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## COMMENT

### The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism

More than a decade after the world did nothing to halt genocide in Rwanda, and in the shadow of ongoing atrocities in Darfur, Sudan, the international community recently made a new commitment to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The United Nations 2005 World Summit brought together representatives from more than 170 countries, including the United States. While largely reiterating previous international development and security goals, the Summit culminated with an agreement that the international community, acting through the United Nations, bears a responsibility to help protect populations from genocide and other atrocities when their own governments fail to do so. The agreement further announced a willingness to take “collective action” through the Security Council to protect populations if peaceful means prove inadequate.<sup>1</sup>

The motivating force behind the agreement is the United Nations’ past inaction in the face of grave atrocities, including genocide. At the conclusion of the World Summit, Secretary General Kofi Annan told the world’s leaders: “[Y]ou will be pledged to act if another Rwanda looms.”<sup>2</sup> However, by describing the responsibility to protect in terms of U.N. action, the World Summit failed to address a critical issue: What can and should be done by individual states if the United Nations fails to fulfill its pledge? The answer to this question will inform the scope of permissible unilateral action, with implications for future humanitarian interventions and military actions.

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1. 2005 World Summit, Sept. 14-16, 2005, *2005 World Summit Outcome*, ¶ 139, U.N. Doc. A/60/L.1 (Sept. 20, 2005).
  2. Kofi Annan, U.N. Secretary-General, Address to the 2005 World Summit (Sept. 14, 2005), available at <http://www.un.org/webcase/summit2005/statements/spenglish3.pdf>.

This Comment argues that the Summit agreement strengthens the legal justification for limited forms of unilateral and regional action—including military action—if the United Nations fails to act to protect populations from genocide and other atrocities. The Summit agreement strengthens the justification for unilateral action in two main ways. First, the agreement affirms important limits on national sovereignty by recognizing a state's responsibility to protect its own citizens. Second, the agreement sets clear responsibilities for the international community when a country fails to protect its own citizens. In cases of U.N. inaction, would-be unilateral actors can point to an explicit failure to fulfill a duty.

However, the agreement only supports unilateral action in a narrow set of circumstances. First, the agreement is limited to a small set of extreme human rights abuses. Second, the agreement implies a hierarchy of actors and of interventions: Good faith U.N. action is privileged over unilateralism and peaceful action is privileged over violent means. Finally, the agreement limits the scope of intervention to the goal of protection. For these reasons, the U.S. invasion of Iraq could not have been justified using the Summit agreement.

## I. THE SUMMIT AGREEMENT FRAMEWORK

The Summit agreement is an important contribution to international law. It builds on recent trends in international law and practice<sup>3</sup> and codifies them in an agreement that nearly every country in the world participated in forming. As such, it strengthens the development of a new international norm regarding humanitarian protection.

The agreement recognizes that while the responsibility to protect begins with national governments, it does not end at nations' borders. Thus, while "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity,"<sup>4</sup> when a

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3. The Summit codifies a norm of protection that emerged in the 1990s. For example, the 1994 Rwandan Genocide prompted arguments among international lawyers and policymakers that international actors had a right, and even a duty, to prevent genocide. See SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 359-62 (2002); Stephen J. Toope, *Does International Law Impose a Duty upon the United Nations To Prevent Genocide?*, 46 MCGILL L.J. 187, 187 (2000). The United Nations has also supported interventions on humanitarian grounds, such as in Somalia. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 16 (2001) [hereinafter THE RESPONSIBILITY TO PROTECT], available at <http://www.iciss.ca/pdf/Commission-Report.pdf>.

4. 2005 World Summit, *supra* note 1, ¶ 138.

state fails to do so, “[t]he international community, through the United Nations, also has the responsibility.”<sup>5</sup> Moreover, the agreement calls for coercive action through the Security Council, including economic sanctions or even military action, as a last resort to protect populations:

[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>6</sup>

While the decision to intervene will be made on a case-by-case basis, the agreement emphasizes the need for “timely and decisive” action when peaceful persuasion is inadequate. In particular, the agreement broadens the concept of “international peace and security”<sup>7</sup> that underlies Chapter VII of the U.N. Charter, which permits coercive action by the Security Council.<sup>8</sup> Most previous Chapter VII actions, particularly humanitarian interventions, either nominally involved the consent of the nation in question or were justified in the name of regional security.<sup>9</sup> In contrast, the Summit agreement suggests that Chapter VII action is also appropriate for purely internal matters when peaceful means are inadequate and national authorities are failing to protect their populations. Violence need not cross borders to justify Security Council involvement when certain international human rights norms are being violated.

