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United Nations Reform Through Practice

Report of the International Law Association Study Group on United Nations Reform

Edited by Ralph Wilde, Rapporteur of the Study Group

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Introduction

Ralph Wilde

Reform through practice

Reform of the United Nations is not a matter that has been underexplored, whether through official initiatives by states and the organization itself, or by academics and other commentators, both supportive and critical of the organization. However, much of this analysis has tended to focus predominantly or even exclusively on 'big ticket' issues requiring formal Charter amendment, such as proposals to alter the membership of the Security Council to make that body more representative. Such a focus ignores the many areas where reform has actually occurred, which are often unacknowledged to be reforms as such: where through 'practice', the role, functions, power and structure of the organization has altered significantly, without a modification of the text in the Charter being adopted to effect or ratify the change.

This 'reform' has sometimes been understood in terms of developments in the interpretation of implied or inherent powers, with the effect of expanding the scope of generally accepted legitimate UN action. Examples of implied/inherent powers, some of which having been invoked by the Security Council in particular, include the power to bring international claims; to enter into international agreements in broader circumstances than those expressly envisaged in the Charter; to exercise competence with respect to the Mandate arrangements of League of Nations Covenant beyond the circumstances expressly provided for in the Charter; to engage in peacekeeping; to create criminal tribunals; to engage in territorial administration outside the circumstances expressly provided for (as part of the Trusteeship System) in the Charter; to render in force a treaty which had not been ratified by the state concerned; and to 'legislate', i.e. introduce general norms to be automatically applicable to some or all member states, including norms which have implications for states' municipal law, even if such norms contradict other applicable rules of international law.

Other ways in which the scope of UN action has expanded is through a broader interpretation of the threshold concept of a threat to international peace and security in Article 39 which enables Chapter VII action by the Security Council, and a narrower interpretation of the scope of the prohibition of Article 2(7), which, absent a Security Council exception, requires the UN to defer to matters deemed to be in the exclusive domain of member states. Broader UN action has even been possible through a departure from the express language of the Charter, in the case of the requirement that all five permanent members of the Security Council must 'concur', i.e. vote affirmatively, for a resolution to be validly passed by that Organ. Finally, the UN's scope of action has been expanded through arrangements outside the Charter which have provided for a UN role, such as the competence of the Security Council to refer cases to, and temporarily suspend the operation of the jurisdiction of, the International Criminal Court under the terms of the Rome Statute.

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The Study Group and this report

The Study Group was created by the International Law Association, through an initiative of its Director of Studies, Christine Chinkin, and two members who became the Study Group Co-Chairs, Kamal Hossein and Nico Schrijver. It was comprised of members drawn from ILA Branches internationally. Unlike the work of the ILA's international Committees, Study Group projects are less formal and their final conclusions, as in the case of the present report, do not go forward for formal consideration by the ILA, nor do they offer resolutions to be adopted by the Association.

This report contains a series of contributions on particular reform topics, addressing many of the matters sketched above. The choice of topics covered was determined by an aspiration to address some of the main areas of relevance, mediated by a consideration of the interests and willingness of Study group members to work on them and produce contributions in time to be included. The result is, of necessity, selective, with the regrettable omission of a planned contribution dedicated to the Human Rights Council (although Ivan Shearer's contribution on the human rights treaty body mechanisms includes some coverage of the Council's activity). Contributors were invited to reflect broadly and in an impressionistic fashion, on the areas of their topic they regarded to be significant, rather than attempting to offer a comprehensive and fully referenced treatment. The aspiration was to try and identify some key themes and offer analysis of them. Although the predominant overall focus is on reform through practice, beyond this no general view was adopted for the work of the Study Group, and, indeed, the report contains a range of different perspectives, in some cases views being mutually contradictory. The views expressed herein are of the individual contributors, not also the Group as a whole or the International Law Association. Within this, the views of contributors are of these individuals personally, not also the institutions with which they are affiliated.

The role of Study Group members fell into two categories: some members joined the Group on the basis that they would provide a substantive contribution, either individually or together with one or more other members. In all but three instances, members discharged this undertaking, and their contributions, attributed to them, make up the present report. The other members of the Study Group were invited to participate on the basis that they would be offered an opportunity, if they wished to take it, to comment on the drafts of the contributors. Some took this opportunity, and provided valuable feedback.

Earlier draft versions of some of the contributions were presented by their authors and, in cases where authors could not be present, myself and other members of the Study Group, at the ILA conferences in Toronto, Rio and The Hague. Revisions to drafts were made in the light of the comments made on them at these conferences. As befits the informal and impressionistic nature of the study, the contributions that follow are lightly referenced and heterogeneous in terms of structure, length, and formatting and citation style.

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Overview of the contributions in the report

Jan Klabbers begins the report with a wide-ranging reflection on many of the important legal issues at stake when thinking about the nature and prospects for reform at the UN. He reminds us of the importance of thinking about reform not as merely a technical enterprise, and necessarily for the good, but, rather, as a matter to be appraised on its merits. Klabbers reviews some of the key historical milestones in reform, highlighting what they suggest about the reform process itself. He then goes on to address the legal parameters of reform through practice: what norms of general international law, and UN law, are involved and should be respected by the reform process.

Nico Schrijver offers a critical evaluation of the pros and cons of introducing a new organization within the UN to address environmental protection. This includes an overview of the limitations of the existing modalities concerned with the implementation of international environmental law, a look back to the origins of the proposals for such an organization made by the Brundtland Commission, and a review of the merits of such proposals, concluding in favour of the creation of a new organization.

Ivan Shearer makes the case for harmonizing the processes of monitoring the implementation of international human rights treaties. Shearer locates the legitimacy for such a unified system in the common framework of the Universal Declaration and the generalized approach to Universal Periodic Review adopted by the UN Human Rights Council. He offers an overview of the evolution of UN-based human rights standard-setting and monitoring, from the Universal Declaration to the role of the Human Rights Commission, its replacement with the Human Rights Council, and the ongoing work of the treaty bodies. He then reviews the merits and prospects of various proposed and actualized harmonization initiatives, from an 'International Court of Human Rights' to streamlined procedures and the use of core reporting documents across multiple bodies.

Hilary Charlesworth offers a critical appraisal of the Peacebuilding Commission (PBC) created by a joint action of the General Assembly and the Security Council in 2005. Charlesworth sets out the structure and role of the Commission, its relationship to the General Assembly and Security Council, and its historical origins. She then evaluates the scope of the PBC's responsibilities and mandate, and its structural position within the UN, and reviews its work over the first five years of its operation, including the countries that have been the focus of its attention, financing issues, the involvement of civil society and international financial institutions at its meetings, and the significance of the work of the PBC for women and girls at a policy level and as a matter of practice.

Vera Gowland Debbas addresses one reform issue that has attracted increasing attention in recent years: accountability issues raised by the activities of the UN Security Council. Gowland Debbas begins by identifying some of the trends in practice that have led to a greater focus on accountability, notably in the context of the Security Council's 'legislative' activity and the impact of its sanctions regimes on the human rights of the target population. She then sets out general theories of accountability, including the relationship between accountability and responsibility, and goes on to address three of the most

important accountability topics: first, whether there are legal constraints on the Council's powers and what the applicable law is; second, what possibilities exist for third party review of Security Council actions; and third, what proposals for reforming the current situation can be made.

Nico Krisch analyses those areas of Security Council reform where, unlike in the case of membership, there have been significant changes and possibilities exist for further developments. He considers, on the one hand, the Council's working methods and the related issues of participation and transparency and, on the other hand, the far-reaching and continuing changes to the accepted scope of Security Council powers. In both areas, Krisch highlights reform initiatives undertaken so far, and identifies and offers critical appraisal of the prospects and possibilities for further changes.

B.S. Chimni addresses the prospects for reforming international law and policy on international economic governance, focusing on the two main international economic institutions, the IMF and the World Bank, and their relationship to ECOSOC. In particular, he considers what greater role ECOSOC might perform in relation to the Fund and the Bank. Chimni offers a critical appraisal of the broader factors that will mediate these prospects, including the structure of the world economy; the changing interests of key developing countries, notably the BRICs; the dominant neo-liberal ideological approach to economics currently prevalent; the constraints imposed by both the constituent texts of the bodies under evaluation and the instruments that determine their inter-relationship; and the distribution of power among member states.

Ove Bring considers how the law on the use of force has been clarified or modified through the practice of the UN, including developments in the General Assembly and Security Council, and the jurisprudence of the International Court of Justice. Bring summarizes relevant developments in the past and reflects upon the prospects for change in the future. Key developments addressed include the way that abstentions by permanent members came to be accepted as not in and of themselves invalidating the adoption of resolutions by the Security Council; the Uniting for Peace resolution; the development of peacekeeping; the Security Council authorizing member states to use force; the Security Council's position on the attacks on 9/11 and the significance of this for the law on self-defence; the endorsement of a 'Responsibility to Protect' within the UN; and developments in the use of force by UN peace operations.

Sienho Yee offers a survey and critical analysis of proposals for and developments in reform of the International Court of Justice. He also makes some suggestions for further consideration. Yee observes that the Court has been in a continuing process of interpreting its Statute, and adopting, interpreting and revising its procedure and working methods to promote efficiency. By doing this, the Court has been effecting reforms in its day-to-day practice and operation. Yee addresses reform developments in relation to composition of the Court (including gender balance); jurisdiction; applicable law; procedure and working methods; working conditions; and workload and case-type matters. His proposals for further developments include consideration of further measures relating to practitioners

before the Court (the organization of an ICJ bar with disciplinary power, and the adoption of a binding code of conduct).

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General Principles and Theories of UN Reform

Jan Klabbers

1. Introduction

In 2007, the venerable magazine The Economist published a rather critical review of a recent book by John Bolton, one-time US ambassador to the UN.[1] The reviewer highlighted that Bolton had staked much of his time at the UN on two ideas for reform: first, he wanted to introduce weighted voting in the General Assembly; second, he thought all UN programs should be run on voluntary contributions.

Needless to say, both proposals would have been disastrous for the UN as we know it. Weighted voting in the General Assembly would do away with the faintest idea of the Assembly being a representative body, the closest thing the world has to a parliament; in Bolton's plan, it would become a mere shareholder's meeting. Likewise, to have programs only run on voluntary contributions would make a mockery of any notion of solidarity between member states and (to those who think solidarity a four-letter-word) would also bring an end to any comprehensive policy-making: it would put a premium on categorizing and fencing off issues into bit-sized, manageable components, ignoring the basic idea that, say, there might be a link between poverty and the absence of military security. But then again, maybe that was precisely why Bolton launched his ideas.

Bolton's plans would have involved a serious measure of UN reform, and are a useful reminder of the fact that not all reforms are equally blissful. Change merely for the sake of change is silly, perhaps even downright dangerous; consequently, the tendency to present UN reform as a technical, neutral, non-political exercise must be resisted, for as Bolton's plans make clear, there is no such thing as technical or apolitical reform. Reform proposals, like any other political proposals, must be judged on their merits.[2]

Somewhat less recently, a US commission (The Commission to Study the Organization of Peace) presented a lengthy report on reforming the UN.[3] Its analysis of the organization's ailments reads as if it were written today, with one notable exception: when the Commission issued its report, in 1957, it could legitimately complain of inaction in and by the Security Council – such a complaint would nowadays be dismissed, and rightly so. Still,

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1 See 'Looking Back in Anger', The Economist, 15 December 2007, at 79-80, reviewing John Bolton, Surrender is not an Option: Defending America at the United Nations and Abroad.

2 See generally Jan Klabbers, 'Reflections on the Politics of Institutional Reform', in Peter Danchin & Horst Fischer (eds.), United Nations Reform and the New Collective Security (Cambridge University Press 2010), 76-93.

3 See Commission to Study the Organization of Peace, Strengthening the United Nations (New York: Harper & Brothers, 1957). The Commission was, it seems, already established in 1940, and its 87 members formed a veritable who's who of US foreign policy, including Philip Jessup, Inis Claude jr., Clyde Eagleton, Stephen Schwebel, Leland Goodrich, Louis Sohn, Charles Fenwick, and Eleanor Roosevelt. It was chaired by Arthur N. Holcombe.

its phrasing of the causes of the lack of effectiveness of the UN (already then…) is highly memorable, as much for its style as for its contents:

> There is the basic problem of inadequate constitutional authority to take measures which may be deemed essential to the realization of established objectives. When legal competence is not lacking, effective action may be prevented by formal barriers to decision-making, such as the veto rule in the Security Council. When the decision-making process is not thus handicapped, essential policies may yet to fail to command the support needed to put them into effect, as a result of bias, lack of courage, lack of vision, or whatever other factors may influence the votes of Member States. If all these hurdles are surmounted, decisions may be nullified by the insufficiency of available means for enforcing or otherwise securing compliance or cooperation. Even if adequate means are theoretically available, the willingness and determination of Member States to use them may be lacking. Their reasons may extend from reluctance to risk war to refusal to spend money. Thus, there are many potential frustrations for international organization between the acceptance of vital responsibilities and the performance of necessary and proper functions.[4]

Again, there is something of a lesson here: the drive to reform the UN is about as old as the organization itself. Dissatisfaction with the organization is of all times, and the juxtaposition by the Commission of what the UN can do and what would really be 'essential' highlights, yet again, the political relevance of UN reform. For, obviously, what may be essential to the US foreign policy establishment in the 1950s may not quite be considered as essential by policy-making elites in the 21st century in, say, Brazil, Zimbabwe, or Nepal.

2. Reform

Amending the UN Charter through the prescribed procedure is not an easy exercise.[5] Under article 108 of the Charter[6], amendments can only enter into force upon ratification by the five permanent members of the Security Council; this effectively provides them with a right to veto any amendment, and as a result, it is no coincidence that formal amendment of the Charter has only occurred three times, and related to relatively minor institutional changes. Yet, formal amendment is by no means excluded. After all, the mid-1960s amendments too (the most important of which included an expansion of the Security Council) occurred in an atmosphere of resignation: the amendment proposals themselves met with reluctance on the part of four of the five permanent members; accordingly, they

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4 Ibid., at 28-29

5 The classic study, still largely relevant, is Ralph Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* (Leiden: Brill, 2005 re-issue; first published in 1968).

6 Article 109 envisages an extraordinary review conference. As this has never been applied, I shall leave it undiscussed.

abstained or voted against. Nonetheless, upon reflection (with or without parliamentary discussion) all five governments ratified, thus serving as a salutary reminder that nothing is impossible.[7]

Still, 'big ticket reform', as it is sometimes referred to, has been tried in vain all too often in recent years, as is silently witnessed by Joachim Müller's big, five-volume documentation of reform proposals. By contrast, informal reform, reform through practice, or authoritative interpretation, or both, has received considerably less attention. The aim of the present paper is not so much to figure out on what issues such 'informal reform' could possibly be achieved.[8] Rather, the aim of this paper is to discuss the legal parameters of reform through practice: what norms of international law, or UN law, are involved and should be respected. In other words: I am interested in drafting a conceptual paper rather than writing a political blueprint. In what follows, I will discuss three fairly different topics: first, I will discuss the strictures embedded in the UN Charter itself and in the way the UN was set up, adhering to the idea that the construction itself may be in need of polishing, but does not require a radical overhaul. In other words: the discussion is premised on the desirability of tinkering at the margins; it will be presumed that the UN as it is by and large commands support. Second, I will discuss, briefly, whatever strictures general international law may impose; and third, I will discuss some practical techniques for reform. Most of these, to be sure, have been tried and tested; I will merely make an inventory. I will not engage in discussions of whether there are too many agencies, or whether their mandates are overlapping, or how staff ought to be recruited, or how operations can be streamlined. This raises few interesting issues of institutional law and, more to the point perhaps, has been done by others far more qualified.[9]

One further remark is in order: I am not concerned here with reform through practice, if by this is meant practice as the aggregate effect of individual acts accumulating over time (the intra-organizational equivalent of customary law). Rather, my concern is with intentional reform taking place outside the formal amendment procedures of articles 108 and 109; I shall refer to this as 'informal reform'. For, it is informal reform which functions (or can be said to function) as a viable alternative to amendment, and creates tensions with the rule of law.[10] Lest it be forgotten, the UN subscribes, in many an official statement, to the rule of law, and advocates installation of the rule of law in its member states. Yet, if the rule of law

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[7] See Wolfram Karl, Bernd Mützelburg & Georg Witschel, 'Article 108', in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary. Volume II* (Oxford University Press 2002, 2d edn.) 1341-1363, at 1356.

[8] For an overview of some of the relevant informal reforms to date, see Nico J. Schrijver, 'The Future of the Charter of the United Nations', 10 *Max Planck Yearbook of United Nations Law* (2006) 1-34, esp. 13-25.

[9] Examples include Paul Kennedy, *The Parliament of Man: The Past, Present, and Future of the United Nations* (New York: Random House, 2006), chapter 8; Thomas G. Weiss, *What's Wrong with the United Nations and How to Fix It* (Cambridge: Polity, 2009).

[10] The rule of law is, of course, itself a convoluted and highly contested notion. For a useful overview, see Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004); arguably its most sophisticated recent formulation is T.R.S. Allen, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2001), and a thin conception is useful discussed in Jeremy Matam Farrell, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007).

means anything on the international level, its meaning must include that where formal amendment procedures are available, departures are not lightly to be presumed.[11]

3. The UN Legal Order

Under this heading, there are two types of relationships which require closer scrutiny. First, there are the relations between the various organs of the UN *inter se*; second, there are the relations between the UN at large and its member states.

The UN Charter is not known for having created a system of checks and balances, as is the case with for instance the US Constitution. Still, in some respects, the Charter envisages an institutional balance, in particular (but not exclusively) between the Security Council and the General Assembly.[12] Thus, famously, decisions on admission of new member states (now largely an obsolete issue[13]) must be taken by Council and Assembly together. As the International Court of Justice put it in 1950, a positive recommendation by the Council is "the condition precedent to the decision of the General Assembly…".[14] The text of the provision under consideration "determines the respective roles of the two organs whose combined action is required…".[15]

Mutatis mutandis, the same applies to a handful of other issues. Thus, member states can only be expelled, or have their rights and privileges under the Charter be suspended, by the two leading organs together (articles 5 and 6 UN); the two have to work in tandem in order to appoint a new Secretary-General (article 97 UN) and members of the International Court of Justice (article 4 ICJ Statute), and while there is room for a 'secondary' responsibility of the Assembly in matters relating to peace and security, as the ICJ found in *Certain Expenses*[16], nonetheless primary responsibility rests with the Council.

