American Society of International Law

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Source: *The American Journal of International Law*, Vol. 99, No. 3 (Jul., 2005), pp. 619-631
Published by: American Society of International Law
Stable URL: http://www.jstor.org/stable/1602294
Accessed: 28/03/2011 11:18

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NOTES AND COMMENTS

SECURITY, SOLIDARITY, AND SOVEREIGNTY: THE GRAND THEMES OF UN REFORM

By Anne-Marie Slaughter[*]

The report of the United Nations secretary-general's High-Level Panel on Threats, Challenges and Change is entitled "A More Secure World: Our Shared Responsibility."[1] It contains 101 recommendations. The panel focused equally on the military and nonmilitary dimensions of collective security, turning first to the "challenge of prevention," then to the use of force, and finally to institutional reform within the United Nations. In March 2005, the secretary-general issued his own report responding to the high-level panel's report. His report is entitled "In Larger Freedom," and contains forty-one action items "for decision by heads of state or government."[2] The report's focal points are the "triangle" of development, security, and human rights, which the secretary-general presents as "freedom from want," freedom from fear," and "freedom to live in dignity." In September 2005, the heads of state of 191 countries will gather at the sixtieth annual meeting of the General Assembly to decide what is to be done.

The agenda is enormous; the occasion momentous; and the timing propitious. Both the Cold War and the "post–Cold War era," the chaotic and often murky decade of both triumphalism and fierce ethnic conflict, are past. The world faces a host of new or newly felt threats, from nuclear terrorism to global pandemics, and many countries, including the largest powers, are acutely aware of the need to update and enhance our collective capacity to meet them. But will the assembled leaders tinker at the margins of reform? Or will they lay down a new foundation for a more secure world?

The high-level panel offers a blueprint for profound change, through nothing less than a reconception of security, solidarity, and even sovereignty. First, it proposes that the United Nations, an organization founded on a commitment to the protection of state security, must now subordinate state security to human security. From the perspective of human security, death, whether it be from violence or disease, is equally to be feared. The principal difference is that death from disease is much more likely for the vast majority of the world's population.

Second, human security redefines solidarity. As human beings, we all seek to live our lives in dignity, free from fear and from want. We need not be guaranteed prosperity, but at least the health and education necessary to strive for it. We cannot be guaranteed long lives, but at least that our government will not try to murder us and will do its utmost to prevent our fellow citizens from doing so. We should not be guaranteed equal esteem of our fellow human beings, but at least equal respect, the promise that neither politicians nor ethnic or religious leaders can declare any group, class, or nation less than human.

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[1] A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, at 8 (2004), *available at* <http://www.un.org/secureworld/report.pdf> [hereinafter Panel Report].

[2] In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005 & annex (2005), *available at* <http://www.un.org/largerfreedom/contents.htm> [hereinafter Report of the Secretary-General].

Third, this conception of solidarity, in turn, redefines sovereignty. More precisely, an effort to implement this conception of sovereignty through an institution like the United Nations requires a quite radical rethinking of sovereignty. International lawyers have paid a great deal of attention to the high-level panel's endorsement of a "responsibility to protect," and rightly so. But the panel goes much further than the version of sovereignty as responsibility adopted by the International Commission on Intervention and State Sovereignty (ICISS).[3] It asserts that all signatories of the UN Charter accept a responsibility both to protect their own citizens and to meet their international obligations to their fellow nations. Failure to fulfill these responsibilities can legitimately subject them to sanction. In a word, membership in the United Nations is no longer a validation of sovereign status and a shield against unwanted meddling in a state's domestic jurisdiction. It is rather the right and capacity to participate in the United Nations itself, working in concert with other nations to sit in judgment of and take action against threats to human security whenever and wherever they arise.

As noted in the conclusion to this essay, these grand themes float comfortably above the sausage making of actual UN reform. The high-level panel and the secretary-general have each taken great pains to emphasize both the value and the feasibility of many very concrete steps, such as reforming the Human Rights Commission, adopting a common definition of terrorism, instituting better internal oversight mechanisms, finding ways to realize the Millennium Development Goals, and achieving greater representation of the full membership. Nevertheless, the panel has actually written an extraordinary document, one that opens the door to rethinking not only the United Nations but also some fundamental assumptions of the international legal system for the twenty-first century. At least in the pages of a distinguished journal such as this one, the full implications of its report merit a moment's reflection.

Part I of this essay provides an overview of the principal recommendations in the high-level panel report. Part II explores the panel's expanded conception of security, from state security to human security. Part III moves from security to solidarity, tracing the way the panel's vision of solidarity functions as a fundamental substantive value and a procedural constraint. Finally, part IV turns to sovereignty, arguing that the panel has abandoned an idealized Westphalian conception of sovereignty as autonomy and, instead, has suggested confronting states with a direct choice of accepting conditional sovereignty in return for the kind of effective collective action that has become indispensable to performing a sovereign's basic obligations to its own people.