However, while the Summit agreement is an important statement regarding the duties of the international community, it fails to address whether the United Nations is the only international actor that can exercise the responsibility to protect, or merely the preferred actor. The Summit’s failure to consider unilateralism is not surprising. The agreement articulates a clear responsibility for the United Nations to act. The need for unilateral or regional action would therefore become an issue only if the United Nations failed to fulfill its duties, something that the drafters may have preferred not to countenance. That said, the dilemma will almost certainly emerge, because the

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5. *Id.* ¶ 139.

6. *Id.*

7. See U.N. Charter arts. 42, 43, 47, 48, 51.

8. *Id.* arts. 39, 41, 42.

9. See Adam Roberts, *The United Nations and Humanitarian Intervention*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 71, 81 (Jennifer M. Welsh ed., 2004).

Summit agreement does not address the structural issues that thwart effective U.N. action to protect vulnerable populations.

First, the structure of the United Nations does not foster quick and decisive responses. Vetoes by the permanent members of the Security Council—or even threats of vetoes—can undermine effective international action. Bureaucratic hurdles and diplomatic negotiations can be time-consuming, making it difficult to respond to rapidly unfolding events. More generally, any form of international coercion is usually diplomatically and politically costly, creating a strong incentive for international actors to avoid difficult measures. The international response to the crisis in Darfur is illustrative. China, which has ties to the Sudanese government and enjoys a permanent seat on the Security Council, was reported to have opposed coercive measures like sanctions.<sup>10</sup> The first Security Council resolution that took any direct action against the perpetrators of human rights abuses was not passed until March 29, 2005, two years after the violence began. Even today, ethnically targeted violence and a “culture of impunity” continue in Darfur.<sup>11</sup>

Second, the World Summit failed to agree to measures that would reduce the likelihood of strategic behavior among Security Council members to undercut action. Due in large part to U.S. pressure,<sup>12</sup> the final Summit agreement removed proposed language that called on permanent Security Council members “to refrain from using the veto in cases of genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>13</sup> This gap leaves permanent members with a powerful negotiating tool, permitting bad faith vetoes in the face of clear atrocities. The agreement’s limitation of coercive measures to a “case-by-case” basis<sup>14</sup> further encourages such bad faith actions.

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10. *Sudan Warns Against Intervention*, BBC NEWS, July 27, 2004, <http://news.bbc.co.uk/2/hi/africa/3931411.stm>.
  11. Jonah Fisher, “Culture of Impunity” in Darfur, BBC NEWS, Sept. 26, 2005, <http://news.bbc.co.uk/2/hi/africa/4283956.stm> (quoting Juan Mendez, U.N. Special Advisor on Genocide).
  12. See Colum Lynch, *U.S. Wants Changes in U.N. Agreement*, WASH. POST, Aug. 25, 2005, at A1.
  13. See *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*, ¶ 120, U.N. Doc. A/59/HLP/CRP.1/Rev.2 (Aug. 10, 2005).
  14. 2005 World Summit, *supra* note 1, ¶ 139.

## II. SUPPORT FOR UNILATERAL ACTION

State practice,<sup>15</sup> academic commentary,<sup>16</sup> and a close reading of the U.N. Charter itself<sup>17</sup> suggest that unilateral (or regional) intervention in the absence of U.N. action may be acceptable under some circumstances. The Summit agreement strengthens the case for unilateral action in the absence of U.N. action but also suggests key parameters limiting the scope of permissible intervention.

First, the agreement affirms important limitations on national sovereignty that have developed over the last two decades. The agreement draws upon the work of the International Commission on Intervention and State Sovereignty (ICISS), which introduced the concept of a “responsibility to protect” in a 2001 report.<sup>18</sup> The report rejected the view that sovereignty provides governments with full autonomy over their territories. Rather, it found there was an international consensus that sovereignty entails responsibilities as well as rights.<sup>19</sup> When individual states fail to protect their own populations, they have no sovereign right to nonintervention. Instead, “non-intervention yields to the international responsibility to protect.”<sup>20</sup>

The World Summit affirmed this view of sovereignty, defining protection as a responsibility and empowering the international community to fulfill that

15. For example, NATO’s unilateral action in Kosovo was not condemned by the Security Council or “in the wider society of states.” Nicholas J. Wheeler, *The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS, *supra* note 9, at 29, 30.