Informal reform would, it seems, have to respect such checks and balances (mainly balances, really), as do exist. It would be improper, if it were possible to begin with, for the Council to adopt a resolution doing away with the secondary responsibility of the Assembly in matters of peace and security, or appoint a new Secretary-General without involving the Assembly. These checks and balances have a constitutional character, or at least are as constitutional as it can get.

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11 The ECJ presented a similar thesis in case 43/75, *Defrenne* v *Sabena* [1976] ECR 455, without, however, always strictly abiding by it itself. See for a notable departure the Bangladesh emergency aid cases: cases C-181 & 248/91, *European Parliament* v *Council and Commission* [1993] CR I-3685.

12 For a brief overview, see Jan Klabbers, 'Checks and Balances in the Law of International Organizations', in Mortimer Sellers (ed.), *Autonomy in the Law* (Dordrecht: Springer, 2007) 141-163.

13 But see Thomas D. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (Leiden: MartinusNijhoff, 2009).

14 See *Competence of the General Assembly for the Admission of a State to the United Nations* (advisory opinion), [1950] ICJ Reports 3, at 8.

15 *Ibid*.

16 See *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, advisory opinion, [1962] ICJ Reports 151.

Others are a bit less obvious, but no less relevant. Of these, the power of the purse stands out: the Security Council can only function, in most cases, with the approval of the Assembly, as the Assembly has the final say about the budget. In a celebrated instance, the Assembly's lukewarm attitude towards the ICTY made it practically difficult for the ICTY to function in its early years: the Assembly simply placed insufficient funding at its disposal.[17] Again, then, a resolution by the Council to strip the Assembly of its budgetary power would be unconstitutional – and in being unconstitutional, it would be illegal.

On a larger scale, the ICJ has highlighted that something similar applies within the broader UN family: in its opinion on the World Health Assembly's request to speak out on the legality of nuclear weapons, it famously found that the specialized agencies operate on the basis of the principle of speciality: each has been assigned a specific function (or set of functions), and can only act within the limits thereof.[18] This then creates, if not a system of checks and balances, at least a division of labour, and a strong case can be made, following the WHA opinion, that this division of tasks must be respected: it would be improper for the ILO to hand out the sort of inoculation passports normally issued by the WHO; by the same token, it would be improper for the ILO to sponsor conventions on, say, the banning of tobacco, or on the links between trade and environmental protection[19]; not just because doing so would, arguably, be *ultra vires* the ILO as such, but also because it would upset the division of labour amongst the UN specialized agencies. It is quite possibly no coincidence that the various specialized agencies have been reluctant to enter each other's fields of action; more importantly perhaps, it would also seem that a decision by the plenary body of one of them to do something outside the proper sphere of powers of the organization itself would not be looked at kindly. While the *WHA Opinion* cannot, as such, affect the legal position of organizations not linked to the UN, at least within the UN family it creates a strong *prima facie* case of limited jurisdiction.

As far as relations between the UN and its member states are concerned, several principles and rules would seem to be of a constitutional nature as the term is used here, i.e. they cannot be circumvented by means of a resolution or other decision short of formal amendment; although nothing prevents such rules from being changed through formal amendment. First among these, obviously perhaps, is the principle of sovereign equality of

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17 The story is told with gusto in Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000), at 221-222.

18 See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, advisory opinion [1996] ICJ Reports 66. Note however that the notion of speciality is somewhat ambivalent: it remains unclear whether it is used as synonymous to attributed powers, or whether it relates to the division of labour between the specialized agencies. A tantalizing proposition is that it might relate to both simultaneously, in which the scope of powers are no longer solely conceptualized as stemming from the intentions of the drafters, but also depend on the organization's role within the larger setting of the UN family. For further reflection, see Jan Klabbers, 'Global Governance at the ICJ: Re-reading the WHA Opinion', (2009) 13 *Max Planck Yearbook of United Nations Law*, 1-28.

19 This reluctance may not stem only from legal concerns, of course, and is not limited to the specialized agencies. By way of example, trade elites have proved reluctant to have the WTO take on environmental or labour issues: see, e.g., the 2005 Sutherland report: *The Future of the WTO: Addressing Institutional Challenges in the New Millennium. Report by the Consultative Board to the Director-General Supachai Panitchpakdi* (Geneva: WTO, 2005).

member states (article 2, paragraph 1). The creation of a secondary form of membership for micro-states, as has sometimes been suggested, would seem to require formal amendment, as it runs counter to the principle of sovereign equality. Likewise, to withhold voting rights of some member states, for whatever reason (unless explicitly based on the Charter), would be incompatible with this principle, as would be the introduction of weighted voting or stripping one of the permanent members of the Security Council from its veto right. By the same token, a decision to strip a member state of its voting rights in the Assembly for being six months in arrears with contribution (rather than the two years mentioned in article 19) should be unacceptable.

Flexible and open-ended though the scope of the notion of a state's jurisdiction may be (as the PCIJ already realized in 1923[20]), surely it would be difficult to defend the UN prohibiting some forms of democracy, or prohibiting some political parties, or defining minimum or maximum numbers of democratic institutions. For example, the UN cannot prohibit the United Kingdom from using a district system for elections, even if a handsome majority would be convinced that such a system is fundamentally flawed; nor could the UN disavow the US system of campaign financing as undemocratic. This does not mean that the UN cannot speak out on democracy, or condemn certain practices, but does imply that it cannot set the law: this is simply not a task the member states have endowed the UN with; nor would it be easy to justify on the basis of an implied powers argument.

Likewise, the social-economic policies (broadly defined) of its member states remain out of the UN's reach: it cannot, e.g., declare the Finnish tax on automobiles too high (although this would meet with widespread approval in Finland), or enact a minimum wage in Germany. By the same token, other policies too remain out of reach: the UN has no authority to, e.g., prohibit polygamy, or order bicyclists to start wearing helmets.

Still, at this point some caveats should be made. While arguably the UN cannot declare Finnish taxes too high, it is legally not impossible that it could suggest that taxes worldwide are too high, or advocate the general desirability of wearing protective headgear or having a minimum wage or having only one spouse. And if the latter is possible, then it is merely a matter of time before the former also becomes a possibility: this, arguably, is how the post-war human rights revolution developed.

Moreover, there is a serious problem here from the point of view of the rule of law: if all members are in agreement that a certain cause is desirable, then legal guarantees often remain helpless bystanders: a unanimous decision by the Assembly to reduce the two years' arrears period to six months may well come to represent a valid new rule, precisely because it is based on the unanimous agreement of all member states. Concerns about the *vires* of an organization can always be overcome by means of acceptance or acquiescence, and this applies even to guarantees deemed to be of constitutional nature.[21]

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[20] See *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, advisory opinion, [1923] Publ. PCIJ, Series B, no. 4.

[21] See Jan Klabbers, 'Constitutionalism Lite', 1 *International Organizations Law Review* (2004) 31-58.

4. General International Law

It is difficult to think of informal reform through acts which would be difficult to reconcile with general international law but are not, in one way or another, covered by the UN legal order itself. The two main issues that present themselves are the following. First, there is the situation when the UN engages in the making of general international law and then, from the same exercise, claims to derive a law-making power. Thus, e.g., an anti-terrorism resolution adopted by the Council may later pave the way for an argument that the UN has the competence to combat terrorism, or that the Council has the competence to legislate more generally. This sort of concern taps into issues relating to the UN legal order, and are akin to those discussed in the preceding section.

Second, there is the consideration that when engaging in informal reform, possibly general international law may be affected. Top of the list here are, of course, jus cogens considerations. To the extent that norms can be positively identified as belonging to this category, it seems clear that no UN organ is at liberty to violate them. This would make conceptual sense: as there should be no excuse for jus cogens violations, so too their violation by even the UN can not be excused. Whether this would allow domestic or regional tribunals, or even the ICJ, to exercise review of United Nations acts allegedly violating jus cogens is a different matter[22]; but the basic principle seems clear enough: the UN is not at liberty to violate jus cogens norms. To provide a blunt (and thus far purely hypothetical) proposal: the creation of a subsidiary organ to endorse the use of torture in law-enforcement would most likely conflict with the jus cogens prohibition of torture.

At this point, though, some further reflections present themselves. One is this: given that jus cogens norms rests on the consent of "the international community of states as a whole", as article 53 of the Vienna Convention on the Law of Treaties puts it, it might be argued that once such norms are disrespected by the UN, they obviously no longer meet with this consent, and cease to be jus cogens norms: while violations by a single state would not immediately affect their jus cogens nature, violations by the UN might. While some norms might be strong enough to survive inadvertent compliance problems by the UN (surely, if the genocide prohibition is a jus cogens norm, then it does not stop being so because a Security Council resolution may inadvertently assist a genocide[23]), when norms are on the brink of jus cogens status, or their jus cogens status is controversial, non-compliance by the UN may just tip the scales.

Moreover, discussing some issues in terms of jus cogens highlights methodological problems. When it comes to the use of force, e.g., aggression is sometimes said to be

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22 See generally Erika de Wet & André Nollkaemper (eds.), *Review of the Security Council by Member States* (Antwerp: Intersentia, 2003).

23 What I have in mind here is the scenario Bosnia invoked in the early 1990s. It suggested that an arms embargo imposed by the Security Council on it and Serbia alike assisted the Serbs in their ethnic cleansing policies and therewith contributed to the violation of the jus cogens prohibition of genocide. The case reached the ICJ, but the Court did not address the issue. See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, provisional measures, [1993] ICJ Reports 325.

prohibited under jus cogens, whereas self-defense is held to be legitimate. This places a premium on being able to separate the two, yet practice is often resilient enough to blur the boundary. Who was the aggressor, e.g., in the Iran-Iraq war during the 1980s? Or in the many wars and armed conflict situations afflicting Israel since its creation? Or, indeed, the US invasion of Iraq, in 2003? And should NATO's intervention over Kosovo classify as a violation of the aggression prohibition, so as to weaken the norm's jus cogens character? If it was indeed illegal (but legitimate, or morally justified, as many commentators have held), than this outcome would seem well-nigh inescapable.

Things become more problematic still when the UN gets involved: can the US action in Iraq in 2003 be designated as giving effect to earlier Security Council resolutions? If this is considered implausible (and there is a strong case for considering it such), can the relative silence by the Council since 2003 be interpreted as tacit approval? If so, does that render the Council somehow co-responsible? And how then would this affect the jus cogens nature of the aggression prohibition? Similarly, does the refusal by the Council to condemn NATO's operation over Kosovo somehow implicate the Council?[24]

Things are different, it would seem, with 'ordinary' international law, as normally speaking states can contract out of their obligations, and it would seem to matter little whether they do so bilaterally or *en groupe* through the United Nations. Thus, should the General Assembly resolve that there is no longer anything sanctified about diplomatic mail, or should the Security Council declare that there is no longer a right of innocent passage, then states would be at liberty to open diplomatic mail or refuse innocent passage (provided of course that the Assembly's and Council's injunctions come to be accepted as legally valid and binding). More to the point, the creation of a subsidiary organ to endorse the use of data-sharing in law-enforcement would presumably stay within the bounds of general international law, even though it might go against some pertinent treaty provisions. By the same token, it is not so much the substance of the Security Council's rules on terrorism that causes concern; rather, it is the fact that such norms emanate from the Security Council (whose powers to legislate are in doubt), that such rules easily take precedence over contrary rules by virtue of article 103 UN, and that, as one prominent observer puts it, the Council's activities "shrink from recognizing legal limits on the Council's own actions."[25]

5. Techniques

Prima facie, the most obvious technique to overcome the risk of the veto is to conclude agreements affecting the UN but to do so outside the UN. After all, while the P-5 have a veto within the UN, they do not have such a veto outside the UN, and under articles 30 and 59 of the Vienna Convention on the Law of Treaties, it is perfectly possible to conclude a later treaty in order to supplement, or even abrogate, an earlier one. There are two caveats though. The first is that in order to be fully effective, the new treaty must involve all UN

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[24] See generally Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2003).

[25] See José E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005), at 207.

members; otherwise, the older version (i.e. today's Charter) will continue to apply between those who remain outside the supplementary treaty, and in relations between parties to the old version and the new version. This is, with 192 member states, not a very likely prospect; and at the very least, it would mean that controversial topics (such as the composition of the Security Council) cannot readily be dealt with on the basis of a treaty outflanking the UN.[26] At any rate, it would be highly impractical to have different versions of institutional provisions, and this alone makes anything other than an agreement by unanimity undesirable.

Second, there is article 103 of the UN Charter, confirmed in article 30 of the Vienna Convention, and holding that in the event of a conflict between obligations arising under the Charter and another treaty, obligations under the Charter shall prevail. While the scope of this provision is not entirely clear[27], what is clear is that this will cover the Charter itself. In other words, any agreement departing from the Charter will automatically be overruled by the Charter, except perhaps in the unlikely circumstance that there would be agreement among the 192 member states that the treaty at issue does not affect obligations under the Charter[28] – but that will effectively give all member states a veto.

A more modest version is the modification between some parties *inter se*, recognized under article 41 of the Vienna Convention. Here too cognitive problems arise (how to tell a modification *inter se* from a successive treaty, or from an interpretative agreement?[29]), as well as the more straightforward problem that such a modification may not conflict with the Charter's object and purpose and must respect the rights of the member states not involved in the modification: given the reach of the Charter and its broad purposes, there is not a whole lot that could legitimately be modified by parties *inter se*. Arguably, the practical change concerning decision-making in the Security Council since the Korean conflict (with the term 'concurring' in article 27 meaning no more than 'not objecting') could be one example of a modification between the permanent members affecting only them, but even this is fraught with problems: a member state receiving sanctions may well be affected in a very meaningful way, as South Africa argued in the *Namibia* case.[30] Perhaps for this reason, the World Court chose not to explain the changed decision-making rule in terms of a modification between some members *inter se*, but rather as coming close to being of customary status.[31]

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26 Likewise Zacklin, note 5 above, at 10-11.

27 See Rain Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter', 57 *International and Comparative Law Quarterly* (2008).

28 Zacklin adds another reason why such a scenario is unlikely: such an agreement "must lead to an application of the Charter which is different from that provided for but without being in conflict with it". See Zacklin, note 5 above, at 196.

29 For further discussion of such issues, see Jan Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2008), chapter 8.

30 See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, advisory opinion, [1971] ICJ Reports 16.

31 For further discussion, see Jan Klabbers, *An Introduction to International Institutional Law*, 2d ed. (Cambridge University Press 2009), at 209-210.

Short of concluding supplementary agreements, another obvious technique to accomplish informal reform is by adopting other instruments. A General Assembly resolution might well come to change, or add to, the written law, despite the Assembly lacking any legislative powers: the Uniting for Peace resolution is a case in point, and it could be argued that at least the ambition behind the Assembly's definition of aggression (resolution 3314 (XXIX)) was to give some concrete hands and feet to article 39 of the Charter: while the resolution at issue may not have been the success many hoped it would be[32], its aspiration was to further delimit a pivotal notion in the Charter, without amending the Charter.

While it is to be expected perhaps that the plenary body adopts resolutions in order to add to, or change, the constituent treaty, when the Security Council aspires to do so it immediately looks more dramatic. The highlight, no doubt, was the outcome of the first summit meeting of the Council, in January 1992.[33] Here the Council not only further developed the notion of threats to the peace, but also cemented the position of the Russian Federation as one of its permanent members.[34]

In strict law, such acts are not unproblematic. The summit statement is not cast in any recognizable form and is not, qua instrument, envisaged in the Charter: its precise legal effects therefore remain nebulous. Still, it is clear that the statement reflected the substantive agreement of the Security Council, including the P-5, and the UN's membership by and large seems to have acquiesced in the replacement of the Soviet Union by Russia.

A less obvious technique is the creation of subsidiary organs.[35] This has the great advantage that the precise legal situation is rather unclear, which leaves policy-makers with considerable room to move. The Charter envisages the creation of subsidiary organs in three distinct articles: article 7 provides a general grant, with articles 22 and 29 specifying that the Assembly and the Council can establish subsidiary organs as they deem necessary for their own functioning. Many have been the organs thus established, but often enough the precise legal basis has remained somewhat unclear; perhaps out of despair, the ICJ too by and large ignored such niceties in *Effect of Awards*: it never discussed the precise legal basis of the UN Administrative Tribunal.[36]

The creation of the two criminal tribunals for Yugoslavia and Rwanda added another problematic element, as these were created by the Council not on the basis of article 29, but rather on the basis of the Council's powers under Chapter VII of the Charter. As the Appeals Chamber of the ICTY suggested in the *Tadic* case, this too was justifiable: it is not

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32 For a strong critique, see Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression', (1977) 71 American Journal of International Law, 224-246.

33 See UN Security Council Doc. S/23500 of 31 January 1992. It is reproduced in 31 *International Legal Materials* (1992) 758-762.

34 This, at least, is the interpretation by a leading commentator. See Nigel D. White, *The Law of International Organisations* (Manchester University Press 1996) at 68.

35 The seminal study is Danesh Sarooshi, *The United Nations and the Development of Collective Security: The delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press 1999).

36 See *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, advisory opinion, [1954] ICJ Reports 47.

impossible to think of especially article 41 of the Charter as authorizing the creation of war crimes tribunals.[37]

The creation of subsidiary organs (regardless of the precise legal basis) is a useful technique for reform through practice for two reasons.[38] First, the creation of a UN organ for a specific task strongly suggests that the UN has legitimate reasons for engaging with such a task; the creation of the Peacebuilding Commission not so long ago, for example, forecloses any discussion of whether the UN actually has, or should have, the legal power to engage in peacebuilding.[39] Second, the creation of a subsidiary organ also suggests that the UN has the prime responsibility, and can fend off competing claims from other actors. To stick to the example of the Peacebuilding Commission: its creation implies that the UN has first go (the primary responsibility, one would be tempted to say) at peace-building operations; the UN assumes priority, over possible claims by organizations such as NATO, the EU or the African Union.