I. AN OVERVIEW OF THE HIGH-LEVEL PANEL REPORT

According to the high-level panel, "The central challenge for the twenty-first century is to fashion a new and broader understanding . . . of what collective security means—and of all the responsibilities, commitments, strategies and institutions that come with it if a collective security system is to be effective, efficient and equitable."[4] In other words, the panel saw its task as nothing less than revising the 1945 consensus underlying the UN Charter itself. As envisioned in the Charter, the United Nations is a collective security system designed to save the world above all from "the scourge of war."[5]

[3] THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001), *available at* <http://www.iciss.ca/report-en.asp> [hereinafter ICISS REPORT]. The ICISS began from the premise that "[i]n key respects . . . the mandates and capacity of international institutions have not kept pace with international needs or modern expectations." *Id.* at 3, para. 1.11. More specifically, the ICISS argued that the intense debate over military protection for humanitarian purposes flowed from a "critical gap" between the immense and unavoidable reality of mass human suffering and the existing rules and mechanisms for managing world order. At the same time, it noted a widening gap between the rules and the principles of the Charter regarding noninterference in the domestic affairs of member nations and actual state practice as it has evolved since 1945. It frames the "responsibility to protect" as an "emerging principle" of customary international law—not yet existing as law but already supported by both state practice and a wide variety of legal sources. *Id.* at 15–16, paras. 2.24–2.27.

[4] Panel Report, *supra* note 1, Synopsis, at 11.

[5] UN CHARTER pmbl.

To tackle this monumental task, the panel chose to divide its work into multiple sections. It first considered the range of threats the world faces today. Importantly, it considered threats to people as well as to states, generating a holistic view of security that understands state security and human security to be fundamentally intertwined. The list of security challenges included poverty; infectious disease; environmental degradation; conflict between and within states; nuclear, radiological, biological, and chemical weapons; transnational organized crime; and terrorism.[6]

Regarding this last threat, the panel offered an explicit definition of terror, an important and belated contribution to a war in which many countries report being engaged. It rejected once and for all the claim that political ends justify terrorist means, or that "one man's terrorist is another man's freedom fighter." Instead, the panel enshrined a norm of civilian inviolability alongside the Charter's prohibition on interstate aggression. It defines terrorism as "any action . . . intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."[7]

The panel then turned to the use of force, a tool that remains central even under a broader conception of security, weighing the use of military force to end or prevent war, keep peace, and rebuild countries in the wake of conflict. While most of the recommendations in this section pertain to policy and structure, the panel also made two important conceptual contributions.

First, it recognized that the Security Council may authorize preventive war—war against a nonimminent, nonproximate threat—but that individual countries may not invoke a right to preventive war under Article 51. This is a huge step, responding to Secretary-General Kofi Annan's exhortation to all UN members to consider the "early authorization of coercive measures."[8] The panel trades off a tremendous potential expansion of the circumstances in which the international community can decide to use force to maintain or preserve international peace and security, as long as the decision is genuinely multilateral.

Second, the panel endorsed the "responsibility to protect"—the idea that the international community has a right and a duty to intervene in states that cannot or will not protect the human rights of their people against "genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law."[9] The panel imagines that this duty can legitimate a range of interventions, from prevention, to military force, to postconflict reconstruction. As with preventive war, the panel says that "a collective international responsibility to protect" is "exercisable by the Security Council authorizing military intervention as a last resort."[10] It could be read to imply some wiggle room, however, by noting that "[t]he Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all."[11]

It is unclear whether the panel meant to suggest that different standards be employed to determine the legitimacy and legality of preventive wars and humanitarian interventions. This issue is likely to split the General Assembly in multiple directions but must be decided in order to create an effective collective security regime. Intentional or not, the difference highlights the importance of the panel's recommendation—and the secretary-general's urging—that the Security Council reach an understanding "on the use of force that sets out principles for the use of force and expresses its intention to be guided by them when deciding whether to authorize or mandate the use of force."[12]

[6] Panel Report, *supra* note 1, at 23, & pt. 2 *passim*.
[7] *Id.* at 49, para. 164 (emphasis omitted).
[8] Kofi Annan, Speech to the General Assembly, UN Doc. A/58/PV.7, at 3–4 (Sept. 23, 2003).
[9] Panel Report, *supra* note 1, at 57, para. 203.
[10] *Id.*
[11] *Id.* at 57, para. 202.
[12] This language comes from the Report of the Secretary-General, *supra* note 2, annex, at 58, para. 6(h).

The final section of the report describes how the United Nations must change to meet the challenges laid out above. In addition to the Security Council reforms, the panel suggested several interesting structural changes, including forming a "Peacebuilding Commission" to prevent state failure, improving UN coordination with regional organizations, expanding the Commission on Human Rights to universal membership, and establishing a fifteen-member advisory council to support the Commission in its work. These reforms would move the United Nations further away from the traditional model of an interstate organization, reaching into states to ensure their sustainability and commitment to human rights, and above them to engage with supranational entities.

To summarize, four key conceptual contributions emerge from the panel's report: (1) the redefinition of international security to include both state security and human security; (2) endorsement of the responsibility to protect; (3) assertion of a collective right to prevent catastrophic attacks; and (4) a common definition of terrorism.

The secretary-general's report "In Larger Freedom" endorses these recommendations wholeheartedly, if with occasional differences in emphasis. The secretary-general writes, "There will be no development without security and no security without development."[13] Further, he urges governments to support "a reaffirmation of the right of the Security Council to use military force, including preventively, to preserve international peace and security, including in cases of genocide, ethnic cleansing and other such crimes against humanity."[14] Finally, he urges the General Assembly to reinvigorate its efforts toward a comprehensive convention against terrorism.[15]

"In Larger Freedom" compellingly constructs its conceptual shifts and concrete recommendations—perhaps with an eye toward politicking—around the theme of freedom: freedom from want, freedom from fear, and freedom to live in dignity. This clear reference to the United States president who was a driving force behind the creation of the United Nations underscores the secretary-general's sense that fundamental reforms to the world body are now both possible and necessary.

