THE INTERNATIONAL LEGAL RESPONSIBILITY TO PROTECT AGAINST GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: WHY NATIONAL SOVEREIGNTY DOES NOT PRECLUDE ITS EXERCISE

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Good morning everyone. I am pleased to be here as part of this exciting International Law Weekend to participate with my good friend and Rocky Mountains colleague, Professor Nanda, along with Professor Wojcik, to discuss this important topic of The Responsibility to Protect Victims of Genocide, War Crimes and Crimes Against Humanity. I have four main points. First, I believe international law imposes a legal duty and responsibility on all nations, as well as the UN Security Council, to protect these victims and prevent such atrocities. Second, I do not believe national sovereignty bars the exercise of this duty and responsibility even when the Security Council fails to authorize such action, in appropriate circumstances. Third, the International Commission on Intervention and State Sovereignty (ICISS) has defined such circumstances with enough clarity for states to act, unilaterally if necessary, and multilaterally otherwise. Fourth, this duty must be exercised effectively by any and all means designed to achieve success, rather than with symbolic gestures having no chance of success and likely to exacerbate tragedy. Let me now address each of these points more fully.

The duty and responsibility to protect targeted victims of genocide, war crimes and crimes against humanity, and indeed, to prevent these atrocities from occurring, can be found in multiple international law instruments explicitly or by reasonable inference. The several Geneva Conventions, the Genocide Convention, the Universal Declaration of Human Rights plus various regional human rights conventions, and the International Convention on Civil and Political Rights all recognize the rights of innocent people to be free from atrocities conducted either in armed conflicts, or under more covert circumstances where states lend support to unofficial illegal acts or, at times, are unable or unwilling to protect their populations from their occurrence.

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Without effective military intervention by states willing and able to enforce these rights, however, the rights themselves become meaningless. I refuse to believe proponents of these instruments, which form the bedrock of today's international law, intended them to be meaningless. The UN General Assembly addressed this issue directly in Resolution 3074, Paragraph 3 requiring states to "co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity" and obligating states to "take the domestic and international measures necessary for that purpose."[1] More recently, UN Security Council Resolution 1674 adopted April 28, 2006 expressly recognized a legal responsibility to protect civilians in times of conflict.[2] Resolution 1674 reflects a major international law breakthrough regarding the protection duty principle.[3]

As to my second point, I do not see national sovereignty as a barrier to protective intervention because in my view, states effectively waive their national sovereignty when they commit, facilitate the commission of, or fail to protect their populations against atrocities. Those interested in reviewing the legal pros and cons of humanitarian intervention undertaken to protect populations from atrocities should read Professor Rogers' excellent analysis.[4]

I have formed my own opinion on this issue and join those who favor intervention at the expense of sovereignty. Can anyone seriously make a credible legal case for defending Sudanese national sovereignty to allow Darfur murders and ethnic cleansing?

Last Spring, I participated with Professor Nanda in a Rocky Mountain anti-genocide conference focusing heavily on Darfur, and as various speakers there pointed out, Darfur atrocities have continued all but unabated for at least 30 years. I recall working on a Darfur-related refugee case in my own law practice about 20 years ago. In my view no legitimate sovereign permits or commits this kind of prolonged systemic international law violation, nor should any sovereign be allowed to do so. Professor King, and also this *ILSA Journal*, have aptly written that since the Nuremberg Principles, states in these circumstances effectively waive sovereignty as a defense against intervention.[5]

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1. G.A. Res. 3074, ¶ 3, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (Dec. 3, 1973).

2. *See generally* S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

3. *Id.*

4. *See generally* A.P.V. Rogers, *Symposium: The Rule of Law in Conflict and Post-Conflict Situations: Humanitarian Intervention and International Law*, 27 HARV. J. L & PUB. POL'Y 725 (2004).

5. *See generally* Henry T. King, Jr., *Address: Nuremberg and Sovereignty*, 28 CASE W. RES. J. INT'L. 135 (1996). *See generally* Mitchell A. Meyers, *Note & Comment, A Defense of Unilateral or Multilateral Intervention Where a Violation of International Human Rights Law By a State Constitutes an Implied Waiver of Sovereignty*, 3 ILSA J. INT'L & COMP. L. 895 (1997).

Kofi Annan has stated: "[I]f 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 offend every precept of our common humanity?"[6] I share these collective opinions.

Let me be clear that I do not favor intervention willy-nilly. I also see some very complex legal and political situations arising from my position, including Chechnya, and possibly even Tibet. On the other hand, ICISS has done the international law community great service by advocating military intervention to protect against and prevent atrocities under carefully prescribed circumstances, and only when the UN Security Council fails to act. These circumstances include slayings of or threats to kill large numbers of people; large scale ethnic cleansing; crimes against humanity or war crimes which could have caused or did cause many deaths; the collapse of a state followed by imminent danger of starvation or civil war; or huge natural and environmental catastrophes if a state is unwilling or unable to help and many people are endangered or killed.[7] Worth noting here is the General Assembly's 2005 adoption, in Resolution 60/1, of the ICISS work as the basis for recognizing "the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[8]

Finally, I want to emphasize the need for effective, rather than ineffective, intervention in carrying out the duty and responsibility to protect. Professor Nanda has mentioned this morning the inability of a viable African peacekeeping force to be formed and placed on the ground in Darfur, and meanwhile the killings there continue. Bosnia and Rwanda witnessed great tragedies caused by the ineffective presence of NATO and UN troops unwilling or unable to protect civilian populations, when innocent victims relied on the presence of these troops to congregate in groups around them only to find themselves in harm's way. I stress here that once a decision is made to enter a strife-ridden place to protect lives, it must be done right to avoid compounding the atrocities. Time does not permit discussing here how effective intervention can be done. I nonetheless note that international intervention treaties by participating states, as contemplated in General Assembly Resolution 3074, offer potentially successful legal mechanisms in this regard.[9]

Thank you for the opportunity to speak.

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6. The Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century*, ch. 4, at 48, U.N. Doc. No. A/54/2000 (Apr. 3, 2000), *available at* http://www.un.org/millennium/sg/report/full.htm (last visited Jan. 30, 2007).

7. *See* THE RESPONSIBILITY TO PROTECT, REPORT OF THE INTERNATIONAL COMM'N ON INTERVENTION AND STATE SOVEREIGNTY (Sept. 21, 2001).

8. G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

9. *See* G.A. Res. 3074, *supra* note 1.