6. Concluding Remarks

The above is but a brief inventory of the sort of issues that may arise in connection with informal institutional reform of the UN. I have focused on the parameters set by the Charter and by general international law, and discussed some possible techniques for informal reform – and their pitfalls. While the starting point has been that as a matter of principle, UN reform should preferably take place through the prescribed amendment procedures (the rule of law demands nothing less), it should also be recognized that over the more than six decades of its existence, informal reform has been far more prominent than formal amendment, and this situation is unlikely to change any time soon.[40]

Perhaps the main reason for this resides with the tendency, in international politics no less than in domestic politics, to have the ends justify the means. It is, perhaps, the original sin of politics that politicians and statesmen, of whatever ilk or affiliation, will always be tempted to take shortcuts to reach their desired results: where there is a will, there is a way. Only a serious commitment to the sanctity of prescribed procedures can counter this – all too understandable – tendency. Yet, such a serious commitment is not something that reform in itself can accomplish: it depends on the sense of responsibility of those

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37 See *Prosecutor* v *DuskoTadic*, ICTY Appeals Chamber, reproduced in (1996) 35 *International Legal Materials*.

38 The creation of another principal organ would most likely have to involve formal amendment. See Schrijver, note 8 above, at 28.

39 Interestingly, the Commission to Study the Organization of Peace (see note 3 above, at 6, 41) went a step further, and held that the UN "is capable not only of administering territory, but of acquiring title under international law…"

40 For a fine, if somewhat disturbing overview, see Frederic L. Kirgis, 'The Security Council's First Fifty Years', (1995) 89 *American Journal of International Law*, 506-539.

politicians and statesmen; it depends on their personal sense of virtue, and that is not something that can be captured in legal instruments, formal or informal.[41]

[41] For further elaboration, see Jan Klabbers, 'Autonomy, Constitutionalism and Virtue in International Institutional Law', in Nigel D. White and Richard Collins (eds.), *International Organisations and the Idea of Autonomy* (London: Routledge, 2011).

INTERNATIONAL LAW ASSOCIATION

UNITED NATIONS REFORM STUDY GROUP

Pros and cons of establishing a UN World Environment Organisation[1]

Nico Schrijver

Treaties and general principles of international environmental law often do not receive adequate follow-up in national legislation and in the setting up of a well-equipped implementation and monitoring instrument. All States face great obstacles in achieving this follow-up. It goes without saying that for developing countries, which often have weak bureaucracies and lack a real enabling environment, this task is considerably more difficult. Internationally, there is also scarcely any well-organised monitoring of compliance with international (treaty) obligations.[2] There are, of course, many reporting procedures but these are also very fragmented. Sanction procedures in the case of non-compliance are provided for in several areas of international environmental law – pioneering instruments in this respect were the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[3] and the 1987 Montreal Protocol regarding the protection of the ozone layer[4] – and in the field of human rights and anti-corruption in the EU-ACP Cotonou Partnership Agreement.[5] There is a distinctly observable trend towards non-confrontation which places more emphasis on 'carrots' than 'sticks'. This is evident, for example, in the extra incentives which the EU Generalised System of Trade Preferences ('GSP plus') provides for compliance with minimum labour standards and anti-corruption measures, support measures within the framework of the UN Convention on the Rights of the Child and financial aid and transfer of environmentally-sound technology in international environmental law. The WTO Appellate Body in *EC – Tariff Preferences* (2004) also endorsed that trade incentives to promote sustainable development are in principle compatible with the WTO regime, as long as, in granting differential tariff treatment, preference-granting countries ensure that identical treatment is available to all beneficiary states that are similarly situated, i.e. that have the same 'development, financial and trade needs'.[6] However, there is often insufficient money available for positive

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1 This contribution builds upon Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, Leiden/The Hague: Martinus Nijhoff/Hague Academy of International Law, 2008.

2 See S. Oeter, "Inspection in International Law: Monitoring Compliance and the Problem of Implementation in International Law", (1998) 28 *NYIL* 101; and A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements,* Cambridge, MA, Harvard University Press, 1995.

3 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington, 3 March 1973, entered into force on 1 July 1975; 993 *UNTS* 243; 12 *ILM* 1085 (1973).

4 The protocol provided for the establishment of non-compliance procedures (Art. 8). These now provide for specific measures against the non-complying party, including the provision of appropriate assistance, issuing of cautions, or even suspension of specific rights and privileges under the Protocol. See Decision IV/5, Report of the Fourth Meeting of the Parties, UNEP/OzL.Pro4/15, 25 November 1992, 32 ILM 874 (1993).

5 See Articles 9 and 96-97 of the EU-ACP Cotonou Partnership Agreement, concluded in 2000.

6 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Appellate Body Report), adopted on 20 April 2004.

measures as an incentive or as a reward for conforming to a treaty's provisions or introducing innovative policy.

There has been considerable discussion on the advantages and disadvantages of setting up a new World Environmental Organisation or a World Organisation for Sustainable Development as advocated by the World Commission on Environment and Development (the 'Brundtland Commission').[7] There are many arguments against such a step. There are, after all, already so many international organisations.[8] And would not the establishment of a new 'specialised' organisation be in contradiction with an integrated approach? The question of sustainable development must, after all, form an integral part of general financial, trade and development policies. This requires a decisive political forum that can apply itself energetically to this task. It is clear that ECOSOC, UNEP and the UN Commission on Sustainable Development will never acquire the stature that this mission demands. Taking everything into consideration and mindful of the continually weak international institutional structure for sustainable development, on balance the best course of action could be to establish a new World Organisation for Sustainable Development as advocated by the Brundtland Commission or a UN World Environment Organisation as proposed by France, Sweden and other countries. This could place the whole question of sustainable development much more clearly on the international agenda and provide an efficient centre for coordination of international environmental and development policy and operational activities. UNCTAD, UNEP and UNECE could be integrated into such a new world organisation. Only a full-fledged world environment organisation can provide checks and balances against other powerful international organizations such as the World Trade Organization and the World Bank.

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7 See L. Swart and E. Perry (eds.), *Global Environmental Governance: Prospects on the Current Debate*, New York, Center for UN Reform Education, 2007, particularly the contributions of M. Ivanova and J. Roy (The Architecture of Global Environmental Governance), F. Biermann (Reforming Global Environmental Governance), and N. Meyer-Ohlendorf and M. Knigge (A United Nations Environment Organisation). See also F. Biermann, "Strengthening Green Global Governance in a Disparate World Society. Would a World Environment Organisation Benefit the South?", (2002) 2 *INEA* 297. For a discussion of earlier proposals see N.J. Schrijver, "International Organisation for Environmental Security", (1989) 20 *Bulletin of Peace Proposals* 115.

8 See N. M. Blokker and H. G. Schermers (eds.), *Proliferation of International Organisations: Legal Issues*, The Hague, Kluwer Law International, 2001.

INTERNATIONAL LAW ASSOCIATION

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UN Enforcement of human rights: Making it more effective

Ivan Shearer

1. Introduction

There is no lack of instruments containing statements and declarations of norms and standards of human rights regarded as binding on all states in the world. The United Nations has sponsored most of those instruments, and its organs either directly monitor their observance in practice or incorporate those norms and standards as basic assumptions in their dealings with member States. Enforcement of human rights, however, remains problematic, and monitoring of the extent to which states observe human rights in their own territories is diffuse in the UN system, and falls short of the effectiveness that could be imagined.

2. Background

The declaration of the promotion of human rights as one of the purposes of the UN, expressed in the Charter, was given early expression in the Universal Declaration of Human Rights, adopted by the General Assembly in December 1948. This declaration, in non-treaty form, cannot be under-estimated. By the very fact of its adoption by an overwhelming majority of members and by reinforcement through the years by way of incorporation into other instruments, and by its acceptance in state practice, the norms it contains are now generally acknowledged as having achieved the status of customary international law binding on all states. The important consequence is that basic human rights and fundamental freedoms do not depend for their recognition or applicability in particular situations on the chequerboard of signatures, ratifications and acceptances of particular treaties, but owe their authority to the Universal Declaration.

Moreover, in the conduct of the reviews of each UN member state under the process of Universal Periodic Review (UPR) by the UN Human Rights Council, instituted in 2008 (to be dealt with below), observance of the rights contained in the Universal Declaration is examined even if the state under review has not become a party to any of the subsequent human rights conventions.

The Commission on Human Rights of the UN, created in 1946, which devised the Universal Declaration, after 1948 turned its attention to the drafting of particular human rights instruments, dealing with certain aspects of human rights in greater detail. These included provision for the creation of expert monitoring committees, the purpose of which would be to receive regular reports on the implementation of the instrument concerned by each of the states parties. This was the pattern followed in the twin Covenants of 1966 (on Economic, Social and Cultural Rights, and on Civil and Political Rights) and in the conventions relating to racial discrimination (1965), discrimination against women (1979), torture (1984), the rights of the child (1989), migrant workers (1990), persons with disabilities (2006), and, most recently, enforced disappearance (2006).

The Commission was authorised by Resolution 1235 of the United Nations Economic and Social Council (ECOSOC) in 1967 to examine publicly "information relevant to gross violations of human rights" and to study "situations which reveal a consistent pattern of violations of human rights". By a complementary procedure, introduced in 1970 by Resolution 1503, petitions from individuals aggrieved by alleged violations of their human rights may be examined, but only in private sessions of the Sub-Commission on the Promotion and Protection of Human Rights. This has not proven to be a very effective procedure. Essentially the same complaints procedure has passed to the Human Rights Council, acting in accordance with its resolution 5/1 of 18 June 2007.

The Commission also established special mandates for individual experts to investigate on its behalf and report on a variety of human rights topics, such as summary or arbitrary executions, religious intolerance, torture, freedom of expression, and the situation of internally displaced persons. These functions too have passed to the new Human Rights Council.

Despite all the above activity, the Commission, being a political body of 53 members, tended in time to act selectively and to become a forum for political point-scoring. An attempt to change the nature and composition of that body was made in 2006, with its replacement by the Council on Human Rights. In 2008 the Council implemented a process of review of the observance of human rights in all UN Member States, known as Universal Periodic Review (UPR). An assessment of the record of this process in its first three years will be attempted below.

In the meantime the examination of reports of states in relation to particular human rights conventions continues. The Human Rights Committee is a body of 18 experts which monitors the International Covenant on Civil and Political Rights. Similar committees monitor the International Covenant on Economic, Social and Cultural Rights, and the conventions relating to racial discrimination, discrimination against women, the prohibition of torture, the rights of the child, migrant workers, the rights of persons with disabilities, and (yet to be established) enforced disappearances. Five of these treaty-based committees consider complaints by individuals that their rights have been violated, where optional additional protocols allowing for such a procedure have been accepted by the state party concerned. [1] In the case of three other conventions a petition procedure is contained within the body of the Convention, subject to optional acceptance.[2] The sole exception to this pattern is the Convention on the Rights of the Child.

It is also important to note, in conclusion to this general background, the establishment in 1993 of the Office of the High Commissioner for Human Rights. That Office is established in Geneva and provides supporting services to the Council and to all of the treaty-based

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[1] The Human Rights Committee and the Committees on Economic, Social and Cultural Rights (ICESCR), Discrimination against Women (CEDAW), Torture (CAT), and Persons with Disabilities.

[2] The Committees on Racial Discrimination (CERD), Migrant Workers, and Enforced Disappearance.

committees. It also maintains field presences in various countries, and liaises with other parts of the UN system where human rights form an important element.

3. The UN Human Rights Council and Universal Periodic Review (UPR).

The Human Rights Council was established in 2006 to replace the UN Commission on Human Rights by General Assembly resolution 60/251. Included in its mandate was the direction to "undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States." The Council consists of 47 elected member States. The process of universal periodic review (UPR) began in 2008. UN Secretary-General Ban Ki-moon stated that the UPR process "has great potential to promote and protect human rights in the darkest corners of the world."[3]

The programme of review provides for the examination of 16 UN Member States at each of the three sessions of the Council held annually. In this way, the human rights records of all 192 Member States will have been examined by the end of 2011.

The reviews are conducted by a Working Group which, despite its name, consists of all 47 members of the Council. UN Member States which are not members of the Council may also attend and take part as observers. The process is assisted by a "troika" of three members of the Council who act as rapporteurs. Separate troikas are selected by ballot for each State to be reviewed. NGOs may submit information to the Working Group but may not otherwise participate in the examination. The duration of each review is fixed at three hours. Shortly after the review the troika prepares an "outcome report" which allows for the participation of the reviewed State. The outcome report then returns to the Working Group for adoption, during which the reviewed State may indicate its acceptance or rejection of particular findings or recommendations. The report then goes to a plenary session of the Council for adoption, at which the reviewed State is allowed to make further statements and answer questions. Members of the Council and observer States, as well as NGOs may also make statements at this point.

It is evident from the records of the examinations of a number of states reviewed thus far by the Council that some poorly performing states tend to be given an easy time in their oral examination by other poorly performing states, which will stress their accomplishments in the face of alleged economic or political difficulties rather than condemn their failures. Other states will deal more directly with the reviewed State's shortcomings. On the whole, however, and bearing in mind the limited time allowed for the process, the final reports in relation to each state reviewed are reasonably balanced. Adverse findings and recommendations are expressed in moderate language, and harsh condemnation is avoided. It remains to be seen, when the second cycle of reviews has

[3] On the Human Rights Council generally, see, e.g., A Boyle, "The United Nations Human Rights Council: Origins, Antecedents, and Prospects" in A Boyle (ed) NEW INSTITUTIONS FOR HUMAN RIGHTS PROTECTIONS (2009) at 12-46.

commenced after 2011, whether the Council will adopt a sterner approach in relation to recommendations from the first cycle which remain unimplemented.

4. Overlap of functions and "reporting fatigue"

Some have suggested that the introduction of the UPR in the Council might replace the work of the nine specialised committees in monitoring compliance with the various human rights instruments. It has been pointed out that the task of attending to the reporting obligations that states have assumed under up to nine instruments is onerous, especially in the case of developing states. No sooner is one report complete, another becomes due. Each report requires attendance by a state delegation for its presentation in either New York or Geneva, at which the delegation is called upon to respond to questions asked by the relevant committee.

On the other hand, it is argued that to relegate all monitoring under the treaty system to the Council may run the danger of politicising the process. The expert committees retain a range of experience and knowledge difficult to replicate in a large political body. Moreover, the complaints procedure under the applicable optional protocols would be difficult to conduct in a body such as the Council, especially the maintenance and development of a coherent jurisprudence.

5. Suggested reforms

(a) One option for reform is to amalgamate all the treaty-based committees into one. At present, the eight specialised committees operate with unsalaried members who sit only for certain relatively brief periods each year.[4] This was the vision of the outgoing UN High Commissioner, Mme. Louise Arbour. A combined body would need to sit on a permanent basis and be salaried, after the manner of the International Court of Justice and the European Court of Human Rights. Some have spoken of the possibility of an "International Court of Human Rights". However, it is difficult to envisage that such a Court could carry out all the work currently performed by the Committees. A solution could be that one amalgamated body could handle State party reports, and another – more truly a "court" - could adjudicate individual complaints.

(b) An alternative to replacement of the individual committees by one committee, or Court, or two overall bodies as mentioned above, is to harmonise and simplify their procedures and reduce the reporting burdens on states. This has already been initiated to some extent through:

(i) The institution of a "common core document" which is to be presented by each state as an initial step in reporting to all

[4] For example, the Human Rights Committee sits for three sessions a year, each of three weeks duration, added to which is an optional fourth week devoted to the preparation of drafts of Views in relation to individual complaints for consideration by the full Committee.

committees, followed by information relevant to the specific terms of the relevant convention;

(ii) harmonised reporting procedures, including guidelines for states on length and manner of presentation; and

(iii) the possible abandonment of free-standing reports to be replaced by answers to a list of questions put in advance by the relevant committee.

(c) With respect to the individual complaint procedure, allowed for under all but one of the existing treaty bodies, the growing burden of cases could be relieved through the institution of a screening procedure under which only the most egregious cases, or cases giving rise to questions of interpretation of general importance, would be considered by the relevant committee. This procedure could be performed by a working group of each committee, which might meet or correspond outside the regular session times.

6. Conclusions

The present situation of monitoring and enforcement of human rights through the UN is far from fully effective in attaining wider observance of human rights at the global level, and indeed even at the local level of some relatively well resourced and otherwise well-meaning states. States are often lamentably slow to produce the required reports. Delays in producing an initial report have even been as great as 23 years. Reports, as well as the performance of states at their periodic review, have tended to be defensive and not always candid. The record of follow-up action to implement the concluding observations and recommendations of the committees has been uneven. Action to give effect to the decisions ("Views") of the treaty bodies having competence to entertain individual complaints has often been completely lacking, some states omitting even to respond to requests for information.

When so many states fall short in their performance, their public disclosure through the annual reports of the committees to the UN General Assembly seems not to lead to a sufficient sense of shame.

The treaty committees do not possess the power – nor could they conceivably be invested with the power – to direct that economic sanctions be imposed on consistently defaulting states. That power can, and has been, wielded by individual members of the international community or multinational institutions which have instituted trade, travel, and other sanctions against states such as Myanmar, North Korea, Sudan, and Zimbabwe on account of their human rights records. In this regard a sharp difference of opinion has emerged in the Human Rights Council where a resolution was introduced in 2008 to condemn "unilateral coercive measures". While on one reading, what was intended was to condemn unilateral resort to forcible measures without the authority of the United Nations, the

scope of the resolution may be read as extending more broadly. Operative paragraph 1 reads:

> Urges all States to stop adopting or implementing unilateral coercive measures not in accordance with international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States, in particular those of a coercive nature with extraterritorial effects, which create obstacles to trade relations among States, thus impeding the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of individuals and peoples to development.

The resolution may thus be read as extending to trade and similar sanctions imposed on States persistently violating norms of human rights. The resolution was adopted by 33 votes to 11, with 2 abstentions, the negative votes having been cast by predominantly Western developed States Members of the Council.[5]

It remains to be seen what measures might be devised by the Human Rights Council to bring pressure to bear on defaulting states, especially the most egregious among them. Such measures depend upon the political will of the majority of the Council. The tenor of its resolution 9/4 referred to above does not inspire hope that effective measures to bring about change in the behaviour of persistently violating States will be forthcoming. The expert Committees, while they should continue their efforts to improve upon their procedures, are not likely to be invested with greater powers than they already possess.