As of this writing, the ambitious plans outlined in these two reports are being ground through the diplomatic process as negotiators scurry to reach some agreement before the General Assembly and heads of state and government convene in New York in mid-September 2005. Security Council expansion has predictably overshadowed the more mundane—but crucial—aspects of UN reform such as budget management, oversight functions, hiring policy, and even substantive issues like deciding upon a common definition of terrorism and working to meet the Millennium Development Goals. In the United States, which will ultimately have a major say in if and how reform will proceed, the debate has been further influenced by an investigation into the Oil-for-Food Programme, ongoing wrangling over the nomination of an ambassador to the United Nations, a bill that proposes to cut funds from the Organization should it not meet specified reforms, and a congressionally mandated panel report that responds to the two above reports from an American perspective.[16]

II. Security Expanded

The core and unifying theme of the high-level panel report is an appeal for a "new security consensus"[17] that will underlie a "new comprehensive collective security system."[18] The new consensus rests on the common recognition of the actual security threats "we face" in the twenty-

[13] *Id.*, annex, at 55, para. 2.

[14] *Id.*, annex, at 58, para. 6(h).

[15] *Id.* at 41, para. 161.

[16] U.S. Institute of Peace, American Interests and UN Reform: Report of the Task Force on the United Nations (June 2005), *available at* <http://www.usip.org/un/report>. (The present author served on the task force that produced this report.)

[17] The title of part I of the high-level panel report is "Towards a New Security Consensus."

[18] Panel Report, *supra* note 1, at 21, para. 28.

first century. These threats "go far beyond States waging aggressive war."[19] As indicated, "They extend to poverty, infectious disease and environmental degradation; war and violence within States; the spread and possible use of nuclear, radiological, chemical and biological weapons; terrorism; and transnational organized crime."[20] They arise from "non-State actors as well as States," and threaten "human security as well as State security."[21]

This point of departure merits closer examination. It is a little disingenuous to note that these threats imperil human security as well as state security; the panel appears to have assumed from the beginning that its mandate to review "threats" included threats to human beings all over the globe as well as states. In my view, this position is eminently defensible, but it was not the position of the drafters of the Charter, or at least not in the standard view of the Charter's history. The high-level panel takes care of this objection with some text-based revisionism. The drafters of the Charter, they note, were preoccupied with state security.

> But they also understood well, long before the idea of human security gained currency, the indivisibility of security, economic development and human freedom. In the opening words of the Charter, the United Nations was created "to reaffirm faith in fundamental human rights" and "to promote social progress and better standards of life in larger freedom."[22]

Drafters of grand documents beware; rhetorical flourishes have a way of becoming reality down the road.

This language notwithstanding, the drafters of the Charter would have identified only scourges such as poverty and disease as threats to the extent that they directly threatened territorial integrity or political independence of individual states in a system of states. Today we understand that to the extent that poverty and disease contribute to state collapse, that collapse can threaten not only that state's neighbors but also states halfway across the world by providing a haven for terrorists and other criminals. So to that extent we can directly link state security and human security. But the high-level panel went several steps further. It did not identify such threats as threats when they reach sufficient magnitude to risk complete government failure or implosion, but rather as threats in and of themselves because they threaten the lives of citizens within states.

Human security has thus been added to the Charter as an independent goal, alongside state security.[23] The panel boils down its own conclusions to the following proposition: the "dignity, justice, worth and safety" of the citizens of every state "should be at the heart of any collective security system for the twenty-first century."[24] This is nothing short of a sea change, with enormous implications.

III. SOLIDARITY AS A VALUE AND A CONSTRAINT

Once we put human security alongside or even before state security, the metric by which we assess the magnitude and priority of threats changes dramatically. Disease and disaster kill many more people every month than armed conflict or terrorists do in a year, a decade, or even a century. As the Worldwatch Institute writes, "All of the wars of the twentieth century are estimated to have resulted in the deaths of an average of 1.1 million combatants and civilians per

[19] *Id.*, Synopsis, at 11.

[20] *Id.*

[21] *Id.* "Human security" first entered our official lexicon in the early 1990s and found an early champion in the Canadian government, particularly Foreign Minister Lloyd Axworthy. *See, e.g.*, Lloyd Axworthy, *Canada and Human Security: The Need for Leadership*, 52 INT'L J. 183 (1997). Kofi Annan then embraced the concept in his millennial "We the Peoples" report, where he spoke of the need for a more human-centered approach to security. "Once synonymous with the defence of territory from external attack, the requirements of security today have come to embrace the protection of communities and individuals from internal violence." KOFI A. ANNAN, 'WE THE PEOPLES': THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 43, UN Sales No. 00.1.16 (2000), *available at* <http://www.un.org/millennium/sg/report/full.htm>.

[22] Panel Report, *supra* note 1, Synopsis, at 11.

[23] Indeed, as I will discuss below, the panel actually sees human security as a higher goal than state security.

