service, *Secretary-General Speaks Out Against Recent Attacks in West Darfur*, available at <http://www.un.org/apps/news/story.asp?NewsID=25564&Cr=darfur&Cr1=#>.

160. See Gareth Evans, Responsibility to Protect, *supra* note 114, at 716-21 (identifying a number of problems with the concept's practical application).