It is said in many other contexts that true reform comes not from the top down but from the bottom up. The true heroes of the struggle for human rights are not the national delegates to the UN, the members of the expert committees, the special rapporteurs, the staff of the Office of the High Commissioner, or even the vigorous defenders of human rights in international NGOs, but local NGOs and individuals working at the grass roots level, unrewarded and often exposed to danger. Their inspiration, if not always comfort, lies in the noble standards of the Universal Declaration and of the specialised human rights instruments. They are encouraged by the existence of the Human Rights Council and of the Office of the High Commissioner for Human Rights, the product of the treaty-based committees, the functions of the thematic and country-specific rapporteurs, and the work of the international NGOs in the field of human rights. For at least that shows that there are firmly established norms and standards, even if their satisfaction sometimes seems a long way off. However, so far as reform is concerned, human rights advocates tend to have little influence on national governments, at least in respect of their international policies. Moves

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[5] UN Doc. A/HRC/RES/9/4, adopted 17 September 2008. In favour: Angola, Argentina, Azerbaijan, Bahrain, Bangladesh, Bolivia, Brazil, Burkina Faso, Cameroun, Chile, China, Cuba, Djibouti, Egypt, Gabon, Ghana, India, Indonesia, Jordan, Malaysia, Mauritius, Mexico, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Uruguay, Zambia. Against: Canada, France, Germany, Italy, Japan, Netherlands, Slovakia, Slovenia, Switzerland, Ukraine, United Kingdom. Abstaining: Bosnia-Herzegovina, Republic of Korea.

towards more robust enforcement mechanisms at the international level tend to be tempered by the old adage that people (or nations) that live in glass houses shouldn't throw stones.

INTERNATIONAL LAW ASSOCIATION

UNITED NATIONS REFORM STUDY GROUP

Peacebuilding Commission

Hilary Charlesworth

1. Introduction

Following the end of the Cold War, United Nations (UN) engagement in post-conflict situations developed sporadically without any clear institutional or normative structure. Indeed, UN peacebuilding activities were largely unaccountable, leading to significant criticism. Some observers recommended that the UN Trusteeship Council be revitalised to become the focus of peacebuilding activities.[1] Eventually, however, the UN reform process initiated by Secretary-General Kofi Annan created a new body to oversee the increasing UN investment in peacebuilding. The Peacebuilding Commission (PBC) was established by concurrent resolutions of both the Security Council and the General Assembly on 30 December 2005.[2] It is the first such advisory subsidiary organ created within the United Nations and it has an intriguing hybrid structure with direct relationships with both the Security Council and the General Assembly. The resolutions style the PBC as a 'dedicated institutional mechanism', an 'intergovernmental advisory body' to provide advice on, and develop an 'integrated approach' to, post-conflict peacebuilding and to allow discussion between states that have an interest in and experience of peacebuilding. The ambitious primary aim of the PBC set out in the joint resolutions is the creation of 'sustainable peace'.

2. Structure of the PBC

The procedural hub of the PBC is its Organisational Committee. This body has 31 members drawn from four categories, which inevitably overlap. They serve for two year, renewable, terms. Seven members are from the Security Council (Resolution 1646, adopted at the same time as the one already referred to, mandated that this means the P5 and two other members); seven members elected by the Economic and Social Council (ECOSOC), taking regional representation and experience in post-conflict situations into account; five of the top contributors to the UN budget; five members who are 'top providers' of military and police for UN missions; and seven additional UN members including those with experience of recovering from conflict. Countries can only be selected in one category. The concurrent resolutions invite international financial institutions to participate in all PBC meetings.

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1 See Ralph Wilde, International Territorial Administration - How Trusteeship and the civilizing mission never went away (Oxford University Press, 2008) 424-428. See also Matthias Ruffert, 'The administration of Kosovo and East Timor by the International Community' (2001) 50 International and Comparative Law Quaterly 613, 631; Carsten Stahn, 'Institutionalizing Brahimi's "light footprint" – A comment on the role and mandate of the Peacebuilding Commission' (2005) 2 International Organizations Law Review 403, 404; and generally Tom Parker, The Ultimate Intervention: Revitalising the UN Trusteeship Council for the 21st Century (Norwegian School of Management, 2003).

2 Security Council Resolution on Operationalising the Peacebuilding Commission, SC Res 1645, UN SC, 5335th mtng, [2(a)], UN Doc S/Res/1645 (2005); General Assembly Resolution on Operationalising the Peacebuilding Commission, GA Res 60/180, UN GAOR, 60th sess, [2(a)], UN Doc A/Res/60/180 (2005).

The PBC also has the capacity to meet in the format of 'country-specific meetings' in which participants can include members of the Organisational Committee, the country being considered, other countries that are involved in peacebuilding in that country, relevant international or regional institutions, UN representatives and representatives from relevant institutional donors such as the World Bank.

Situations may come onto the PBC's agenda as requests for advice from four different quarters: from the Security Council; from ECOSOC or the General Assembly if the state concerned is 'on the verge of lapsing or relapsing into conflict' and has agreed to PBC involvement; from a member state who is in such a situation; and from the Secretary-General. The PBC does not, then, have the capacity to take independent action to place a country situation on its agenda.

The PBC is required to reach all decisions through consensus. It reports annually to the General Assembly, which makes that body the major forum for review of the progress of the PBC. The PBC's constitutional resolutions also established a 'Peacebuilding Fund' to receive voluntary contributions from member states and other donors and foreshadowed a Peacebuilding Support Office within the UN Secretariat, which has been duly established. Although these two entities engage with the situations being dealt with by the PBC, they also have the capacity to interact with cases that are not on the PBC's agenda.

3. Political objectives for reform

The PBC emerged from a reform agenda initiated by UN Secretary-General Kofi Annan partly as a response to the turmoil created by the Security Council's failure to endorse the United States invasion of Iraq, and partly to create an 'Annan legacy'. This project began with the Secretary-General establishing a 'High-level Panel on Threats, Challenges and Change' in September 2003. A year later, the High-level Panel made a number of proposals, including the creation of a UN Peacebuilding Commission, which was to be established under the Security Council. The Panel noted a 'key institutional gap' within the UN: the lack of any mechanism devoting to preventing states collapsing into conflict, or supporting countries in the transition from conflict to peace.[3] Accordingly, the Panel described the PBC's role as one of both conflict prevention and post-conflict peacebuilding:

> to identify countries which are under stress and risk sliding towards State collapse; to organise, in partnership with the national Government, proactive assistance in preventing that process from developing further; to assist in the planning for transitions between conflict and post-conflict.[4]

The Secretary-General included the idea of a PBC in his March 2005 report, which set out an agenda for the September World Summit of Heads of State and Government. He spoke of a 'gaping hole' in the UN because of the lack of an institution that assisted countries in

[3] United Nations Report of the High-level Panel on Threats, Challenges and Change, A more secure world: Our shared responsibility (2004) paras 261-262.
[4] Ibid, para. 264.

transition from war to lasting peace.[5] There was, however, a significant amendment to the proposal made by the High-level Panel, because the Secretary-General omitted any reference to an 'early warning' function for the PBC[6] and any role in conflict-prevention. Instead, the PBC would deal only with countries that had gone through a period of conflict and its focus would be advice and coordination. It is likely that this change was designed to mollify members of the Security Council who may have read the High-level Panel proposal as usurping their Chapter VII powers.[7] The High-level Panel proposal was changed also in its translation into the Summit's Outcome document from being a small, expert body funded by new resources to being an intergovernmental body dependent on existing resources or voluntary contributions and through the introduction of links to the General Assembly as well as the Security Council. The insertion of the General Assembly into peacebuilding activities was the result of lobbying by Asian and African countries which were keen to displace the Security Council's monopoly over this area. The PBC, then, started its life with limited responsibilities in the area of peacebuilding, and, as an advisory and coordinating body, without a mandate to set the direction of UN peacebuilding missions.

The formal creation of the PBC was a product of the World Summit in September 2005. The Summit Outcome document, adopted on 24 October 2005 set a very tight timetable (just over two months) for the establishment of the PBC.[8] The PBC offered a sense of immediate and practical reform on an issue that had consumed much international energy, but its design as an advisory body did not threaten state sovereignty.

4. Actualising reform

The PBC was inaugurated on 23 June 2006 with Angola elected as chair. The chair of the PBC has changed annually, with Japan, Chile and Germany having now taken on this role and Rwanda serving as chair in 2011. The objects of PBC deliberations have all been from Africa. The Security Council requested that the PBC place Burundi and Sierra Leone on its agenda in its first year, both countries having agreed to this process. Since then, Guinea-Bissau, the Central African Republic and Liberia have been added to the PBC's agenda. The PBC has adopted workplans and organised field missions to all these countries and it has supported consultations with major local players about consolidating peace. The Peacebuilding Fund has allocated funding to the PBC cases. The PBC also set up a Working Group on Lessons Learned to identify 'best practice' in peacebuilding, which reported in 2010.[9] In February 2011, the PBC added Guinea to its agenda, the first time it has acted without a Security Council referral.

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5 Report of the United Nations Secretary-General, In larger freedom: towards development, security and human rights for all, UN GAOR, 59th sess, [114], UN Doc A/59/2005 (2005).

6 Ibid, para. 115.

7 See Gerhard Thallinger, 'The UN Peacebuilding Commission and Transitional Justice' (2007) 8 German Law Journal 681, 683-4.

8 2005 World Summit Outcome, GA Res 60/1, UN GAOR, 60th sess, [97-105], UN Doc A/Res/60/1 (2005).

9 Emerging Lessons and Practices in Peacebuilding 2007-2009, Report of the Working Group on Lessons Learned of the Peacebuilding Commission (2010).

5. Appraising reform

Some observers regard the establishment of the PBC as one of the few 2005 Summit reform success stories.[10] The use of 'Integrated peacebuilding strategies' has promoted coordination of consultative and collaborative plans for peace that go beyond security and economic issues. The PBC has also placed a spotlight on countries recovering from conflict that receive little international attention. More critical views emphasise the PBC's slow start and its possible redundancy, pointing out that the UN already has extensive capacity and expertise in peacebuilding and that all that is required is better coordination. Others query the value of institutionalizing peacebuilding and support ad hoc country-specific approaches.[11] Still others argue that NGOs, rather than intergovernmental institutions, are best-placed to monitor peacebuilding.[12] A review of the UN's peacebuilding architecture in 2010 was unusually trenchant in criticising the operations of the PBC.[13] It noted the limited range of countries on the PBC's agenda and expressed concern that so few countries had sought the PBC's advice. The review did not find clear evidence that the PBC had made a difference on the ground. It also criticised the weakness of the relationships the PBC had forged with the Security Council, the General Assembly and ECOSOC. A major concern identified by the review was the PBC's lack of practical attention to national ownership of peacebuilding. The review found that national perspectives did not play a major role in the planning process, or in the implementation phase.[14]

To some extent, the PBC is caught up in North-South politics. The developed North tends to favour an active and interventionist PBC, while the South is wary of an institution that could morph into a new system of trusteeship.[15] There is also evidence that some countries fear that being listed on the PBC's agenda will not only label them as dysfunctional, but also reduce the amount of attention they receive from the Security Council.[16]

The Security Council and General Assembly resolutions that establish the PBC illustrate some of the problems it faces. The role of the PBC is expressed in general terms, for example bringing together 'all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery';[17] 'to focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict';[18] 'to provide recommendations and information to improve the coordination

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10 Eg CSR Murthy, 'New Phase in UN Reforms: Establishment of the Peacebuilding Commission and Human Rights Council' (2007) 44 International Studies 39, 39-40.

11 Above n 7, 707.

12 Hugh Miall, 'The United Nations and peacebuilding: prospects and perils in international regime (trans)formation. The EU and the Peacebuilding Commission' (2007) 20 Cambridge Review of International Affairs 29, 30.

13 Review of the United Nations Peacebuilding Architecture, UN GAOR, 64thsess, UN SC, 65th year, UN Doc A/64/868-S/2020/393 (2010).

14 Ibid, paras 17-19, 49-53.

15 Jeremy Farrall, Interviews with United Nations officials (New York, April 2007).

16 Above n 13, para. 46.

17 Above n 2.

18 Ibid, para. 2(b).

of all relevant actors within and outside the United Nations to develop best practices…'.[19] This broad canvas does not provide a clear direction for the fledgling institution. The PBC has a mandate only in the context of post-conflict peacebuilding. It will however often be difficult to determine whether a country has attained a 'post-conflict' status; and this status may well be only temporary. The redefinition of the role of the PBC to remove the early warning function envisaged by the High-level Panel has also reduced its potential impact.

The PBC is an advisory body, operating on the basis of consensus. The effect of this is that any member state has a de facto veto. The fact that the permanent members of the Security Council all have a seat on the PBC may lessen potential friction between the two bodies, but it has caused tensions with the General Assembly and has imported Security Council politics directly into the PBC. On the other hand, the General Assembly has the important function of debating the PBC's annual reports.

The PBC's budget is dependent on a voluntary fund and contributions from UN member states have been uneven. It took some time for the Fund to get close to the aim of US $250 million (at the end of 2010 it had got to $342 million), and less than a quarter of UN members have made contributions, ranging from Sweden ($US 72 million) to Peru ($US 5000). Given that peacebuilding in a single country such as Afghanistan has cost many billions of dollars, the Fund may well be inadequate. Moreover, most donors made one off commitments to the Fund. This is an uncertain financial foundation for the PBC and a major challenge is securing a viable long-term funding base. There are also concerns that countries may seek to be placed on the PBC's agenda simply to attract an injection of money. In both Burundi and Sierra Leone, funds were provided before a peacebuilding framework had been agreed and monitoring and accountability mechanisms were weak.[20]

The resolutions establishing the PBC envisaged a role for civil society. The preambular paragraphs refer to 'the important contribution of civil society and non-governmental organisations, including women's organisations, to peacebuilding efforts.'[21] This contribution has been undermined in practice. The PBC adopted provisional guidelines on the participation of civil society, which create complex procedures and restrict access to the PBC. The 2010 review of the UN's peacebuilding architecture noted civil society's disengagement and isolation from the PBC.[22] On the other hand, the role defined for international monetary institutions in the resolutions has been expanded in practice, with the IMF, the World Bank, the European Community and the Organisation of Islamic Conference allowed to participate as full members in PBC meetings.

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19 Ibid, para. 2(c).

20 Action Aid, CAFOD & Care International, Consolidating the Peace? Views from Sierra Leone and Burundi on the United Nations Peacebuilding Commission (2007). The Peacebuilding Fund has been reviewed twice: see Report of the Office of Internal Oversight Services on the Independent Evaluation of the Peacebuilding Fund (2008); Nicole Ball and Mariska van Beijnum, Review of the Peacebuilding Fund (2009).

21 Above n 2.

22 Above n 13.

Another area where the PBC has become engulfed by UN traditions is in the area of attention to women and issues of gender. The Security Council and General Assembly resolutions made a number of references to women and gender; indeed the PBC is the first UN institution to have gender incorporated in its constitutional resolutions. The resolutions reaffirm 'the important role of women in the prevention and resolution of conflicts and in peacebuilding' and call for women's 'equal participation and full involvement in all efforts for the maintenance and promotion of peace and security.' The resolutions also call upon the PBC 'to integrate a gender perspective into all its work.'[23]

In the PBC's work in both Sierra Leone and Burundi gender equality was designated as a 'cross-cutting issue'. Reviews of the workings of the PBC, however, suggest that these commitments have been given low priority. Women are routinely left out of policy development with respect to peace, and the PBC has operated with narrow understandings of security. Women's organisations have argued for recognition that gender-related violence and discrimination can undermine peacebuilding efforts and thus are integrally connected to security.[24] The 2010 review of the PBC argued that the PBC had not ensured that women's voices were adequately heard in peacebuilding activities.[25] This concern is not peculiar to the PBC: a ten year review of the implementation of the historic Security Council resolution 1325 of 2000, which called for greater engagement of women in peacebuilding, found that it had had limited impact on post-conflict practice.[26]

Overall, the first five years of the PBC's work suggest that it has not yet developed a secure identity. As an intergovernmental body, it cannot readily operate as a technical, or an implementing body. It is above all a political institution, but one that so far has been wary of operating politically, of bridging the gap between post-conflict countries and the UN system.[27]

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23 Above n 2, para. 20. See also SC Res 1325, UN Security Council, 4213th mtg, [5, 8, 15, 16, 17] UN Doc S/Res/1325 (2000).

24 See NGO Working Group on Women, Peace and Security & International Alert, Enhancing Security and the Rule of Law: How can Gender be better integrated into the Priorities of the UN Peacebuilding Commission? (2007).

25 Above n 13, paras29-30, 53.

26 Ten Year Impact Study on Implementation of UN Security Council Resolution 1325 (2000) on Women, Peace and Security in Peacekeeping, Final Report to the United Nations Department of Peacekeeping Operations, Department of Field Support (2010).

27 Above n 13, paras 168-169.

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Accountability of the Security Council

Vera Gowlland Debbas

1. Security Council Activism

It is only recently that the problem of accountability has come to the fore in view of the use of unbridled powers by international organizations in a changing environment, thus increasing the potential for encroachment on the rights of states and individuals.

The Security Council's extensive operational activities – such as the expanded mandates of peacekeeping operations and the establishment of Chapter VII UN interim administrations with broad powers – have now the capacity to violate fundamental rules of human rights and international humanitarian law, or to cause damage, injury and death. The implementation of its decisions on sanctions, initially comprehensive, has had in the long-term extensive and lasting effects on the populations of targeted states. The subsequent move towards targeted sanctions against individuals rather than states, particularly in the context of counter-terrorism, while partly addressing the problems arising from comprehensive sanctions, has raised human rights issues of its own, such as due process and property rights, particularly where resulting from the establishment and maintenance under resolutions 1267 and 1390 of updated lists of specified individuals and entities linked to international terrorist networks whose funds are to be frozen. Accountability may also arise from the Security Council's extensive normative activity tantamount to legislation, i.e. enacting general open-ended regulations with no time limits binding on all member States, a legislative competence distinct from its enforcement powers on the basis of which it adopts temporary binding decisions in respect of specific crises under Chapter VII. This trend was initiated by S/RES/1373 (2001) in the face of the global threat of terrorism but has been extended to other areas, e.g. weapons of mass destruction, international humanitarian law etc. Where this affects treaty obligations, the Security Council may thus appear to bypass the *pacta tertiis* rule. Moreover, the Security Council as a non-representative body can hardly claim to fulfil the customary law requirements of general practice and *opinion juris.*

The Security Council's activism combined with the binding nature of its Chapter VII decisions and the hierarchical nature of the Charter as embodied in Article 103, has resulted in certain tensions between public policy concepts, in particular, between human rights and security.