[24] Panel Report, *supra* note 1, at 22, para. 30.

year. But at present, communicable diseases are killing fourteen times that number of people annually."[25] If human security is our aim, why on earth should we privilege the saving of lives from violence over the saving of lives from disease? Both are equally preventable; indeed, given human nature, preventing disease is likely to be the easier challenge.

But why should human security be a matter of *collective* security? When a state fears attack by another state, it naturally importunes still other states for help. An alliance seeks to match the heft and capabilities of would-be attackers with pledged defenders; a collective security system seeks to prevent attack through collective obligations and a collective deterrent. But why do states need the help of their fellow states to ensure the security of their own citizens?

The panel's answer is the mantra of our time: "We live in an interdependent world." The report is replete with passages like the following: "Today, more than ever before, threats are interrelated and a threat to one is a threat to all. The mutual vulnerability of weak and strong has never been clearer."[26] Or, "No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today's threats."[27]

For citizens of developed countries, this rhetoric encapsulates what I have called the "ineffectiveness challenge" to the ideal of Westphalian sovereignty.[28] Robert Keohane identified this challenge succinctly in 1993: "It is now a platitude that the ability of governments to attain their objectives through individual action has been undermined by international political and economic interdependence."[29] A state's ability to control its own territory without external interference is no longer sufficient to allow it to govern its people—to provide security, economic stability and a measure of prosperity, clean air and water, and even minimum health standards.

For citizens of many developing countries, however, claims of interdependence are much more likely to sound like a justification for interference than a plea of ineffectiveness. Throughout the 1990s the Security Council repeatedly found that the conditions prevailing within a state, from starvation in Somalia to political intimidation and massacre in East Timor, constituted threats to international peace and security sufficient to require collective armed intervention;[30] and the Council should have made such a determination regarding the genocide in Rwanda. Similarly, individual leaders are being held to account for actions against their own citizens.[31] States can no longer assume that if they refrain from interfering in the affairs of other states, they will remain free from interference themselves.

Particularly important are the justifications for such interference. Systematic human rights abuses, ruthless political oppression bordering on extermination, and the anarchy resulting from the complete disintegration of political authority—all prick the conscience of publics everywhere. Human rights groups and ethnic constituencies, often composed of emigrants from a particular suffering state, also work systematically to raise the salience of any particular human

[25] Worldwatch Institute, State of the World 2005: Trends and Facts—Containing Infectious Disease (Jan. 2005), *available at* <http://www.worldwatch.org/features/security/tf/4>.

[26] Panel Report, *supra* note 1, at 19, para. 17.

[27] *Id.* at 21, para. 24.

[28] Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 284 (2004).

[29] Robert O. Keohane, *Sovereignty, Interdependence, and International Institutions*, *in* IDEAS & IDEALS: ESSAYS ON POLITICS IN HONOR OF STANLEY HOFFMANN 91, 92 (Linda B. Miller & Michael Joseph Smith eds., 1993).

[30] For examples of Security Council action with respect to East Timor, see SC Res. 1272 (Oct. 22, 1999), 39 ILM 240 (2000); SC Res. 1319 (Sept. 8, 2000); SC Res. 1338 (Jan. 31, 2001); SC Res. 1392 (Jan. 31, 2002); SC Res. 1410 (May 17, 2002), 41 ILM 1011 (2002). For examples relating to Somalia, see SC Res. 794 (Dec. 3, 1992) (welcoming the U.S. offer to help create a secure environment for the delivery of humanitarian aid in Somalia and authorizing, under Chapter VII of the Charter, the use of "all necessary means" to do so).

[31] The growing number of international criminal tribunals is testament to that. *See, e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3, *corrected through Jan. 16, 2002, at* <http://www.icc-cpi.int>. Today, for example, Slobodan Milošević is being prosecuted by the International Criminal Tribunal for the Former Yugoslavia and former Liberian president Charles Taylor is under indictment by the Special Court for Sierra Leone. Gary Bass, *Milosevic in The Hague*, FOREIGN AFF., May/June 2003, at 82; Prosecutor v. Taylor, Indictment, No. SCSL–03–01 (Mar. 3, 2003), *available at* <http://www.sc-sl.org>.

rights crisis.[32] But the growing willingness of states to intervene in the domestic affairs of other states frequently has a far more self-interested basis. Governments increasingly understand that they often cannot *afford* to look the other way; that fundamental threats to their own security, whether from refugees, terrorists, the potential destabilization of an entire region, or a miasma of disease and crime, may well have their origins in conditions once thought to be within a state's exclusive domestic jurisdiction.[33]

The high-level panel tried to address the dangers of both ineffectiveness and interference through the overarching theme of shared responsibility. This, after all, is the title of the report: "A More Secure World: *Our Shared Responsibility.*" It is the responsibility of developed states to look to the conditions threatening the security of the majority of the world's citizens. But it is equally the responsibility of the governments of states in which human security is imperiled not only to refrain from harming those citizens directly, but also to accept aid and expertise from their fellow members of the international community and to use it wisely and well.

The panel's vision of a collective security system is thus based on a positive pledge of affirmative assistance rather than a negative commitment to refrain from the use of force against fellow states. In this regard, it might appear to be taking a step backward toward the League of Nations rather than building on the basic insight of the framers of the UN Charter. The League, after all, was built on a commitment by every member state to come to the assistance of a fellow League member subject to aggression.[34] Article 2(4) of the Charter, by contrast, offers no such guarantee of positive assistance. It requires each UN member to look only to its own behavior, leaving it to the Security Council to make decisions regarding active collective defense against threats.