16. See FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 150 (1997); Roberts, *supra* note 9, at 85.

17. Articles 55 and 56 of the U.N. Charter oblige states to take joint and separate action in cooperation with the United Nations in defense of human rights. While Article 2(4) of the Charter prohibits the threat or use of force against the territorial integrity or political independence of a state or in a manner inconsistent with the purposes and principles of the United Nations, humanitarian intervention is not aimed at the territorial integrity of a state and is consistent with human rights principles. See Michael Reisman & Myres S. McDougal, Humanitarian Intervention To Protect the Ibos, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, app. A at 175-77 (Richard B. Lillich ed., 1973); see also Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons From Kosovo*, 41 WM. & MARY L. REV. 1743, 1751 (2000) (“A close reading of the U.N. Charter supports humanitarian intervention in Kosovo-like situations . . . in which an outside alliance acts unilaterally to redress human rights violations . . .”).

18. See THE RESPONSIBILITY TO PROTECT, *supra* note 3.

19. *Id.* at 8.

20. *Id.* at xi.

duty if a nation fails to do so.<sup>21</sup> The text of the agreement is limited to U.N. action, but its implications are much broader. The agreement undermines the objection that unilateral coercive action violates national sovereignty. If nations have no sovereign right to commit or passively permit atrocities against their own populations, then they cannot object on sovereignty grounds to coercive actions halting the commission of those atrocities. Sovereignty simply does not extend that far. This understanding of sovereignty does not affirmatively establish the legality of unilateral action, but it does undercut an important legal objection.

Second, the agreement sets a new standard for the United Nations and the international community as a whole: Failure to take action to protect populations from genocide and other atrocities is failure to fulfill a clearly acknowledged duty. Thus, the agreement asserts a “responsibility” for the international community, acting through the United Nations, to protect populations from genocide,<sup>22</sup> and declares that the United Nations is “prepared” to take “timely and decisive” coercive action if peaceful means prove inadequate.<sup>23</sup> Incidents of genocide and other atrocities are no longer merely morally reprehensible or violations of an individual nation’s responsibilities, and failure by the international community to respond is no longer simply morally blameworthy. Rather, the failure to act is a dereliction of a clearly articulated institutional duty, implicating not only individual states, but also the United Nations. If the United Nations fails to act, it is institutionally broken, at least with respect to the case at hand.<sup>24</sup>

In the absence of a functioning international institution, one must look to the overriding purpose of the Summit agreement: a pledge to prevent another Rwandan genocide.<sup>25</sup> It would be perverse to argue that members of the international community cannot respond individually to vindicate the purpose of the agreement, particularly in light of the U.N. Charter’s commitment to human rights.<sup>26</sup> Rather than acting illegally, states would be acting in a legal

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21. 2005 World Summit, *supra* note 1, ¶¶ 138-39.

22. *Id.* ¶ 139.

23. *Id.*

24. See 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, 17 (2000) (observing that the U.N. system has difficulty responding to grave human rights abuses and arguing that these abuses “will sometimes be addressed by forms of unilateral action that the international legal process may, in context, deem lawful, but that manifestly fail a test of formal legality under the UN Charter”).

25. See Annan, *supra* note 2.

26. See U.N. Charter arts. 55, 56; *supra* note 17.

void opened by U.N. inaction and with the purpose of addressing an institutional failure. Even ICISS leaves open the possibility of unilateral action in such circumstances:

[I]f the Security Council expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within a reasonable time, it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely discounted.<sup>27</sup>

While terms such as “reasonable time” are not clearly defined, they do suggest a framework with which to consider the permissibility of unilateral action. Indeed, under the agreement, unsanctioned action may be the only means of avoiding complicity in the failure to protect.

### III. LIMITATIONS ON UNILATERAL ACTION

While the agreement strengthens the case for unilateral responses to protect populations from genocide and other atrocities, it also suggests important limitations that affect how the agreement might be utilized by future unilateral actors, particularly the United States.<sup>28</sup> The ongoing war in Iraq is an elephant in the room when discussing the justifiability of unilateral action in the face of U.N. inaction. The Summit agreement, however, provides only weak support for interventions such as the invasion of Iraq.

First, the Summit agreement is limited to a small set of extreme human rights abuses. The responsibility to protect is defined to apply to genocide, war crimes, ethnic cleansing, and crimes against humanity. The agreement does not address the many other rights articulated in previous human rights conventions, such as political freedom and economic rights. Therefore, justifications for the war based on bringing democracy to Iraqis<sup>29</sup> are not relevant under the agreement. Likewise, justifications for intervention based on the war against terror are not relevant because the agreement relates to intervention when a government fails to protect its own population, not external populations. Saddam Hussein’s regime did commit ethnic cleansing

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27. THE RESPONSIBILITY TO PROTECT, *supra* note 3, at 53.

28. See Melvin P. Leffler, *Bush’s Foreign Policy*, FOREIGN POL’Y, Sept.-Oct. 2004, at 22; Richard L. Morningstar & Coit D. Blacker, *World Orders: Unilateralism vs. Multilateralism*, HARV. INT’L REV., Fall 2004, at 74.