The need for accountability has been addressed in some of the reform proposals, e.g. the 2005 Summit Outcome document has called for regular monitoring and review by the Council to ensure accountability for the way in which sanctions decisions are implemented. The High-Level Panel Report states in para.152: "(t)he way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions." The transposition of the concept of "rule of law" in the

international context which has been given substance within IOs and reflected in UN reform proposals, has also led to growing concern with issues of responsibility and accountability of international organisations.

The Security Council's decisions have led to challenges from various quarters, including from member states and judicial and quasi-judicial bodies, regarding the limits to its powers and its accountability.

2. The Notion of Accountability

A distinction has to be made between accountability (a political concept but which includes also legal mechanisms), liability arising from the damage ensuing from a lawful act, and responsibility as the legal consequences of a wrongful act. The concept of accountability of international organisations can be clarified by analogy with the domestic law notion of constitutionalism, with its obvious political/ideological connotations which have roots in democratic theory. Accountability of international organisations may be taken to mean the responsibility (in its broad meaning) of international institutions for the proper exercise of the power or authority which is granted to them, and which includes the constraints which are expressly or implicitly attached to these powers and the mechanisms by which these are controlled (reference may be made to the report of the ILA Committee on Accountability of International Organisations on Recommended Rules and Practices and to the ongoing work of the International Law Commission on the Responsibility of International Organisations - I will not treat the specific responsibility issues raised in the ILC Draft Articles which are the topic of another Study Group).

The accountability of the Security Council raises a number of questions, all of which cannot be addressed in this brief contribution. Among the most important are, firstly, whether there are legal constraints on its powers and competences and what the applicable law is, and secondly, – a distinct issue – whether there one can point to the existence of third party review of its acts. Finally, what proposals for reform of the current situation can be made?

3. Legal constraints on Security Council action

As the ICJ has stated, international organisations as international persons are "as such…bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties." (*Interpretation of the Agreement of 25 Mach 1951 between the WHO and Egypt,* para.37). The ILC Report on Responsibility of International Organizations adds that the rules of the organisation (also rules of international law) include also the decisions and resolutions adopted in accordance with them, and established practice of the Organization. (See Giorgio Gaja's First and Second Reports).

The Charter has inbuilt legal constraints on the Security Council both substantive in the form of the Charter's purposes and principles (see Article 24 (1)) and procedural in terms of voting procedures. The former may be vague but have evolved over time and to the

extent that core human rights treaties may be said to give effect to the broad purposes of the United Nations, the Universal Declaration of Human Rights acting as the springboard, they do effectively set teleological limits on Council action. The general rules governing treaty law, which allows express derogation from (as opposed to violation of) general rules, except for peremptory norms, also govern the Charter's relationship with rules of customary international law, Finally, general principles of law, including administrative law, such as the concept of abuse of rights, *détournement de pouvoir*, the principle of good faith and delegation of powers may be relevant.

4. Judicial Review, Scrutiny and Control

Judicial review by the International Court of Justice

Recognition that the Council's powers are not entirely unlimited and may be exercised in contravention of the UN Charter leads naturally to the question of judicial review. This question, at issue in the *Lockerbie* case is more easily addressed if we are not seeking a constitutional type process of judicial review, with compulsory effect, since it is clear that no analogous procedure is to be found in the structure of the United Nations.

The ICJ, however, while disclaiming that it possesses such powers (*Namibia* Advisory Opinion, p.45) has exercised some form of judicial control indirectly over UN resolutions when the question is posed incidentally before it and for purposes of the exercise of its own jurisdiction (*Expenses, Namibia, Lockerbie, Wall*), although it has acted on the basis of *prima facie* validity (*Namibia*, p.22; *Wall Opinion*, para.35). The ICJ has an important role to play as a principal organ of the UN, bound both to give effect to UN resolutions and to guard Charter legality. The latter task appears to have been acknowledged by all the parties concerned (see dissenting Judge *ad hoc* Sir Robert Jennings in *Lockerbie* case: Security Council decisions and actions could not be regarded as "enjoying some sort of 'immunity' from the jurisdiction of the principal judicial organ of the United Nations").

Even the Security Council's subsidiary organ, the ICTY, in *Tadic*, did not consider itself debarred from reviewing a decision of the Council, at least for the purposes of confirming the Tribunal's own jurisdiction.

But there are also certain important limitations on the Court in matters of review of UN resolutions: the lack of an established procedure for judicial review and the need for a case-by-case jurisdictional basis, which makes the process incidental or fortuitous; the non-authoritative nature of the Court's pronouncements in this respect (advisory or only binding the parties before it (Article 59 Statute)); and the absence of a coherent theory of the legal effects of the illegal acts of international organizations. In regard to the latter, the Court is said to have made a distinction in the *Expenses* case, between procedural illegality - an act of an organ which exceeds its competence under the Charter - and substantive illegality, e.g. non-conformity with the Purposes and Principles of the Charter; only in the latter case would the validity of the act be in doubt (ICJ Rep. l962, p.l68), but the question remains unclear. This has led some commentators to uphold the right of last resort of

member states not to recognize the validity of an illegal resolution. But this may entail their responsibility under international law.

Review by regional and universal judicial and quasi-judicial bodies

Challenges in human rights judicial and quasi-judicial bodies have arisen in particular from the 1267 listing process and concern such rights as those of due process, including effective judicial review, respect for property, and the principle of proportionality.

Regional and domestic courts initially declined to offer remedies for individuals from potential abuses in implementation of Security Council decisions. The EU Court of First Instance in the *Kadi, Youssef* and *Awadi* cases did this mainly on two grounds. The first ground was by an automatic application of Article 103 of the Charter accepting the precedence of Security Council decisions over the fundamental rights protected by the EU, other than *jus cogens*; the latter had not been breached since the Court considered that there were appropriate procedures in the Sanctions Committee, even though these were political and diplomatic rather than judicial remedies. The second way remedies were avoided was through an unquestioning interpretation of the Court's mandate as lacking powers of even indirect judicial review over Security Council resolutions, unless – somewhat paradoxically – to ensure that they were not contrary to *jus cogens* (European Court of First Instance, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T 306/01; *Yassin Abdullah Kadi v. Council and Commission*, Case T 315/01, 21 September 2005). The choice the Court made in deciding to uphold the "public-interest objective of fundamental importance to the international community which is to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts" over the fundamental human rights protected within the Community, illustrates the kinds of challenges posed by the collective security system in a rule of law context.

The decision by the European Court in the *Kadi* appeal (Court of Justice of the European Communities, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402P and C-415/05P, 3 September 2008) adopting a dualist view of the relationship between EU law and international law (that is, the view put forward by the Advocate General Maduro) overruled the judgment of the Court of First Instance, on the grounds that the EU Regulation implementing the Security Council Resolution did not sufficiently respect certain fundamental rights of the European Community, though it did not strike it down with immediate effect, aware of the problems this would create. Though rejecting its competence to review Security Council resolutions even in respect of *jus cogens* norms, however, it accepted indirect review of these in looking into the legality and validity of EU implementing regulations, stating: "…it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations" (para. 299). It also found that the contested regulation could not be considered to be an act directly attributable to the United Nations (para.314). (Though referring to the criteria laid down in

Behrami it came to different conclusions. *Behrami* is outside the scope of my contribution since it covers authorized action by the Security Council).

The European Court of Human Rights has also exercised some form of indirect review in considering in *Nalitelic v. Croatia* (Application No. 51891/99 (Decision as to Admissibility), ECtHR, 4 May 2000) that the ICTY offered sufficient procedural guarantees.

In conclusion, these challenges to the Security Council's decisions, whether before the EU courts or the Human Rights Committee, are concerned not with the question of the human rights limitations on the Council itself, but with the question of the individual responsibility of member States to respect their human rights obligations while implementing Security Council decisions. Thus the Human Rights Committee in *Sayadi* stated that it "could not consider alleged violations of other instruments such as the Charter of the United Nations, or allegations that challenged United Nations rules concerning the fight against terrorism" but that it was competent to pronounce on whether a State party had violated Covenant rights, "regardless of the source of the obligations implemented by the State party". In other words, the case before it concerned the compatibility of national measures implementing a Security Council resolution and not an interpretation of a provision of the Covenant impairing the provisions of the Charter (see Article 46 of the Covenant) (Communication no.1472/2006, Decision of 22 October 2008).

Review by domestic courts

Though implementing Security Council resolutions in domestic law may lead to conflicts between Security Council resolutions and constitutionally protected individual rights, in the rare instances of challenges raised in domestic courts, there has generally been refusal by these to control the legality of Security Council resolutions. They have based their refusal not on grounds of immunity, for challenges have been to the domestic law implementing sanctions, not the Security Council resolutions themselves, but rather by invoking the political question doctrine, the primacy of the Charter and the absence of competence to exercise judicial review of such resolutions. (see e.g. *Slobodan Milosevic v. The State of the Netherlands* (Judgment in interlocutory injunction), 31 August 2001, President of the Hague Distr. Ct, Kort Geding 2001/258, p. 688).

Political control by the General Assembly

Some mention must also be made of accountability before political organs. The General Assembly has encouraged the submission of Security Council special reports provided for under Articles 15 and 24(3) of the Charter. Through the Sixth Committee and Special Committee on Charter reform, the Assembly has tried to provide guidelines for the adoption and implementation of Council sanctions, as well as for Council transparency. This has led to a series of reports, such as from the Secretary-General and the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organisation, on means of improving the mechanisms and criteria concerning the implementation and lifting of sanctions.

The General Assembly has also a budgetary competence which it can and has exercised on at least one important occasion to curb the excesses by the Security Council - namely the financing of the ICTY. It could thus be in a position to invoke the accountability of the Council. Such political limits have in turn their political limitations. For example the General Assembly has not examined in substance the special reports presented by the Security Council under Article 24(3) and has not actively pursued its secondary responsibility in the maintenance of international peace and security.

5. Addressing accountability problems of the Security Council

A new reading of Article 1(1) of the Charter in light of the changing international legal system

The growing importance of human rights law has required a fresh reading of the collective security provision laid down in Article 1(1) of the Charter in the light of such concepts as human security – the various UN reform debates and proposals, including the 2007 World Summit Outcome are replete with such references. Moreover, there has been a recent linkage between collective security and principles of justice and international law (originally only associated with peaceful settlement of disputes); for not only has justice in the form of international criminal tribunals now been viewed as instrumental to peace maintenance, but also references to international law and in particular to States' human rights obligations, are now to be found in Council resolutions and form an important part of UN "rule of law" projects in the territorial administrations the Security Council has set up. The Council has also acquired a new human rights protection function, reacting under Chapter VII to fundamental violations of human rights, so that human rights has now become part of the peace maintenance function itself.

A new reading of Article 103

A new reading of collective security must also entail a fresh look at Article 103 to explore the limits set on its application beyond that of *jus cogens*, and to clear up some misunderstandings which have purported to considerably widen its scope.

Unlike Article 20 of the League Covenant which called for the abrogation of existing inconsistent obligations, Article 103 is not so much a hierarchical rule reflecting the *jus cogens* character of the Charter, as a conflict rule (see the VCLT provision on successive treaties). The concern at San Francisco was that treaties which were not intrinsically inconsistent with Charter obligations, such as a trade treaty, could become so in the event of a Security Council decision under Article 4l in a specific situation threatening the maintenance of international peace and security. The intention of this provision therefore was the temporary and reversible suspension of say a trade treaty until such time as the Security Council had restored the peace. Security Council practice shows that the few references to Article 103 in its resolutions were indeed made in this context, e.g. suspension of the Chicago Convention in the case of severance of air communications, or explicit calls to member States to apply sanctions notwithstanding any existing

international agreement. In view of this, the application of Article 103 to situations resulting in indefinite suspension of individual due process and property rights, amongst others, under international and regional human rights treaties arising from indefinite freezing of funds (which cannot be viewed as mere temporary administrative measures but have penal connotations) is contrary to the intent of Article 103 since tantamount to the nullification of treaty rights and therefore highly debatable.

It is also clear from the *travaux préparatoires* that Article 103, though no doubt intended to cover Security Council decisions, was not intended to cover customary international law (see UNCIO, summary report of 41st mtg. of coordination committee September 13, 1945) and therefore had a narrower scope of application. Moreover, since the Security Council can anyway derogate (expressly) from customary international law as in the case of the operation of any normal treaty, barring *jus cogens* norms, reliance on Article 103 in the case of conflicting customary international law is not necessary.

One would also have to demonstrate the applicability of Article 103 in particular situations, for it requires an assessment of whether a conflict does indeed exist. It is obviously no longer feasible to maintain the objectives of peace and security in a vacuum distanced from the evolution of the international legal system as a whole. The courts must look more carefully into the application of Article 103 in a particular case to examine whether there is room for harmonisation of human rights and security, seeing that the one has become an integral part of the other. A teleological reading of Security Council resolutions would have to act on the presumption that there is no "manifest intent" on the part of the Security Council to call on States to derogate from human rights treaties or from generally recognized principles of international law, in view of its new human rights protection functions.

Establishing procedures to address the lacuna of due process

The various challenges from regional courts and other quasi-judicial bodies have their uses in that they may spur the Council to further action to ward off such challenges. But ad hoc decisions by regional courts while important for clarifying fundamental principles, are not the solution for they are dependent on jurisdictional bases and individual mandates of such bodies. Moreover, they challenge not Security Council action but the actions of Member States or parties to human rights conventions and may present dilemmas to States in the implementation of their obligations under the Charter.

In consequence, therefore, effective mechanisms for accountability should be internalized within the UN - there is a need for a global approach and for harmonization of the different rules of the international legal system.

The General Assembly established from the start an administrative tribunal offering due process to members of its staff. Other IOs have internalized to varying degrees human rights and environmental standards against which their activities or the activities of their member States may be evaluated (most notably the World Bank in establishing the Inspection Panel, the WTO Appellate Body in e.g. the *Shrimp/Turtle* case). This underlines

the fact that the Security Council cannot remain outside such a process, e.g. where it concerns the treatment of individuals suspected of terrorist or other criminal activities.

In fact, the Security Council itself has ensured that the Statutes for its two international tribunals embed due process rights for individuals accused of international crimes and in its resolutions called on States to respect their obligations under international law, including human rights law, in all the measures taken to combat terrorism. The Council has also responded to some degree to external pressures for reform of its sanctions/counterterrorism decisions. The World Summit Outcome document has called on the Security Council "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions" (paras. 85 and 109, respectively. See also 2005 Report of the Analytical Support and Sanctions Monitoring Team established pursuant to Security Council resolution 1526 (2004) (S/2005/83)). The Council has done so by instituting some changes to its Chapter VII actions, such as the shift from comprehensive to targeted sanctions.

However, in regard to the listing process where the lack of due process rights has been the most glaring, the 2006 amended guidelines within the Sanctions Committee for review of particular listings, the establishment of a Focal Point for De-listing based on Resolution 1730 (2006) within the UN secretariat, the appointment of an ombudsperson (SC Res.1904 (2009) to participate in the de-listing procedures, and the possibility for States to take up the diplomatic protection of their nationals, while constituting improvements and an acknowledgement of the need to ensure a modicum of "fair and clear procedures", fall far short of proper judicial remedies. The Council will not therefore be immune from further judicial challenges. But at least there has been the realization that an increasing perception of the illegitimacy of sanctions could seriously erode their effective implementation.

The problem is how to insist on limitations on the powers of international institutions without at the same time opening the door to unilateral determinations by States based on parochial interests and the hi-jacking of collective measures, which of course would constitute a set-back to the evolution of these organisations.

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Informal Reform in the Security Council

Nico Krisch

1. Introduction

Security Council reform is, in both public perception and high-level diplomacy, the centrepiece of efforts at reforming the UN, but also the most intractable reform issue. The most visible efforts, notably in the General Assembly working group on Security Council reform, have focused on issues of membership, resulting in a plethora of concrete proposals, of which in particular the two worked out by the 2004 report of the High Level Panel on Threats, Challenges and Change, taken up by the Secretary-General in his 2005 report, have become focal points of the debate.[1] The 2005 World Summit pursued this by calling for greater representativeness of the Council[2], but discussion has stalled over the inclusion of new permanent members, their powers, and the extent of a general increase in membership. Because of the vested interests of the current Permanent Members of the Council and their centrality to formal Charter amendments, prospects of reform in this area are very uncertain.[3]

In the shadow of the discussion on membership, Security Council reform has been debated, and has in part proceeded, on a number of other fronts, especially on the Council's working methods and the related issues of participation and transparency. Less the focus of open discussion, but all the more relevant for the practice of the organisation is the far-reaching and continuing change in Security Council powers, which has only recently become the object of broad-based critique. In what follows, this paper will focus on these two areas; it will highlight reform initiatives undertaken so far and sketch prospects and possibilities for further change.

2. Informal Reform in the Security Council

Council reform is an ongoing process, and it depends only in part on formal Charter amendments. The limits of informal change are indeed few, as has been shown, for example, in the redefinition of Article 27(3)'s treatment of abstention by permanent members in the early practice of the Council, and later ratified by the International Court of Justice.[4] Charter language has likewise not prevented change in the delimitation of powers

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1 High Level Panel on Threat, Challenges and Change, *A more secure world*, 2004, http://www.un.org/secureworld/, paras. 250-256; UN Secretary-General, *In larger freedom*, 2005, http://www.un.org/largerfreedom/, para. 170.

2 *World Summit Outcome*, GA Res. 60/1 of 24 October 2005, UN Doc. A/RES/60/1, para. 153.

3 For an overview of the divergent positions, see the paper by the Chair of the Intergovernmental Negotiations on Security Council Reform of 10 May 2010, http://www.un.org/ga/president/64/issues/screform100510.pdf.

4 ICJ, Advisory Opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, paras. 21-22.

between the Council and the General Assembly, with the latter slowly eroding the limitations of Article 12; another change eventually sanctioned by the ICJ.[5] But if textual limits in the Charter may not exclude even far-reaching reform, they may serve as focal points of political resistance and render change more difficult, especially on organisational issues where the rules are relatively clear, and on issues that do not lend themselves to slow, incremental change.