The high-level panel's conception of a new security consensus rests on solidarity more than self-defense, an awareness of common threats, hence common responsibilities. This solidarity is procedural as well as substantive. While the above analysis might appear to suggest that the panel has simply read Article 2(7) out of the Charter altogether, it actually builds on the original bargain enshrined in the article.[35] Nothing in the Charter allows UN members to infringe on the domestic jurisdiction of their fellow states *except as authorized by the Security Council.* The panel recognizes that a security consensus based on a positive commitment to address a wide range of threats to both human and state security will worry many states; it thus insists on Security Council authorization for any action. Conversely, however, it recognizes that other states will never put their faith in the Security Council unless it can prove itself to be both proactive and effective.

This trade-off is most evident in the high-level panel's treatment of the use of force—specifically, the possibility of preventive uses of force. In announcing his intention to establish the panel, the secretary-general urged it to consider the "early authorization of coercive measures," arguing that unless the United Nations could find a way to act preemptively or even preventively, member states would simply take matters into their own hands.[36] The panel heeded his urging, concluding:

[32] For a discussion of this so-called boomerang effect, see MARGARET KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 12–13 (1998).

[33] *See, e.g.*, FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY 96 (2004) (noting that "the problems that weak states generate for themselves and for others vastly increase the likelihood that someone else in the international system will seek to intervene in their affairs against their wishes to forcibly fix the problem").

[34] Article 10 of the League Covenant declares, in part: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."

[35] Article 2(7) of the UN Charter reads:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

[36] Annan, *supra* note 8, at 3–4.

> In the world of the twenty-first century, the international community does have to be concerned about nightmare scenarios combining terrorists, weapons of mass destruction and irresponsible States, and much more besides, which may conceivably justify the use of force, not just reactively but preventively and before a latent threat becomes imminent.[37]

The panel further concluded without hesitation that the Security Council could act legally in such circumstances, and that it "may well need to be prepared to be much more proactive on these issues, taking more decisive action earlier, than it has been in the past."[38]

Contrast this language with the panel's treatment of the inherent right of self-defense under Article 51. The panel declined to support any "rewriting or reinterpretation" of Article 51, concluding that "if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to."[39] Thus, the panel recognized that it could well be necessary for the Security Council to authorize military action in a case like Iraq, just as it concluded that the Security Council could well have to authorize military action to prevent genocide or crimes against humanity. But in both cases, the trade-off for expanded substantive jurisdiction is a tighter hold than ever on multilateral process.

In another finely tuned balancing act, the panel sought to moderate its emphasis on proactive measures and prevention with a kind of "reasonableness test" for the use of force. It recommends that the Security Council adopt "a set of agreed guidelines, going directly not to whether force *can* legally be used but whether, as a matter of good conscience and good sense, it *should* be."[40] The guidelines it proposes would require the Council always to address "five basic criteria of legitimacy": seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences.[41]

Issues of legality versus legitimacy have roiled the international law community ever since the Kosovo commission declared that the NATO intervention in Kosovo was "illegal but legitimate."[42] That intervention, of course, bypassed the Security Council, although a subsequent resolution effectively endorsed the action.[43] Given this precedent, much subsequent discussion of legality and legitimacy has assumed that legitimacy can sometimes be a *substitute* for legality; that even when a use of force is formally illegal, in that it neither amounts to self-defense under Article 51 nor was authorized by the Security Council, it can nevertheless be justified if it is legitimate in the eyes of world public opinion.

This is not the place to rehearse the pros and cons of this debate. The important point is that the high-level panel has moved the goalpost. It assumes that the criteria of legitimacy will be applied by the Security Council itself, thereby assuming legality. The question thus becomes not whether it is illegal but legitimate, but rather whether it is legal *and* legitimate. The legitimacy inquiry becomes a second filter on the decision to use force; the Security Council not only must establish the presence of a breach of the peace, threat to the peace, or act of aggression under Article 39, but also must determine that the use of force in response would satisfy the five criteria of legitimacy.

This approach, as some commentators have already decried, sounds like a recipe for further inaction by the Council, giving members five new criteria to argue about while Rome, or Rwanda, or Darfur, burns.[44] In the context of a report urging reform and prompt and effective action by

[37] Panel Report, *supra* note 1, at 55, para. 194.

[38] *Id.*

[39] *Id.* at 55, paras. 190, 192 (emphasis omitted).

[40] *Id.* at 57, para. 205.

[41] *Id.*, para. 207.

[42] INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000), *available at* <http://www.reliefweb.int/library/documents/thekosovoreport.htm>.

[43] SC Res. 1244 (June 10, 1999), 38 ILM 1451 (1999).

[44] *See, e.g.*, Vesselin Popovski, From 'Responsibility to Protect' to 'Protect the Responsibility' (Dec. 19, 2004) (unpublished manuscript, on file with author).

all UN organs, why on earth would the panel create what appears to be an additional brake on Security Council decisions? The answer lies in the substantial expansion of Security Council jurisdiction that the panel achieves in other parts of the report. The new security consensus it advances embraces an expanded global solidarity, solidarity among humans as the underpinning of action by their governments. This solidarity is both a moral and an instrumental value; human security is the birthright of humans everywhere and threats to human security cannot be cabined within the borders of any one nation.

