

INTERNATIONAL LAW ASSOCIATION

UNITED NATIONS REFORM STUDY GROUP

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Group agenda

Update, August 2008

UN Charter, Preamble

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

[...]

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained...

Context of the work of the Study Group

- General background to the subject-matter
 - Two main reform processes:
 - 'Big ticket' reforms, e.g. Security Council composition, requiring Charter amendment.
 - Reform through practice, absent Charter amendment. Examples:
 - Changes in the meaning of a 'threat to international peace and security'
 - Peacekeeping
 - Security Council developments:
 - expansion of activities e.g. creating criminal tribunals
 - abstentions of permanent members not seen as compromising 'concurring vote' requirement
 - authorizing the use of force by member states
 - Predominant focus of policy analysis on 'big ticket', dedicated reform initiatives, which usually fall short of what was originally intended; reform through practice, which is the main process of actualizing reform, is relatively underexplored and theorized
- Developments at the UN
 - Reform on the mainstream policy agenda; latest main initiative culminating in the 2005 Millennium General Assembly Summit [key reports: High Level Panel Report, Secretary-General Report, Millennium Summit Outcome Document]; many big issues not covered e.g. Security Council composition; certain initiatives taken forward: internal administrative reform, Human Rights Council, Peacebuilding Commission.
- Format of ILA Study Groups compared with that of ILA Committees:
 - Output not officially adopted/endorsed by the ILA, so not the 'view' of the ILA collectively on the subject matter and not published in the ILA Conference Report

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Overall agenda of the Study Group in the light of this context

- Analysis of reform through practice; how international law relates to this process, and vice versa
- Produce a report in time for the Hague ILA conference in 2010
- Three stages/components to the Group's work
 - Part A Review of general principles and theories
 - Part B Case studies of reform through practice
 - Part C Synthesis of outcomes of Parts A and B

Part A General principles and theories

Nico Schrijver, Jan Klabbers, Anne Orford

Potential additional input/comments on specific issues: Hilary Charlesworth (gender); Kamal Hossain (principles and theories); Alexander Yankov (principles and theories); Roda Mushkat (human security)
General input/comments: José Alvarez; Gian Luca Burci, Jean-Pierre Cot; Ove Bring; Tom Weiss

- Sources: international law broadly defined, general principles, UN Charter rules, soft law, concepts of 'justice' etc.
- Principles and theories – non-exhaustive list:
 - Purposes and principles of the Charter (including peaceful settlement of international disputes), Charter law more generally (and originalist/teleological interpretative approaches)
 - Economic and social co-operation and new international economic order agenda
 - basis for development, cf. right to development, and environmental protection
 - Contemporary importance is itself a 'reform' in that only vague references made in the Charter
 - Responsibility to protect
 - Self-determination
 - Gender
 - Duty to co-operate and consult
 - Human security
 - Global commons/environmental protection
 - Millennium development goals
- 3 avenues of enquiry on reform, applying these general ideas
 - (1) Political objectives for reform
 - Which issues, structures, institutional mechanisms etc. are made subject to reform, and which are left off? What should be covered in the future? How are reforms conceived? What is reform (focus on practice)? Efficiency issues.
 - (2) Actualizing reform. Focus on practice rather than Charter amendment.
 - (3) Appraising reform: who determines legitimacy, and how; what role is performed by international law?
 - Sites of legitimation: whose views count? e.g. General Assembly, civil society, International Court of Justice and other judicial bodies (cf. *competence de la competence* discussion in the *Tadic* case before the ICTY)
 - Processes of legitimation
 - Formal treaty amendment
 - Alternatives for 'democratic'/'popular' processes: affirmative support, acquiescence; relevance of general ideas of international norm generation
- Analysis in this Part: what general answers to the three avenues of enquiry might be suggested by a consideration of the different principles and theories?

Part B Case studies of reform through practice

- General structure
 - Case study approach, both structures (e.g. ECOSOC) and topics (e.g. use of force)
 - Selectivity: addressing certain key issues not every conceivable reform issue
 - Broad temporal scope: past, current proposals, into the future
 - Analysis:
 - What has been done/proposed/might be done
 - Critical evaluation based on the three avenues of enquiry from Part I
- Case studies covered
 - Use of force generally
 - Ove Bring**

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- Substantive norms, e.g. right of self defence after 9/11 and SC determinations re: Afghanistan/Wall Opinion [temporal, qualitative and identity (state/non-state) aspects of the required 'threat' to trigger a right to war]; guidelines on the use of force
- Role of Security Council and General Assembly, cf. Uniting for Peace [origins, Suez, ICJ acknowledgment of legitimacy of procedure in *Wall* advisory opinion]; delegation to member states after Iraq 1991; peacekeeping; ideas of taking powers away from the Council e.g. unilateral humanitarian intervention; Iraq war 2003 appraisals of the Security Council (failing to implement its own proscriptions/failing to prevent war conducted by two of its members/successfully resisting authorizing unnecessary war)
- Security Council
 - Nico Krisch**
 - Composition, cf. China and Russia changes; cf representativeness identified in the General Assembly Millennium Declaration
 - Procedure
 - Indicative voting
 - Veto, including proposals for non use in certain circumstances
 - Expansion of powers, via elastic notion of 'threat to international peace and security':
 - Topics: weapons capability/development [cf 'disarmament' versus 'non-proliferation']; infectious diseases; human rights violations; criminal law
 - Powers: sanctions; legislation e.g. on 'terrorism;' enforcing criminal law [creating ad hoc and hybrid tribunals, and criminal investigation body (Hariri Commission) cf. *Tadic* decision; initiating and blocking prosecutions at the ICC]; authorizing international territorial administration; modifying other norms in international law
- ECOSOC
 - Role in governance on economic/financial/capital issues, cf. current primacy of the International Monetary Fund and World Bank
 - B.S. Chimni**
- Peacebuilding Commission
 - Hilary Charlesworth**
- Human rights
 - Human Rights Council (cf. practice on determining composition)
 - Irene Khan**
 - Reforms of treaty body procedures, including use of inter-state procedure
 - Ivan Shearer**
- Accountability issues
 - Vera Gowlland**
- International Court of Justice
 - Sienho Yee**

Part C (from the particular back to the general)**First draft prepared by Ralph Wilde after the completion of the earlier contributions**

Revisiting the analysis in Part A, which applied the general principles to the three avenues of enquiry, in the light of the analysis in Part B, which pursued the three avenues of enquiry in relation to specific case studies. Critical evaluation of the three avenues of enquiry bearing in mind what has happened in practice, drawing across the case-study-specific analysis of Part B.

Issues to be discussed

- Possibilities and limitations of reform through practice;
- How reform through practice happens, what part is played by international law in the process;
- How can a distinction be made between 'legitimate' and 'illegitimate' reforms, what role does international law play in that;
- What differences operate across these issues as between different institutions, e.g. what are the markers of legitimacy in each issue, cf. underlying reason for limited SC membership and plenary GA membership;
- General idea of mapping the discipline and suggestions of what work could be done in the future

intended product

Report of 40/50 pages