29. E.g., President’s Remarks to the National Endowment for Democracy, 41 WEEKLY COMP. PRES. DOC. 1502 (Oct. 6, 2005).



and crimes against humanity in the past, such as the gassing of the Kurdish population in 1988.<sup>30</sup> The Summit agreement, however, requires evidence that a government is currently failing to protect its population against such atrocities. Thus, for the agreement to have been used to justify U.S. intervention, the United States would have had to make qualitatively different arguments, showing ongoing atrocities on the level of genocide, ethnic cleansing, or crimes against humanity occurring in Iraq, as well as the international community's unwillingness to prevent them.

Second, the Summit agreement implies a hierarchy of actors and of interventions: Good faith U.N. action is privileged over unilateral intervention, and peaceful action is privileged over violent means.<sup>31</sup> Individual states are obliged to explore every possible avenue through the United Nations before acting unilaterally, including action through the General Assembly. Consider, for example, the ongoing violence in Darfur. Under the agreement, the United States has a duty to advocate for increased action through the United Nations and to provide logistical or even military support to U.N.-sanctioned African Union peacekeepers,<sup>32</sup> who are grossly under-equipped.<sup>33</sup> But it would not be appropriate for the United States to unilaterally intervene militarily in Sudan at this stage, because it is not apparent that the United States has exhausted all available U.N. tools.

Likewise, the agreement clarifies that the international community is "prepared"<sup>34</sup> to intervene coercively only when peaceful means are ineffective. While this does not necessitate trying every noncoercive means before intervening, it does require fairly examining all diplomatic options. It also requires efforts to establish early warning facilities, so as to prevent atrocities before they begin.<sup>35</sup> Given that the purpose of the agreement is to protect

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30. See *Charges Facing Saddam Hussein*, BBC NEWS, July 1, 2004, [http://news.bbc.co.uk/2/hi/middle\\_east/3320293.stm](http://news.bbc.co.uk/2/hi/middle_east/3320293.stm).

31. 2005 World Summit, *supra* note 1, ¶ 139.

32. S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004) (“[w]elcoming the leadership role and the engagement of the African Union to address the situation in Darfur and *expressing* its readiness to support fully these efforts”).

33. The International Crisis Group estimates that a force level of 12,000 to 15,000 troops is required in Darfur. *The AU's Mission in Darfur: Bridging the Gaps* (Int'l Crisis Group, Africa Briefing No. 28, July 6, 2005). However, as of October 2005, Human Rights Watch estimated that there were only 7000 African Union personnel in Darfur, including 4890 troops and 1176 civilian police. HUMAN RIGHTS WATCH, *ENTRENCHING IMPUNITY: GOVERNMENT RESPONSIBILITY FOR INTERNATIONAL CRIMES IN DARFUR* 7 (2005), available at <http://hrw.org/reports/2005/darfur1205/>.

34. See 2005 World Summit, *supra* note 1, ¶ 139.

35. *Id.* ¶ 138.

civilians, military means must be the last resort and must be calculated to minimize the threat to human life. There is a full spectrum of coercive measures available short of a full invasion, including economic tools such as sanctions and asset freezes, and military actions such as no-fly zones or the bombing of military installations.

Finally, the scope of the international response must be limited to protecting a population from genocide or other atrocities. While the Summit agreement redefines sovereignty, it does not do away with it altogether. In particular, nations still retain sovereign rights, including territorial integrity, under the U.N. Charter.<sup>36</sup> The agreement clarifies that territorial integrity is not violated by international protection, but military interventions must be targeted, and regime change or other highly intrusive measures are only justifiable if absolutely necessary for the protection of populations.

### CONCLUSION

While the Summit agreement does not justify broad-based unilateral intervention, opportunistic nations may still use the rhetoric of the agreement to justify such action. More generally, it is likely that future justifications for military interventions will include an examination of the human rights conditions within a given country, and that future unilateral actors will make arguments drawing on the duty to prevent genocide and other atrocities in addition to claims of self-defense or international security. However, the Summit agreement does not thereby hearken a breakdown in international order. There is a risk that a nation could use claims of genocide or other atrocities as a ruse to invade another country. If such claims were truly without substance, however, or if the intervention exceeded what was necessary to protect populations, the intervention would still be illegal and could justify Security Council action against the invading state. The fact that human rights language can be coopted by bad faith actors does not mean that such standards have no meaning. Rather, the Summit agreement shifts the terms of the debate to the accuracy of a unilateral actor's claims and to the necessity of the proposed response.

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36. See U.N. Charter art. 2, para. 4 ("All Members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any State . . .").



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