If solidarity as a value justifies UN action, preferably early and preventive action, on disease, hunger, illiteracy, environmental degradation, internal conflict, systematic human rights violations, weapons proliferation, and terrorism in addition to traditional interstate aggression, then it is not surprising that the high-level panel insists that such action be routed through the Security Council and that the Security Council exercise extra caution when deciding on the most drastic action. That same solidarity requires that states deciding on action be required to envision the consequences of that action through others' eyes; that they hear the issues at stake debated from multiple perspectives; that they be required to confront evidence contrary to their own. Solidarity thus functions as both a value and a constraint.

IV. SOVEREIGNTY REDEFINED

The most powerful and profound part of the high-level panel report is a brief section entitled "Sovereignty and Responsibility." In two scant paragraphs the panel redefines sovereignty itself for all UN member states. These paragraphs accomplish a tectonic shift, reinterpreting the very act of signing the Charter in ways that will create a new legal and diplomatic discourse about member states' obligations to their own people and to one another.

"In signing the Charter of the United Nations," the panel writes, "States not only benefit from the privileges of sovereignty but also accept its responsibilities."[45] These responsibilities include both "the obligation of a State to protect the welfare of its own peoples" and its obligation to "meet its obligations to the wider international community."[46] These responsibilities are facts of contemporary life, in contrast to "[w]hatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty."[47]

In tying its redefinition of sovereignty to signing the Charter and in positing a state's responsibility to protect its own people, the high-level panel was borrowing directly from the ICISS. In September 1999, Secretary-General Annan called on the international community to "reach consensus—not only on the principle that massive and systematic violations of human rights must be checked, wherever they take place, but also on ways of deciding what action is necessary, and when, and by whom."[48] In response, the Canadian government, together with a group of major foundations, established the ICISS, headed by former Australian foreign minister Gareth Evans[49] and special adviser to the UN secretary-general Mohamed Sahnoun and composed of a distinguished global group of diplomats, politicians, scholars, and nongovernmental activists. In December 2001, the ICISS issued an important and influential report, "The Responsibility to Protect."[50]

The ICISS sought to change the core meaning of UN membership from "the final symbol of independent sovereign statehood and thus the seal of acceptance into the community of nations,"[51] to recognition of a state "as a responsible member of the community of nations."[52]

[45] Panel Report, *supra* note 1, at 21, para. 29.

[46] *Id.* at 22.

[47] *Id.* at 21–22.

[48] Kofi A. Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, *available in* LEXIS, News Library, Individual Publications File, *available at* <http://www.un.org/News/ossg/sg/stories/kaecon.html>.

[49] Gareth Evans subsequently also served as a member of the secretary-general's high-level panel.

[50] ICISS REPORT, *supra* note 3.

[51] *Id.* at 13, para. 2.11.

[52] *Id.*, para. 2.14.

Nations are free to choose whether or not to sign the Charter; if they do, however, they must accept the "responsibilities of membership" flowing from their signature.[53] According to the ICISS, "There is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties."[54] Internally, a government has the responsibility to respect the dignity and basic rights of its citizens; externally, it has the responsibility to respect the sovereignty of other states.

The high-level panel took several steps further than the ICISS. First, it makes clear that states themselves have an instrumental rather than an intrinsic value. "The Charter of the United Nations," the panel writes, "seeks to protect all States, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens."[55] Here human security trumps state security; sovereignty attaches to a state as a *means* of ensuring the security of its citizens. From this starting point, sovereignty misused, in the sense of failure to fulfill this responsibility, could become sovereignty denied.

Second, the panel avers that a state has a duty not only to protect its own peoples, but also to "meet its obligations to the wider international community." In this conception, the United Nations itself, by dint of the obligations of membership, becomes a guarantor of "international obligations" writ large. Enhancing member state compliance with these obligations will often be a matter of capacity building, but direct enforcement is also an option.[56]

These twin responsibilities spell nothing less than conditional sovereignty, although the panel itself did not and politically could not use that term. Sovereignty in the state of nature, e.g., outside the UN system, may still mean some Westphalian ideal of absolute autonomy. But for the 191 member states, membership is no longer simply validation and protection of their sovereign status. The Charter itself becomes a change agent, providing a collective instrument for holding all members to their word.

If this reading seems far-fetched, consider the following recommendation from a group of leading European policy thinkers asked to consider how the European Union should respond to the high-level panel report. They urged the Union to "[p]romote 'the Responsibility to Protect', while also reframing the sovereignty debate to cover a principle of both *enhancing* effective and legitimate sovereignty of weak states (through international assistance), and *conditioning* sovereignty on state behaviour."[57]

The European Union itself, of course, exists in a post-Westphalian world anyway.[58] EU members can only be EU members if they accept stringent conditions concerning democratic government, respect for human rights, the rule of law, and market capitalism. All EU members commit themselves to meeting these standards and work collectively both to enable and to enforce the compliance of their fellow members. But the European Union is a *Union*, governed by a set of treaties ensuring ample benefits in return for meeting these obligations. Why should UN member states agree to a concept of conditional sovereignty?

The best answer to this question has been advanced by Kal Raustiala, building on the work of Abram and Antonia Chayes. Raustiala argues that the transformation of sovereignty is only keeping up with the transformation of "both the international system and state-society relations . . .

[53] *Id.*

[54] *Id.* (emphasis omitted).