The extension of Security Council powers since 1990 is an example of how incremental change can lead to large-scale reform through practice. Since then, the Council has expanded the notion of "threat to the peace" to use its enforcement powers in internal conflicts, against serious human rights abuses and the deposition of elected governments. It has come to interpret its power to enact non-military measures as including the creation of criminal tribunals and other investigating bodies, of commissions to demarcate boundaries, of territorial administration by the UN; and it has come to target non-state groups and individuals rather than states through its increasingly detailed sanctions regimes.[6] And while some of its actions were disputed at the time of their adoption, today the general power of the Council to use such measures is no longer contested in a significant way. In particular crises, principled critique has been overcome by the desire (and pressure) to take immediate action, and as the extended powers were used repeatedly in such crises, the power of precedent grew and space for sustained opposition dwindled.

Contestation has moved to more recent attempts by the Council at expanding its powers, namely its attempts at "legislating" and at considering topics outside the narrower area of peace and security, such as AIDS and climate change. Especially developing countries see these as encroaching upon prerogatives of the General Assembly and are suspicious of the further empowerment such a shift would bring for the permanent members. Most vocally with respect to a debate the Council convened on Climate Change in April 2007, both the G-77 and the NAM issued statements deploring the transgression of Council powers, and many states, including China and Russia, expressed similar concerns in the debate.[7] Likewise, a significant number of states have expressed principled criticism of the Council's recent assumption of "legislative" powers by creating general obligations independently of a particular conflict, as it has done as regards terrorism and the proliferation of nuclear weapons.[8] With respect to SC resolution 1540 (2004) on non-proliferation, a large number of countries raised concerns about the legislative role of the Council, pointing out (among other things) that it "could disrupt the balance of powers between the General Assembly

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5 ICJ, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 27-28.

6 See only Jochen A. Frowein & NicoKrisch, 'Chapter VII of the Charter', in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary*, Oxford: Oxford University Press, 2nd ed., 2002, 722-726, 740-745, 714-716.

7 See Thalif Deen, 'Security Council Accused of Overstepping Bounds', *Inter Press Service*, 12 April 2007, http://www.globalpolicy.org/reform/topics/general/2007/0412bounds.htm; for the debate in the Council, see UN Doc. S/PV.5663 and S/PV.5663 (Resumption 1) of 17 April 2007.

8 SC Res. 1373 (2001); 1540 (2004); S/PV.4950 and S/PV.4950 (Resumption 1) of 22 April 2004; S/PV.4956 of 28 April 2004.

and the Security Council, as enshrined in the Charter."[9] Unlike previous instances of expanding powers, such broader initiatives are likely to provoke significant opposition because they cannot be framed as easily as an indispensable, quick response to a particular conflict from the only organ capable of action, and because the general character of the obligations affects all states and thus helps mobilise greater resistance.

The second important area of Council reform through practice is its working methods and procedure.[10] Efforts at making the Council's work more transparent and participatory gathered pace in the early 1990s, in response to the much increased, though largely secretive, activity of the Council after the end of the Cold War. Unsurprisingly, it was shortly after the General Assembly established its working group on Security Council reform that the Council began serious work on procedural issues to regain some legitimacy. Among the broader membership, unease grew over the dominance of informal (and closed) consultations rather than open meetings, over the lack of timely information on initiatives in the Council, and over the lack of input into the Council's work even by member states particularly affected by its decisions. The Council's responses ranged from listing its informal consultations in the UN's daily journal to open briefings about the outcome of its closed sessions, the circulation of draft resolutions before informal consideration, invitations for troop-contributing countries to take part in open Council meetings, and informal meetings with NGOs.[11] However, those measures did not remedy the membership's unease, and the 2005 World Summit raised pressure by recommending that the Council

> …continue to adapt its working methods so as to increase the involvement of States not members of the Council in its work, as appropriate, enhance its accountability to the membership and increase the transparency of its work.[12]

Furthermore, in early 2006, a group of small states (the "S5") tabled a draft resolution in the GA proposing concrete measures.[13] In response, the SC strengthened its working group on working methods and in July 2006 agreed to consolidate and improve upon its practices, in part by stronger recourse to open and private meetings (open to UN member states) instead of informal consultations.[14] While positively received, this move is unlikely to satisfy critics, partly because it has led to crucial discussions being conducted even prior

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9 S/PV.4950 of 22 April 2004, p.32 (India).

10 Useful summaries can be found in Security Council Report, *Security Council Transparency, Legitimacy and Effectiveness: Efforts to Reform Council Working Methods 1993-2007*, October 2007, at http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.3506555/; Security Council Report, *Security Council Working Methods – A Work in Progress?*, 30 March 2010, http://www.securitycouncilreport.org/site/?c=glKWLeMTIsG&b=5906427; J.S. Lund, 'Reforming the Working Methods of the Security Council', Center for UN Reform, 18 November 2009, http://www.centerforunreform.org/node/412.

11 See also Susan C. Hulton, 'Council Working Methods and Procedure', in Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century*, Boulder, London: Lynne Rienner Publishers, 2004, 237-251.

12 See supra fn. 2, para. 154.

13 UN Doc. A/60/L.49 of 17 March 2006.

14 UN Doc. S/2006/507 of 19 July 2006.

to informal consultations, in expert meetings or meetings of "Groups of Friends" (groups of states with a particular interest in a given situation or conflict). Moreover, in the eyes of many, implementation of the agreed-upon reforms on working methods has been slow and incomplete. The S5 have presented a further proposal in 2009, and in open meetings of the Council on the issue in 2008 and 2010 many states continued to voice dissatisfaction with the progress achieved so far.[15] However, the SC's moves show that the Council seeks to improve its standing and legitimacy and that, as a result, it is ready to respond to sustained and broadly-based challenges, as it has also done in reaction to human-rights critiques of its sanctions administration – an issue taken up in Vera Gowland's contribution to the present report. Such changes also show that enhancing representativeness and broader participation in the Council does not necessarily have to wait for an agreement on membership reform and consequent Charter amendment, but that there may be space for more informal improvement.

3. Prospects for Future Reform through Practice

Future reform of the Council, in whatever form, will have to be measured against normative standards adequate to the body's changed, and varied, functions. Effectiveness was preferred to broader representativeness when the SC was created, on the grounds that it was to perform mainly a police function: silencing the guns and leaving the political or legal resolution of a conflict to others.[16] The Council's forays into dispute resolution, judicial functions and legislation, and into areas quite beyond the confines of particular conflicts, certainly challenge this initial rationale and require a rethinking of the normative framework beyond attempts merely to bring SC membership into line with the changed geopolitical circumstances of the 21st century as compared to 1945.[17] The broader the functions are that the Council performs, the stronger will be demands for a broader, more representative composition as well as greater transparency and accountability to the UN membership as a whole.

While this may eventually require changes in membership and thus a Charter amendment, many steps can be taken below this level. As pointed out above, most decision-making in the Council takes place outside the Council chamber, in informal settings or subsidiary bodies, and efforts at reform through practice should focus on these, rather than on the workings of the Council in open sessions. In many conflicts, for example, Groups of Friends have played a central role in formulating Council policy, and these groups have included Council members as well as non-members. Criticised for the obscure selection of members and their lack of transparency, in a reformed shape they may however be a way for giving a broader membership, perhaps selected by the General Assembly, input into decisions that,

15 See UN Doc. S/PV.5968 of 27 August 2008; S/PV.6300 of 22 April 2010. See also the acknowledgment of dissatisfaction by the Japanese Council presidency, S/2010/165 of 5 April 2010.

16 See Frowein & Krisch, *supra* fn. 6, 705-706.

17 See Martti Koskenniemi, 'The Police in the Temple – Order, Justice and the UN: A Dialectical View', *European Journal of International Law* 6 (1995), 325-348.

for reasons of efficacy and speed, can hardly involve the Assembly as such.[18] Likewise, for subsidiary organs of the Council, such as the Sanctions Committees, a broader membership may be a useful tool to increase transparency and accountability to non-Council members.[19] This could follow the model of the Peacebuilding Commission, with its complex balance between the GA and the SC in selecting members. The risk of formalizing and expanding such bodies is, of course, that decision-making will move once again to other, more informal arenas. Yet such moves are themselves constrained by the need to defend the precarious legitimacy of the Council.

As the need for greater inclusiveness rises with the breadth of the functions performed, it may be useful to differentiate between different types of issues. Where decision-making in a particular conflict is at stake, limited input of the GA in a preparatory body of the Council, such as a Group of Friends, may be workable. Where broader policy and law-making functions are performed, as for example in the area of terrorism or arms proliferation, the Council has already given non-members a stronger voice[20], but probably the GA's participation should take place on a yet more equal footing. This may be seen, by those claiming those functions to be the domain of the GA entirely, as legitimating the Council's encroachment of other organs' powers. However, given that the SC is the only organ with strong decision-making and enforcement powers, a gradual expansion of its functions is probably inevitable, unless other well-functioning bodies with binding powers are created. It may thus be more promising to pursue models of cooperative decision-making between the SC and the GA than to try to uphold a separation-of-powers model that has long been eroded from both sides.

One issue on which there has been little movement in the discussions over Security Council reform is that of the veto. Central to public debates about the legitimacy of the SC, attempts at weakening the veto for existing permanent members have provoked such resistance among them that formal changes are very unlikely; the veto also fulfills important functions, as it provides a constraint for a body with otherwise hardly limited powers and prevents the SC becoming a tool in a great power conflict. Proposals below the level of formal abolition or change include commitments of the permanent members not to use the veto in particular circumstances (such as genocide and serious violations of international humanitarian law); but because the qualification of the situation will often be contested, and the choice of means to remedy it will never be obvious, this is unlikely to prove successful. More promising appears the suggestion that the use of the veto should be justified publicly and in written form.[21] Even if this may not reveal the true motives and may lead to empty rhetoric, it may also force the permanent members into a hypocrisy with at least some civilising force.[22] But as the veto is today mostly used informally, prior to

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18 On Groups of Friends, see Jochen Prantl, *The UN Security Council and Informal Groups of States*, Oxford: Oxford University Press, 2006.

19 See also the (limited) proposals by the S5, *supra* fn. 13.

20 See, for example, Stefan Talmon, 'The Security Council as World Legislature', *AJIL* 99 (2005), 175-193, at 186-188.

21 See the S5 proposal, *supra* fn. 13.

22 On that effect of hypocrisy, see Jon Elster, 'Deliberation and Constitution Making', in Jon Elster (ed.), *Deliberative Democracy*, 1998, 97-122, at 111.

open meetings (and precisely to avoid particular proposals being tabled)[23], the reach of such a requirement of justification will, again, be limited.

[23] See Céline Nahory, 'The Hidden Veto', Global Policy Forum, May 2004, http://globalpolicy.igc.org/security/veto/2004/0519hiddenveto.htm.

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ECOSOC and International Economic Institutions

B.S.Chimni

The UN Economic and Social Council (ECOSOC) has not been able to play an effective role in relation to 'international economic, social, cultural, educational, health, and related matters' (Article 62 of UN Charter). The expectation that ECOSOC will promote co-ordination in international economic and social policies for the welfare of the global poor has been belied. Indeed, the ECOSOC has little influence over the implementation of the UN Development Agenda.

This became especially clear when in the wake of the global economic crisis there were no serious initiatives within the UN system, other than the usual report and conference, to seek serious changes in the working of the global economic system. Instead it was left to the G-20 group of countries to evolve responses to the crisis. As the Permanent Representative of Singapore to the United Nations put it in his remarks at the ECOSOC panel discussion on "Global Economic Governance" in July, 2010: "The fact that the G-20 was able to help avert a global depression, without paying much heed to what the UN was also trying to do to tackle the crisis raised some fundamental questions about the role of the UN in global economic governance" (Menon 2010).

This situation may be contrasted with the early seventies when the recession saw developing countries call for the creation of a new international economic order (NIEO) at a special session of the UN General Assembly. The UN platform was used to develop new thinking. The responsibility for the lack of initiative today rests with emerging powers like Brazil, China and India and other key developing countries (Argentina, Indonesia and Mexico) that instead of providing leadership to the developing world within the UN system have accepted to be part of the G-20 process. In the backdrop of the global economic crisis these powers could have played a more active role in shaping an alternative global economic agenda in the UN system in general and ECOSOC in particular. In recent years the bargaining power of countries like Brazil, China and India has increased because its economies were not as deeply affected by the global economic crisis (given the prudent measures in place to insulate their financial system from global developments) and the fact that the global recovery is being led by growth in these emerging economies. However, the opportunity to strengthen the UN system has been missed.

It has been argued that this expectation itself was misplaced given the transformed interests of the emerging powers. These have come to diverge from other developing countries. First, most of the leading developing countries are no longer opposed to external liberalization policies. For example, they welcome foreign investment with open arms. Thus, in the last two decades India has signed at least 70 Bilateral Investment Protection Treaties (BITS) and more are in the pipeline. It is also negotiating about 30 Free Trade Agreements (FTAs) many of which contain provisions offering protection to foreign investment and accept TRIPS Plus standards. It has already signed comprehensive

economic partnership agreements with Japan and South Korea. India is already a member of World Bank's Multilateral Investment Guarantee Agency (MIGA) and by virtue of being a member of WTO has to abide by the TRIPS, TRIMS and GATS agreement. Second, the interests of leading developing countries often coincide with that of the industrialized North. For instance, leading developing countries are today exporters of capital and therefore are no longer in favor of an international regime that seeks to actively regulate foreign capital. In short, the imagery of North-South divide seems inapt at a time when countries like Brazil, China and India have become economic powerhouses.

It leads some commentators to suggest that ECOSOC should reconcile itself to the changes in the global economic governance system. In this view 'rather than being defensive and feeling uneasy about the maturation of the G-20, ECOSOC needs to think hard about its own comparative edge. Rather than viewing the new powerhouse as a threat, the UN in general and ECOSOC in particular should think of the relationship as symbiotic and not competitive' (Weiss 2010). For 'with 80 percent of the world's population and 90 percent of the world's GDP, the argument that the G-20 lacks legitimacy is far-fetched. The G-7 lacked legitimacy; the G-20 does not' (Ibid).

In any event, it is pointed out, the 'once creative voices of the Non-Aligned Movement and the Group of 77 developing countries have become prisoners of their own rhetoric. These counterproductive groups—and the artificial divisions and toxic atmosphere that they create—constitute almost insurmountable barriers to diplomatic initiatives. Serious conversation is virtually impossible and is replaced by meaningless posturing in order to score points in UN forums and media at home' (Weiss 2010). It is therefore suggested that 'within ECOSOC, policy debates and negotiations can and should reflect issues-based and interest-based coalitions' (Ibid).

These observations thus question the desirability and practicability of making ECOSOC the central agency for implementing the Global Development Agenda. Several points may be made in this context. First, the situation in developing country members of G-20 is complex. There are large sections of population living below the poverty line, as in the case of India. Key developing countries have thus a long way to go to catch up with the industrialized world; their low placement in the Human Development Index (HDI) is evidence of this. To put it differently, while there is some coincidence of interests between leading developing countries and the G-7 countries the old north-south divide remains. Second, for many of these countries there is a diplomatic cost in giving up the platform of developing countries. These countries, long associated with NAM and G-77, will lose considerable moral and cultural capital by their association with G-7. This fact has its own pulls and pressures. Third, there is not much to be gained from the membership of G-20 in terms of having a greater voice in global economic governance. The concessions made are more symbolic than real. Fourth, the demand for making ECOSOC the home for shaping global economic and social policies is important for (a) a vast majority of developing countries that have been excluded from the benefits of economic globalization process; (b) global social movements, including platforms like the World Social Forum (WSF) that give voice to the poor and oppressed in the developing world. But what this complex map of duality of

interests and identities of key developing countries shows is that *at present* (a) there will not be great support for making the ECOSOC the central forum for coordinating global economic and social policies; and (b) it will be called upon to coordinate its policies with G 20 and other multilateral agencies that support the G 20 agenda.

The outcome document of the UN Conference on the World Financial and Economic Crisis and its Impact on Development (2009) supports this understanding. Having noted that the world is faced with the worst financial and economic crisis since the Great Depression and that the developing countries, despite not being responsible for the crisis, were severely affected by it, the outcome resolution essentially defers to the G-20 process to come out with appropriate solutions (UNGA 2009: Paras 1 and 3). It also endorses the marginal changes that are proposed to the voting powers in the international financial institutions (Ibid: Para 17); thus for example, even after the proposed changes are implemented the United States will retain its veto over all decisions requiring 85 per cent majority vote (Chimni 2010). But at the same time the resolution calls for 'Closer cooperation and strong partnership between the United Nations development system, regional development banks and the World Bank and their scaled-up efforts' as these 'can effectively address the needs of those hardest hit and ensure that their plight is not ignored' (Ibid: Para 22). The call for closer cooperation comes despite the fact that there are no serious changes proposed to the system of conditionalities prescribed by the international financial institutions (Ibid).

Thus, while we have seen much cooperation between the G-20 countries in dealing with the global economic crisis this cooperation has been on terms set out by G-7 states. It should therefore come as no surprise that the ECOSOC does not play a significant role today in either shaping or implementing the UN development agenda. It has been assigned an advocacy role to promote development (UNGA 2009: Para 53). The paragraph in the outcome document of the UN Conference on the World Financial and Economic Crisis (2009), which elaborates the role of the ECOSOC, deserves to be quoted in full:

> We request the Economic and Social Council:
>
> *(a)* To consider the promotion and enhancement of a coordinated response of the United Nations development system and specialized agencies in the follow-up to and implementation of this outcome document, in order to advance consistency and coherence in support of consensus-building around policies related to the world financial and economic crisis and its impact on development;
>
> *(b)* To make recommendations to the General Assembly, in accordance with the Doha Declaration of 2 December 2008, for a strengthened and more effective and inclusive intergovernmental process to carry out the financing for development follow-up;

(c) Examine the strengthening of institutional arrangements to promote international cooperation in tax matters, including the United Nations Committee of Experts on International Cooperation in Tax Matters;

(d) Review the implementation of the agreements between the United Nations and the Bretton Woods institutions in collaboration with these institutions, focusing in particular on enhancing collaboration and cooperation between the United Nations and the Bretton Woods institutions, as well as on the opportunities for contributing to advancing their respective mandates;

(e) Consider and make recommendations to the General Assembly regarding the possible establishment of an ad hoc panel of experts on the world economic and financial crisis and its impact on development. The panel could provide independent technical expertise and analysis, which would contribute to informing international action and political decision-making and fostering constructive dialogues and exchanges among policymakers, academics, institutions and civil society (UNGA 2009: Para 56).