[55] Panel Report, *supra* note 1, at 22, para. 30.

[56] The high-level panel addresses this point somewhat indirectly, noting that when a state fails in its responsibilities to its own people or to the international community, "some portion of those responsibilities should be taken up by the international community, acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the necessary protection, as the case may be." *Id.*, para. 29.

[57] Espen Barth Eide, *Introduction: The Role of the EU in Fostering 'Effective Multilateralism,' in* 'EFFECTIVE MULTILATERALISM': EUROPE, REGIONAL SECURITY AND A REVITALISED UN 1, 9 (Global Europe Report No. 1, Espen Barth Eide ed., 2004).

[58] ROBERT COOPER, THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY (2004).

by events of the twentieth century."[59] Sovereignty itself refers to the "supreme authority and control over policy"[60] within any delimited political space. To exercise such authority and control in a world that has become so interconnected that people, politics, and pathogens are virtually able to disregard borders requires institutionalized cooperation and intervention. Thus, Raustiala claims, international institutions "actually serve as a means to reassert sovereignty."[61]

This vision of organizations such as the United Nations as sovereignty-strengthening institutions fits neatly into Chayes and Chayes's concept of "the new sovereignty," which they defined as the right and the capacity to participate in the international institutions that allow their members, working together, to accomplish ends that individual governments could once accomplish alone.[62] Writing in 1995, Chayes and Chayes already saw that the international system itself had moved beyond interdependence. It had become a "tightly woven fabric of international agreements, organizations, and institutions that shape [states'] relations with each other and penetrate deeply into their internal economics and politics."[63]

In this context, where the defining features of the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, sovereignty as autonomy makes no sense. However paradoxical it sounds, the measure of a state's capacity to act as an independent unit within the international system—the condition that "sovereignty" purports both to grant and to describe—depends on the breadth and depth of its links to other states.[64]

For states that want to be good citizens in the international system, weak and strong alike; for governments likely to be rewarded by their people for harvesting the gains that international cooperation can bring; for leaders committed to using their power consistently with the purposes of the Charter, the high-level panel's conception of sovereignty as responsibility will simply ratify current realities and strengthen the power and authority of the United Nations to surmount twenty-first-century challenges. But for states that have only recently gained their sovereignty as independent actors in the international system and prize it as a shield against colonial intervention; for governments that care not for the welfare of their people; for leaders committed above all to their personal aggrandizement, sovereignty as responsibility may well sound like a ruse for reading Article 2(7) out of the Charter.[65]

Legally, however, the panel could argue that a government's signature of the Charter itself avows that the basic "dignity, justice, worth and safety" of its citizens are no longer "essentially within [its] domestic jurisdiction," but only as a first resort. The Charter institutes a vast system of complementarity, whereby governments have the first responsibility toward their citizens and are secure from intervention as long as they fulfill their most fundamental obligations. But if they prove "unable or unwilling" to fulfill their responsibility, as determined by the members of the United Nations acting through the institutions of the United Nations, they forfeit the exclusivity of their domestic jurisdiction. Similarly, the "new security consensus" recommended by the high-level panel recognizes that each UN member's security rests in the capacity and commitment of its fellow members to live up to their international obligations.

So much to cede. But so much to gain. This is the basic bargain proposed by the high-level panel. It reconceives the Charter as a far more demanding instrument than the one it has become over the decades since 1945. But it outlines a genuine collective effort to meet the full spectrum of threats menacing men, women, and children around the globe, from the microbes

[59] Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 860 (2003).

[60] *Id.* at 852.

[61] *Id.* at 843.

[62] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 4 (1995).

[63] *Id.* at 26. Similarly, Wolfgang Reinicke has emphasized the extent to which globalization, unlike interdependence, penetrates the deep structure and strategic behavior of corporations and other actors in the international system. *See generally* Wolfgang H. Reinicke, *Global Public Policy*, FOREIGN AFF., Nov./Dec. 1997, at 127.

[64] This is what Raustiala calls a "sovereignty-strengthening" theory. Raustiala, *supra* note 59, at 843.

[65] *See* text of Article 2(7) *supra* note 35.

poisoning drinking water for over 2 billion people worldwide, to the terrorist cells plotting the nuclear destruction of a global city. To dissolve the deep divisions between military security and civil security, between state security and human security, will require a far more vigorous, effective, proactive, and committed United Nations. It will require a new diplomacy, a new willingness to speak and accept unpleasant truths. Tyrants cannot expect fellow UN members to look the other way in the face of gross and systematic human rights violations, but neither can great powers expect to be able to ignore their international obligations without notice and consequences.

For all countries, the vision of the United Nations glimmering in the high-level panel report could be the answer to what John Ikenberry describes as the "Westphalian flip." He points out that the two guarantors of order in the Westphalian system, a balance of power internationally and a monopoly on force domestically, have been inverted. Today, he argues, the United States has a "quasi-monopoly on the use of force" internationally and states are subject to "growing legitimate international authority" over what goes on within their borders. The result is the profound destabilization of international order itself, as envisioned and guaranteed by a Westphalian conception of sovereignty.[66]

Consider, then, a collective security system in which the United States married its vast military power to the peace-enforcing, peace-stabilizing, and peace-building capacity of many other nations; in which the United States once again sought to prevent other states from arming against it by undertaking a set of commitments about the purposes for which and the procedures by which it would use its military might.[67] At the same time, consider a collective security system that would have both the authority and the power to address threats where they begin and where they breed, by offering clean water and insisting on clean government; by creating opportunities for individuals and penalties for criminals regardless of class, race, religion, ethnicity, or high office; by insisting that the rule of law internationally rest on the rule of law domestically. That is the hope and the promise of "A More Secure World."