It can be seen that other than perhaps clause (d), to which we will return, the other requests simply defer to the G-20 agenda and give ECOSOC an academic role. The outcome resolution confirms that the international community, including leading developing countries, is looking towards the G-20 to identify appropriate responses to the crisis, including spelling out the role and policies of international economic institutions, and make greater resources available to revitalize the world economy (Ibid, Para 17ff). The need for G- 20 countries to play a key role is stressed even as it is 'resolved to strengthen the role of the United Nations and its Member States in economic and financial affairs, including its coordinating role' (Ibid: Para 16. See also Paras 23-24).

Besides the changing map of interests of key developing countries, another set of reasons that explains the reluctance to assign the ECOSOC a greater role relates to the fact that it continues to suffer from some structural defects: (a) it is not given any serious decision making powers (can only make recommendations) and is 'subordinate' to the UN General Assembly; (b) its membership is both too small and too large; too large for effective functioning and too small in terms of being able to represent the views of the international community; (c) it presides over a network of bodies and commissions whose roles are not clearly defined. Therefore, the general impression is that most of its reports remain unread and its resolutions neglected.

On the other hand, it is felt that 'there is much that could be done within the present mandate of ECOSOC' as it has lost none 'of its original significance and legitimacy' (ILO 2004: 118). The creation of the Annual Ministerial Review (AMR) and Development Cooperation Forum (DCF) has perhaps given a greater focus on the UN development agenda, including the Millennium Development Goals (MDG). But there is little movement

in the real world. Thus while there has been some progress on MDGs there is a consensus today that in the wake of the global economic crisis its goals cannot be fully realized in the near future (UN 2010).

The failings of ECOSOC to further the UN Development Agenda cannot to be traced to the *simple* absence of global economic cooperation. For the international financial and trade institutions are functioning effectively only because there is international cooperation. The real problem is that cooperation from developed countries is presently forthcoming only when the economics of neo-liberalism informs the policies and programs of institutions (Pollin 2006: 227). Indeed, the ECOSOC is expected to, and is, adjusting to this thinking. As the then UNSG Kofi Annan observed in a speech to the ECOSOC: 'Over the past several years, this annual discussion between ECOSOC and the Bretton Woods Institutions has contributed to *a large degree of convergence in our thinking* - both about the problems we face, and about the solutions we must put in place' (Annan 2003. Emphasis added). This convergence is disturbing because of its consequences for the developing countries, in particular its poor. It is certainly dated after the global economic crisis for such thinking leaves little hope of the implementation of what is called the UN Development Agenda.

The ECOSOC in any case has little influence over key international economic institutions like the IMF, World Bank and the WTO. This lack of influence is legitimized in the relationship agreement between the UN and key specialized agencies like the IMF and the World Bank. The original idea was that was that 'each specialized agency…would exercise its authority within the limited scope of its specialization and that the U.N. Economic and Social Council would be the forum in which their activities would be coordinated' (Bradlow 2006: 20). Ideally this would mean that 'the specialized agency was subordinate to the United Nations'. But the relationship agreements between the IFIs and UN amount to what has been termed 'a declaration of independence' (Ibid). Thus, the Agreement between the UN and the IMF states in Article I (2): 'By reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Fund is, and *is required to function as, an independent international organization*'. While there is possibility of exchange of information between the ECOSOC and the IFIs the only serious constraint so far as the UN system is concerned is contained in Article VI (1) of the relationship agreement which states:

> The Fund takes note of the obligation assumed, under paragraph 2 of Article 48 of the United Nations Charter, by such of its members as are also Members of the United Nations, to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members, and will, in the conduct of its activities, have due regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter.

An important step that can strengthen the role of ECOSOC is to renegotiate the relationship agreements with the IMF and the World Bank, as envisaged by paragraph 56 (d) of UNGA resolution of 2009, so as to clarify their responsibilities towards the UN, in particular

ECOSOC (Bradlow 2006: 37). The new agreement should allow ECOSOC to oversee that the specialized agencies complied with the values embodied in the UN Charter as manifested in relevant Charter provisions, UN declarations, and decisions.

Once the IFIs assume greater responsibilities towards the UN system, ECOSOC will be able to play a relatively greater role in influencing their programs and policies in a manner to pursue the development agenda of the UN. The new relationship agreement could also be used to get international financial institutions to accept the obligation have to conform to customary international law, in particular international human rights law (Clapham 2006). If a new relationship agreement is not possible the ECOSOC should, using the powers vested under Article 64 of the UN Charter, require that the IMF and the World Bank submit regular reports on implementation of UN resolutions. Article 64 *inter alia* states: 'The Economic and Social Council may take appropriate steps to obtain regular reports from specialized agencies…on steps taken to give effect to its own recommendations…'.

Further, it has been suggested that an independent expert panel be established 'to review the IMF's relations with other international organizations and to make recommendations on how the IMF, acting in conformity with its specialized mandate can most effectively coordinate its activities with these organizations' (Bradlow 2006: 37). It may be recalled in this context that that IFIs are today involved in a range of social issues including law reform, labor issues, health and education, environment, and trade liberalization, its operations are trespassing into the jurisdiction of other specialized international organizations like the ILO, WHO, UNICEF, UNEP and the WTO (Bradlow 2006: 20). The idea of establishing the independent expert panel is to facilitate the coordination functions of ECOSOC.

Another possible mode of gaining influence over specialized agencies such as the World Bank and the IMF is to have their evaluation done by ECOSOC experts instead of in house staff. As Stiglitz notes:

> While the World Bank and IMF presently do this--and indeed, spend a considerable amount of money on such evaluations--the evaluation units have typically relied heavily on temporary staff supplied by the Fund or the Bank. Though this has an advantage in that they are all well informed about what is going on, it is hard for them to provide a fully independent evaluation. The task of evaluation should be moved--to the UN, for instance. Assessments must be made of the disparity between predicted consequences and what actually happens: Why, for instance, did the IMF bail-out packages not work in the way predicted during the crisis? Why was there money available to bail-out international banks, but not money to pay for food subsidies to the poor? Why were the benefits received by many of the poorest countries from the last round of trade negotiations so much less than has been promised? (Stiglitz 2006: 283).

Turning to the WTO, its relationship with the UN is governed by the 1995 "Arrangements for Effective Cooperation with other Intergovernmental Organizations-Relations Between the WTO and United Nations". The participation of the WTO in the work of the UN is a very limited one[24]. On the other hand, keeping in view that the mandate of Article III.5 of the Marrakesh Agreement establishing the WTO calls for cooperation with IMF and the World Bank the WTO has signed agreements with both[25]. Thus, the WTO has a formal relationship with UN specialized agencies but not with ECOSOC. It is important to establish a closer relationship between WTO and ECOSOC to promote compatibility of the WTO agenda with the UN development agenda. Article V.1 of the Agreement establishing the World Trade Organization makes this possible. It states in para (1) that 'The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO'.

To sum up, the limits of reform of international economic institutions are dictated by (a) the structure of world economy, (b) the changing interests of key developing countries, (c) the dominant ideological thinking of the times, (d) the constraints imposed by the constituent texts, and (e) the distribution of power among member States. Given (b), (c) and (e) interest in the old NIEO agenda has waned, and along with it bodies like ECOSOC. It is now primarily left to those developing states that have little to benefit from the new global economic agenda and the transnational oppressed classes to insist on ECOSOC being the principal forum for discussing the global development agenda. It is also hoped that given the complex economic and political contexts in the emerging powers, and their identity as leaders of the developing world, these countries will not be averse to supporting proposals that make ECOSOC a more effective body. Whether new structures like AMF and DCF are taken advantage of remains to be seen.

Meanwhile, the ECOSOC can play a role in the generation of ideas that can make the globalization process more inclusive. Weis has thus proposed that 'ECOSOC should establish a research council to expand opportunities for information-sharing and collaboration….' (Weiss 2010). Second, the ECOSOC can maximize its authority through reviewing its relationship with the international financial institutions and the WTO. Third, it should review its experience with AMR and DCF in order to see how these can be made more effective.

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[24] For the nature of participation see http://www.wto.org/english/theWTO_e/coher_e/wto_un_e.htm accessed 22 July 2010.

[25] Article III.5 of the Marrakesh Agreement establishing the WTO states that: 'With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies'.

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INTERNATIONAL LAW ASSOCIATION

UNITED NATIONS REFORM STUDY GROUP

Use of Force under the Charter: Modification and Reform

Ove Bring

1. Introduction

International law on the use of force coincides to a substantial extent with the relevant provisions of the United Nations Charter. The purpose of the present paper is not to address the UN Charter law on the use of force as such, but to indicate how that law has been clarified or modified through the practice of UN member states and UN organs over time.

Under the terms of the UN Charter the use of force between States is severely circumscribed as a legal option. The use of force-prohibition of Art. 2(4) should, according to a majority opinion, be given an extensive interpretation yielding an absolute prohibition. However, under other provisions of the Charter there would be two exceptions available: (1), the right to individual or collective self-defence under Art. 51; and (2), the right to act, individually or collectively, on the basis of a Security Council decision under Chapter VII.

Another, restrictive and liberal interpretation of the 2(4) prohibition was put forward during the cold-war-era by a number of Western lawyers. It was restrictive in the sense that it restricted the scope of the use of force-prohibition; and it was liberal in its approach to unilateral action. It was argued that a "contextual" reading of 2(4) would allow unilateral or regional military interventions (humanitarian, pro-democratic or others) which are not directed against another State´s "territorial integrity or political independence", or "in any other manner inconsistent with the Purposes of the United Nations", to use the language of the provision.[1] This position is now a minority view amongst commentators. During the Kosovo intervention of 1999 the debate shifted from contextual rights to universal values; the issue of human rights protection generated the tentative "illegal but legitimate" approach of writers like Simma, Cassese and Franck.[2] The underlying thrust of this approach is the notion that international law is not static and that its dynamic potential could result in a value-oriented development from political legitimacy to formal legality.

As a matter of fact, the practice of States responds to evolving realities[3] and history has proven that a static vision of the law of the UN Charter is untenable. The following paper

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1 E.g. Anthony D´Amato, *International Law: Process and Prospect,* Transnational Publishers, Dobbs Ferry, New York (1987), p. 58 f.

2 Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects" and Antonio Cassese, "Ex injuria jus oritur: Are we moving Towards International Legitimation of Forcible Humanitarian Measures", both in 10 *European Journal of International Law* (1999), pp. 1 and 23. See also Thomas M. Franck, "Lessons of Kosovo", 93 *American Journal of International Law* (1999), p. 857.

3 Cf. the approach of the New Haven school based upon the description of international law "as a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular … states unilaterally put forward claims … and in which other decision-makers …weigh and

will summarize relevant developments in the past and touch upon the prospects for change in the future.[4]

2. Modification developments since 1945

The law as it was understood in San Francisco has been modified over the years by the institutional practice of the Security Council followed by acceptance of this practice by UN member States. In other words, the Council´s handling of a certain situation *in concreto* has been followed by a state practice *in abstracto* (through acquiescence or normative statements in the UN or other international fora). In some cases events have taken place in reverse order and the concrete practice of some member States has been followed by acceptance by the Security Council. Since in the past state practice (within and without the Security Council) has brought about changes to the law of the UN Charter; this could happen again.

Any formal amendments of the Charter concerning the use of force are highly unlikely as a matter of politics, bearing in mind the veto power of the P5 Security Council members. The only form of legal development that seems possible is through state practice, implying an adaptation to evolving needs in line with the purposes of the United Nations.

The first Charter modification occurred as early as the period 1946-1950 and concerned "the concurring votes" requirement of Art. 27(3). A former legal adviser at the US State Department noted that in 1946, "and consistently thereafter, abstentions were treated as ´concurring votes´". Valid Security Council decisions could materialize irrespective of whether a permanent member of the Council "abstained, declined to vote, or was absent".[5] The ICJ confirmed the new legal situation regarding abstentions in 1971.[6] This ´informal amendment´ has made it easier to authorize the use of force, as was seen at the outbreak of the Korean War in 1950 and after the Iraqi invasion of Kuwait in 1990.

A further development was the adoption of the Uniting for Peace resolution of November 1950. This was planned as a recommendatory mechanism for the General Assembly when the use of force was perceived as needed, but has not really been used to bypass (or supplement) the exclusive enforcement competence of the Security Council. The present

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appraise these competing claims in terms of the interests of the world community and of the rival claimant, and ultimately accept or reject them". Myres McDougal, "The Hydrogen Bomb Tests", 49 *AJIL* (1955), p. 354.

4 Cf. in this context N. Blokker & N. Schrijver (Eds.), *The Security Council and the Use of Force, Theory and Reality – A Need for Change?,* Martinus Nijhoff Publishers, Leiden/Boston (2005); and T. Gazzini, *The Changing Rules on the Use of Force in International Law,* Manchester University Press, Manchester (2005).

5 Michael J. Matheson, *Council Unbound, The Growth of UN Decision Making on Conflict and Post Conflict Issues after the Cold War,* US Institute of Peace Press, Washington (2006), pp. 21 and 330. See also Bruno Simma (Ed.), *The Charter of the United Nations, A Commentary,* 2nd ed, Oxford University Press, New York (2002), pp. 493-501.

6 The Hague Court noted that the P5 had "consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions". *Advisory Opinion on Namibia,* ICJ Reports 1971, p. 10.

status of Uniting for Peace, in terms of enforcement action, is unclear. It may constitute a dormant procedure, an option which could be revived at any time.

The concept of peacekeeping was introduced during the Suez crisis in 1956. The then Secretary-General Dag Hammarskjöld and his entourage looked upon it as a development under the unwritten Chapter VI½ of the UN Charter. It was recognized that peacekeepers could use their weapons in individual self-defence; from 1973 units could also use force to protect the purposes of their mandate, so called mission defence. In 1960, during the peacekeeping operation in the Congo and in the face of slaughter of civilians, Hammarskjöld ordered an immediate ´humanitarian intervention´ by ONUC, although the mandate had not foreseen the eventual need for this and consequently made no mention of the issue.[7]

The absence of Article 43 agreements (member States providing the Council with standing armed forces) means that the Council cannot fulfil the independent and centralized function expressly prescribed for it in the Charter. Art. 42, presuming operative political and military leadership by the Council, could not be used during the Korean War or the Gulf War of 1991; its ideal did not reflect reality. Art. 42 was too ambitious. In Resolution 687 of November, 1990, the Council *authorized* a coalition of the willing to "use all necessary means" to restore peace and security in the area. The mandate to liberate Kuwait was in effect based upon the unwritten and less ambitious Art. 41½.

In 2001 the terrorist attacks of 9/11 were characterized by the Security Council (in two resolutions) as a threat to international peace and security. The right to individual or collective self-defence under Art. 51 was confirmed (generically) in that context. The Council later received a report from the USA and the UK, as required by Art. 51, on their military action against targets in Afghanistan. The Council took note of the report in a way that strongly suggested recognition, under Art. 51, of the legality of the action taken. The President of the Council summarized the situation thus: "The members of the Security Council were appreciative of the presentations made by the United States and the United Kingdom".[8]

Art. 51 does not exclude actions in self-defence against non-State actors (cf. the *Caroline Case*), but its wording does not allow military measures in response to attacks that have ceased. However, in relation to large-scale terrorist attacks, an interpretation of Art. 51, that restricts the use of force in self-defence to the time during which the attack is in progress, "hardly accords with reality and would leave the target State powerless".[9] It could be argued that the United States was subject to a continuous and ongoing attack

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7 As Hammarskjöld put it in a statement before the General Assembly on 17 October 1960: "You try to save a drowning man without prior authorization". See O. Bring, "Dag Hammarskjöld and the Issue of Humanitarian Intervention", in J. Petmann& J. Klabbers, *Nordic Cosmopolitanism*, *Essays in International Law for MarttiKoskenniemi,* MartinusNijhoff, The Hague (2002), p. 515.

8 Statement to the press by the President of the Security Council, 8 October 2001.

9 T. Gazzini, *The Changing Rules on the Use of Force in International Law* (2005), p. 192.

(Washington argued "an ongoing threat") which was part of a larger hostile plan and that, consequently, the military response was not, in essence, an *ex post facto* response.

In this case the Council seemed to have legitimized a new and flexible interpretation of Art. 51, adding the possibility of ongoing preventive self-defence against large scale international terrorism (an Art. 51 plus). Another possibility is that the Council acted *sui generis* and expressed a one-off view on the facts with no precedential significance. The Council´s position, however it was interpreted, was confirmed by a general attitude of acquiescence in the international community.

However, in 2004, when the ICJ delivered its Advisory Opinion on the Israeli Wall in Palestine, it seemed to confirm a traditional strict interpretation of Art. 51, as did the UN High-Level Panel Report the same year.[10] When the ICJ touched upon the question of non-State actors in the *Congo v. Uganda* Case in 2005, it saw no need to clarify the issue "whether and other what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces".[11] The vagueness of the legal situation has to be clarified through state practice, but it is clear that some development in terms of self-defence against terrorism has taken place after 9/11. At the same time, it is clear that neither state practice nor *opinion juris* has licensed any doctrine on pre-emptive war against international terrorism or, for that matter, against states developing weapons of mass destruction (WMD).

3. Prospects for future clarifications and/or modifications

In its Advisory Opinion on the Israeli Wall the ICJ seemed to suggest that, under Art. 51, self-defence is only allowed against an armed attack carried out by another state. The formulation in question was not completely clear and seemed incomplete. It was linked to the issue of occupied territory and reached without reference to cases where a non-state actor conducts an armed attack from the territory of a sovereign state. Judge Buergenthal, in his declaration, and Judges Higgins and Kooijmans, in their separate opinions, objected to the majority formulation. The general assessment in legal doctrine seems to be that States legitimately treat the law of self-defence as being applicable to acts by none-State actors.[12]

In 2007 the ICJ majority view, in its strictest interpretation, was quietly challenged by State practice in the conflict between Turkey and the non-State actor PKK (the Kurdistan Workers´ Party). PKK incursions into Turkish territory from bases in Iraqi Kurdistan highlighted the issue of non-state actors and the use of force in self-defence. The Turkish right of transborder self-defence against PKK was not denied by other States, although a

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10 ICJ Advisory Opinion on the Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory (2004), para 138; and the Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility,* United Nations, New York (2004), p. 63.

11 *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, para147 (p. 223).