V. CONCLUSION

The grand themes of the high-level panel report highlighted here animate, but will not dictate, the actual process of UN reform. The politics of Security Council expansion, the reform of the Human Rights Commission, the adoption of a common definition of terrorism, a common commitment to donate 0.7 percent of gross domestic product to overseas development assistance, and internal management reforms will all grab the headlines. The high-level panel and particularly the secretary-general have repeatedly insisted that Security Council reform should not stalemate the entire process. Yet the security consensus, the vision of global solidarity, and the redefinition of sovereignty outlined above suggest that Security Council reform cannot, or at least should not, be simply another piece of a larger puzzle.

Notwithstanding the rhetoric of formal equality and the one-state, one-vote system in the General Assembly, the current United Nations institutionalizes inequality based on power. The

[66] The quoted language is from G. John Ikenberry, Why Bush Grand Strategy Fails (May 15, 2005) (unpublished manuscript, on file with author). Ikenberry has used the term "Westphalian flip" and spelled out the basic argument in G. John Ikenberry, *The Liberal Leviathan*, PROSPECT, Oct. 2004, at 46–51.

[67] This strategy would emulate U.S. foreign policy following World War II, when, as John Ikenberry has argued, the United States set limits to its power to create and preserve a stable international system, from which it benefited greatly. G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS (2001). Ikenberry argues:

> Leading postwar states might ideally want to tie other states down to fixed and predictable policy orientations and leave themselves institutionally unencumbered. But in seeking the institutional commitment of less powerful states—locking them into the postwar order—the leading state has to offer them something in return: some measure of credible and institutionalized restraint on its own exercise of power. The type of order that emerges after great wars hinges on the ability of states to restrain power institutionally and bind themselves to long-term commitments.

Id., *Preface*, at xi, xi.

Security Council system of permanent members carrying vetoes reflected the World War II victors' determination to avoid the utopianism and dysfunction of the League of Nations. That inequality will continue in a reformed United Nations, whether or not Security Council reform succeeds and regardless of the model. Nevertheless, a larger and more representative Security Council is likely to diminish the impact of the veto in a number of ways, from isolating a veto-wielding permanent member seeking to cast its veto against the weight of global public opinion, to creating a larger potential majority in favor of having an action proceed in the face of a veto, as essentially happened with the NATO action in Kosovo.

More important, the high-level panel's vision of a reformed United Nations would create a different divide among UN members, a divide based not on power but on adherence to law in both internal and external affairs. States that fulfill their responsibility to protect their own citizens in accordance with the minimum dictates of international human rights law and their responsibility to meet their international legal obligations toward their fellow states will be UN members in good standing. States that fail in these two obligations will be subject to legitimate sanction by their fellow states, sanction that can include the threat or use of force.

Disparities in power will remain, of course. Thus, a state like North Korea or Sudan that abuses its citizens freely, either through direct violence or by allowing or even creating famine, is far more likely to be subject to sanction than a state like the United States, Britain, Poland, Italy, or Spain that participated in the invasion of Iraq, which was seen as illegal by a majority of UN members. Nevertheless, at least from the point of view of a majority of members of the U.S. Congress and large swaths of the American people, as well as important groups of citizens in many other countries, if the United Nations does a better job of responding to mass killings, at a bare minimum by not treating governments engaged in those killings as if nothing were amiss, its legitimacy will increase and its word on any issue will weigh more heavily.

To move from a rights-based conception of sovereignty to a responsibility-based conception, from a perception of UN membership as validation of sovereign status to viewing signature of the Charter as acceptance of conditional sovereignty, and from an organization based on and dedicated to state security to one that locates the value of states in their ability to guarantee human security is bold indeed. It cannot succeed on the envisioned scale without real reform of key UN institutions, which is precisely why Security Council expansion, of some kind, is actually essential to the reform process.

Consider once again the title of the high-level panel report: "A More Secure World: Our Shared Responsibility." The responsibilities envisaged, nation by nation and collectively, require the participation of nations across the world, from rising powers to states suffering from the shock waves of globalization. The best guarantee that any of those states will actually have a voice in a purportedly global institution is by updating a conception of the Security Council anchored in the nineteenth and twentieth centuries. Change there will convince the world at large that real change, real reform, is actually possible.

The title of the high-level panel report could well have been "Collective Security Means Collective Responsibility." But in the end, the collective responsibility of all nations means nothing without the individual responsibility of each nation. The panel writes: "What we seek to protect reflects what we value."[68] All states must value the dignity, justice, worth, and safety of all their citizens individually; all states must uphold these values collectively. Here, in closing, is the elemental syllogism of the report: "[T]oo often, States have failed to respect and promote" these values.[69] Hence, "[t]he collective security we seek to build today asserts a shared responsibility on the part of all States and international institutions, and those who lead them, to do just that."[70] May the panel's vision succeed for the next sixty years of the United Nations, and for centuries to come.

[68] Panel Report, *supra* note 1, at 22, para. 30.
[69] *Id.*
[70] *Id.*