12 E.g. Thomas Franck, "Terrorism and the Right of Self-Defense", 95 *AJIL* (2001), p. 534.

large-scale Turkish invasion would probably be condemned as a violation of the proportionality requirement of self-defence. The prognosis is that, irrespective of this particular case, state practice will clarify the legal situation in a manner at variance with the ICJ Wall opinion and more in line with the 2001 view of the Security Council.

In September 2005, at the World Summit in New York, Governments agreed on a reform agenda for the UN. Somewhat surprisingly, there was agreement on the inclusion of the concept of the Responsibility to Protect (R2P) in the Outcome Document. R2P was addressed in paragraphs 138-139, in the chapter on human rights and the rule of law (not in the chapter on collective security and the use of force):

> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes …
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VI and VIII of the Charter, to help to protect populations from genocide (etc) …
>
> In this context we 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 …

Thus, the phrasing of the responsibility to *react* is circumventive and cautious. The text lacks any openings for regional organizations to act on their own, should the Security Council be unable or unwilling to protect "human security", the concept that is recognized in paragraph 143 of the Outcome Document. Again, paragraph 143 is written in language that circumvents the hard issues on *when* and *how* to protect, if sovereign States do not use their sovereignty to protect their own populations. In fact, there is only mention of a role for the General Assembly in this context. There is no linkage to the R2P paragraphs nor the role of the Security Council.

In the Report of the Secretary-General of 2009 on "Implementing the responsibility to protect" the language was again very cautious as to the possible use of force.[13] In the section on "Timely and decisive response" it was noted that a precondition for collective "non-peaceful" action was a finding that peaceful measures were inadequate. This issue, as it relates to Art. 42 of the UN Charter, was referred to a footnote in the Report. The footnote

13 UN Doc. A/63/677, 12 January 2009.

clarifies the use of force option in a way that was not possible to achieve in paragraph 139 of the Outcome Document.[14]

Of course, more clear-cut and forceful language could not be expected from any kind of diplomatic negotiation where the values of sovereignty and human rights are pitched against each other, where the spectre of intervention looms over what is perceived as the territorial integrity and national sovereignty of States. However, the "responsibility to react" element of R2P harbours the embryo of a right to regional humanitarian intervention, should the UN Security Council remain passive in a developing humanitarian crisis. As in Kosovo, the argument of necessity may play a role in hard politics. With regard to developments in Sierra Leone there is an example of ECOWAS-ECOMOG military action where Security Council approval only materialized *ex post facto*[15]*.* A development in (regional) State practice towards an Art. 53 minus (minus the requirement of Security Council approval for enforcement action) cannot be excluded. This would lead to regional divides and different views on the relationship between sovereignty and intervention, in other words a further fragmentation of international law – a price to be paid for better protection of human rights?

It has been argued that international law could not accommodate a legitimization of "humanitarian intervention" since the use of force-prohibition of Art. 2(4) is a peremptory norm, *jus cogens.* No deviations would be possible. The counter-argument, put forward by some scholars, is that only the core content of the rule, i.e. pure aggression, constitutes *jus cogens.*[16]That argumentation implies a distinction between aggressive purposes and other more benign purposes to save a State´s own nationals or civilians in general.

The use of force in peacekeeping operations has recently undergone further developments. These include specific mandates to protect civilians and the delivery of aid. For example, in the case of Liberia, the mandate of UNMIL includes protecting civilians "under imminent threat of physical violence".[17] In the absence of such a specific formulation in the mandate, the armed protection of civilians could possibly still be considered an option under UN peacekeeping doctrine and the evolving institutional law of the United Nations. Anyway, it is hoped that the current practice of robust protective mandates – although they have been characterized by a certain "blurring" of the lines between peacekeeping and enforcement action[18] - will mark a new successful era of peacekeeping where civilians are benefitting from an increased protection.

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14 Footnote 9 quotes the opening wording of Art. 42: "should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate . . . ". The text concludes that Member States at the World Summit 2005 accepted that the Security Council "should not wait until all other possible tools had been tried and had failed before considering more robust collective measures". UN Doc. A/63/677, p. 22.

15 Security Council Resolution 1156 (1998).

16 Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law,* Finnish Lawyers´ Publishing Company, Helsinki (1988), pp. 326-340.

17 Security Council Resolution 1509 (2003).

18 Ralph Zacklin, "The Use of Force in Peacekeeping Operations", in Blokker & Schrijver (Eds.), *The Security Council and the Use of Force* (2005), p. 106.

INTERNATIONAL LAW ASSOCIATION

UNITED NATIONS REFORM STUDY GROUP

Reform Proposals Regarding the International Court of Justice

Sienho Yee*

This Report consists of (1) The Preliminary Report of 2008 (paragraphs 1-27), which was submitted to the ILA Study Group on UN Reform at the Brazil Conference in 2008; (2) Comments Received (paragraphs 28-31); (3) Subsequent Developments (paragraphs 32-40); and (4) Conclusions and Suggestions (paragraphs 41-44).

1. The Preliminary Report of 2008**

1.1 Introduction

1. The 2005 "World Summit Outcome Document" merely calls upon States to honor their obligations to peaceful settlement of disputes and to promote wider acceptance of the jurisdiction of the International Court of Justice (ICJ or the Court), without mentioning any other concrete reform measures regarding the Court.[1] This absence may be interpreted in several ways. It may be deemed to indicate that the world is content with the current state of affairs at and about the Court. Given the recent successes of the Court in terms of its caseload and its work product, this view may well be plausible. This absence may also be deemed to show a resignation that it is impossible to implement any reform proposals that would require amending the Charter and/or the Statute of the Court. If, as has been claimed, the UN Charter is a "finely tuned" instrument,[2] the ICJ Part[3] of the Charter (consisting of Chapter XIV and the Statute) can be considered even more finely tuned, or at least more finely balanced and, therefore, more resistant to amendment. Indeed, as

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** This section reproduces Sienho Yee, Notes on the International Court of Justice (Part 2): Reform Proposals Regarding the International Court of Justice—A Preliminary Report for the International Law Association Study Group on United Nations Reform, 8 Chinese Journal of International Law (January 2009), 181-189, which was a slightly edited version of the Preliminary Report completed on 2 August 2008 for the International Law Association Study Group on United Nations Reform. The Preliminary Report was intended to be a survey on the more significant proposals, not a detailed treatment of any of them. In the preparation of the 2008 Report, I am indebted to President Dame Rosalyn Higgins of the ICJ and Dr Ralph Wilde, Rapporteur of the ILA Study Group, for valuable comments and to Ingrid Kost, Curator of the Peace Palace Library for research assistance. All responsibility is mine alone.

1 UN Doc. A/60/L.1, at documents-dds-ny.un.org/doc/UNDOC/LTD/N05/511/30/pdf/N0551130.pdf, paras. 73, 134.

2 Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), 3 ICJ Pleadings, 244 (argument of Louis Sohn).

3 This term draws inspiration of the "General Part" in criminal codes and civil codes, and is used for brevity and convenience. Here the provisions relating to amendments to the UN Charter are not included, though they are relevant.

described in paragraph 8 below, proposals for enlarging the membership of the Court were not accepted, while amendments have been made to the Charter in order to enlarge the membership of other UN organs.

2. Yet reform proposals regarding the ICJ abound.[4] They have been made by States, official bodies including the Court itself,[5] learned societies including the International Law Association and *l'Institut de droit international*,[6] and last but not least, individuals.[7]

3. Some proposals would require amending the UN Charter and/or the Statute, while others would not. As we know, no amendments have ever been made to the ICJ Part of the Charter, while the Statute of the Permanent Court of International Justice (PCIJ) was amended once by the Protocol of 14 September 1929. In 1998, the General Assembly requested the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization "To continue to consider, ... practical ways and means of strengthening the Court, while respecting its authority and independence, on the understanding that whatever action may be taken as a result of the consideration will have no implications for any changes in the Charter of the United Nations or in the Statute of the International Court of Justice".[8] This would seem to exclude any possibility of

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4 For general assessments, see Wolfram Karl, Article 69, in: Andreas Zimmermann, Karin Oellers-Frahm and Christian Tomuschat (eds), The Statute of the International Court of Justice: A Commentary (Oxford University Press, 2006), 1481–1486; idem, Article 70, ibid., 1487–1490; Shabtai Rosenne, Law and Practice of the International Court: 1920–2005 (4th edn, 2006), 93–96.

5 For proposals made by the Court, States and other official bodies, see summaries and evaluations by Wolfram Karl, above n.4.

6 For general discussion, see, e.g., ABILA Committee on Intergovernmental Settlement of Disputes, Reforming the United Nations: What about the International Court of Justice?, 5 Chinese JIL (2006), 39; BIICL Study Group, The International Court of Justice: Efficiency of Procedures and Working Methods – Report of the Study Group established by the British Institute of International and Comparative Law as a contribution to the UN Decade of International Law, 45 (Suppl) ICLQ (1996), republished with comments in Derek W. Bowett et al., The International Court of Justice: Process, Practice and Procedure (1997); ILA, Report of the 46th Conference (1954), 37–192; idem, Report of the 47th Conference (1956), viii, 64–145; 45 Annuaire de l'Institut de droit international (1954–II), 296.

7 See, e.g., ICJ Registry (ed.), A Dialogue at the Court: Proceedings of the ICJ/UNITAR Colloquium held on the occasion of the Sixtieth Anniversary of the International Court of Justice, at the Peace Palace on 10 and 11 April 2006 (2007); Sienho Yee, A Proposal for Formalizing the "No Case Exists" Objections Procedure at the International Court of Justice, 4 Chinese JIL (2005), 393–416; Mohamed Sameh M. Amr, The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations (2003), pp. 380 et seq.; Geoffrey Palmer, International Law and the Reform of the International Court of Justice, in: Antony Anghie and Garry Sturgess (eds), Legal Visions of the 21st Century: Essays in Honor of Judge Christopher Weeramantry (1998), 579–600; Connie Peck and Roy S. Lee (eds), Increasing the Effectiveness of the International Court of Justice (1997); Louis Sohn, Important Improvements in the Functioning of the Principal Organs of the United Nations That Can Be Made Without Charter Revision, 91 AJIL (1997), 660; Lori Damrosch (ed.), The International Court of Justice at a Crossroads (1987); Louis B. Sohn, Broadening the Advisory Jurisdiction of the International Court of Justice, 77 AJIL (1983), 124.

8 A/RES/53/106, para. 4(e), at daccessdds.un.org/doc/UNDOC/GEN/N99/762/55/PDF/N9976255.pdf.

amending the ICJ Part. Barring a change of this policy, any reform proposals that would require such amendment would seem to be an academic exercise.

4. Furthermore, proposals have been made to call upon the United Nations General Assembly (UNGA) to take certain measures that could have achieved the same aim without amending the ICJ Part of the Charter. These proposals do not seem to have met with any success.

5. The ICJ, however, has been in a continuing process of interpreting the Statute, adopting, interpreting and revising its procedure and working methods to promote efficiency. By doing this, the Court in fact has been effecting reforms in its day-to-day practice and operation.

6. The purpose of this Preliminary Report is to review some of the more significant reform proposals regarding the ICJ and to make some suggestions for further consideration, with a view to producing a second report before the 2010 meeting of the International Law Association at The Hague.

1.2 Significant existing proposals

7. The number of existing reform proposals regarding the ICJ is large. Here, only those that are considered more significant will be briefly discussed. These proposals can be categorized in different ways such as by their effect.[9] For convenience, they will be discussed in following order by subject matter: (a) composition of the Court; (b) jurisdiction: contentious and advisory; (c) applicable law—Article 38 of the Statute; (d) procedure and working methods; (e) working conditions of the Court; (f) the role of the Court and its current workload and type of cases in hand and (g) measures to be taken at the UNGA.

1.2.1. Composition of the Court

8. Membership. A proposal was made by several States in 1956/57 to enlarge the membership of the Court so that it would correspond, on the basis of equitable representation, to the UN membership at large. This was not pursued subsequently.[10] At present, in anticipation of the possible enlargement of the United Nations Security Council (UNSC), a proposal has been made by a committee of the American Branch of the International Law Association (ILA)[11] to enlarge the membership of the Court so that it would mirror that of the UNSC, more or less on the model of the expansion of the European Court of Human Rights. First of all, we may note that although the Court is supposed to be representative of the main forms of civilization and of the principal legal systems of the

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9 See, e.g., Georg Schwarzenberger, Second Report on the Review of the Charter of the United Nations, in: ILA Report (1956), 119–120.

10 See Karl, Article 69, above n.4, 1483–1484.

11 ABILA Committee on Intergovernmental Settlement of Disputes, above n.6, 40.

world under Article 9 of the ICJ Statute, there is no requirement that it would mirror the membership of the UNGA or the UNSC. Secondly, there is no inherent need to enlarge the membership of the Court in order to achieve the goal within the meaning of Article 9. Of course, Article 9 could be changed in future reforms too, but that would give us an all together different framework. Thirdly, as a deliberative body, there may be an optimal point where a proper balance may be struck between size and efficiency. The current membership so far seems to have worked well, and may be close to that optimal point. Finally, voting patterns shown in the judgments[12] do not suggest any problems relating to its membership that need alleviating. Accordingly, these proposals for enlarging the membership may not have merit.

9. Re-election and tenure. Proposals have been made to eliminate eligibility for re-election with a corresponding expansion of tenure to 12 years, in order to avoid the possible problems of a Judge coming up for re-elections who, in making judicial decisions, may feel a need to please the future electors. This proposal seems to be a reasonable one, aiming to promote the judicial character of the Court, although, on the one hand, the politics of judging may still exist even if the proposal is accepted, while on the other hand, the proposal presumes a certain weakness in the Judges. Furthermore, extending the tenure to 12 years may have its downside; it will take longer for a Judge who is not performing well to leave the Court.

10. Female members of the Court. Proposals have been made to elect more female members of the Court. The fact that in the entire history of the PCIJ and the ICJ only one female member (Judge and President Rosalyn Higgins) has been elected and one female Judge ad hoc (Mme S. Bastid) appointed by a non-national State of the appointee bespeaks the soundness of this proposal. But this is a delicate issue. Rigidity regarding the gender of the candidates may produce adverse consequences. For example, a form of "quota" method of voting for judges of another international court may have led to a feeling of dissatisfaction with the voting patterns in the elections.

11. Age limit. Proposals have been made to apply an age limit to candidacy or even judgeship on which opinion may differ.

1.2.2. Jurisdiction: contentious and advisory

12. Many proposals have been made to expand the jurisdiction of, and/or access to, the Court. These were made primarily when the Court was perceived to be under-utilized and under the perception that the international organizations do not have adequate forums for settlement of disputes.

13. Some of these proposals would expand the Court's contentious jurisdiction by, for example, reformulating Article 36 of the ICJ Statute, such as adopting an "opt out" clause on

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[12] See, e.g., Edith Brown Weiss, Judicial Independence and Impartiality: A Preliminary Inquiry, in: Lori F. Damrosch (ed.), The International Court of Justice at a Crossroads (1987), 123–134.

jurisdiction similar to the type of reservations in the Law of the Sea Convention.[13] Noting the difficulty in implementing this in the Statute, regional treaties were considered ripe for experiment. Some other proposals would achieve the same or similar result by giving intergovernmental organizations or even other "public international law organizations", the capacity to be parties in a case before the Court.

14. To the extent that the Court now enjoys a heavy caseload and that the existing mechanisms for settling disputes between intergovernmental organizations and States are adequate, as was the view of the Charter Committee in 1999,[14] these proposals may now have lost their force. International organizations have a variety of means at their disposal such as the advisory jurisdiction of the Court and its innovative form which some have dubbed "'binding' advisory opinions".[15] In any event, contentious jurisdiction really depends on the political attitude of States, and efforts should be made to promote a "go to Court not war" culture.

15. Some proposals would expand the Court's advisory jurisdiction by allowing more international organizations or by having the UNGA authorized more such organizations to seek advisory opinions from the Court. Some would give the UN Secretary-General (UNSG) the power to do the same. To the extent that these proposals were motivated by a perceived relatively infrequent recourse to Advisory Opinions, it has been noted that such a state of affairs is "not necessarily a matter to be regretted".[16] In addition, granting such a power to the UNSG may upset the delicate political balance at the UN and may offend the cardinal principle of international dispute settlement by consent.

16. Proposals have also been made to permit some sort of "referral advisory jurisdiction" similar to that enjoyed by the European Court of Justice so that international courts and tribunals may, pending decision in a case, seek advice from the ICJ, in order to promote the unity of international law. Proposals have been made to allow States to seek advisory opinions in concrete disputes, which are not new. If these proposals had any attraction at a time when the ICJ was under-utilized, they are now unrealistic. They may lead to an even heavier caseload that the Court will have trouble handling—despite the fact that it has proven its ability to move very fast recently—and may lead to tension with the consent principle and with the need to protect the interests of third parties.

1.2.3. Article 38 of the Statute

17. Very few proposals seem to have been made regarding this issue.[17] However, proposals have been made to fix the apparent logical mistake in Article 38(1)(b) (custom "as evidence

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13 See unnamed speaker, in ICJ Registry (ed.), A Dialogue at the Court, above n.7, 12.

14 A/54/33 (May 1999), paras. 110–116.

15 Robert Ago, "Binding" Advisory Opinions of the International Court of Justice, 85 AJIL (1991), 439.

16 Dame Rosalyn Higgins, A comment on the Current Health of Advisory Opinions, in: Vaughan Lowe and Malgosia Fitzmaurice (eds), Fifty years of the International Court of Justice (1996), 567, at 581.

17 There has been some debate on whether the list of sources in Article 38 of the Statute is exhaustive. See, for example, Alain Pellet, Article 38, in: Andreas Zimmermann et al. (eds), above n.4, 700–714.

of a general practice accepted as law") and to remove "civilized" from the inappropriate phrase "civilized nations", which would not affect the substantive meaning of the article.[18] Both proposals are in the nature of bringing the plain meaning of the terms of the Statute into line with the meaning that has been applied in actual operation by the Court, which reflects better the meaning intended by the drafters. This is also evidence that the Statute has been "reformed" in practice by the Court.

1.2.4. Procedure and working methods

18. Since the end of the Cold War, the Court has experienced a change of fortune, with its caseload being kept very heavy. This factor, plus the perceived excessive length of time that it took for the Court to complete a case, caused many to make proposals for improving efficiency at the Court, by streamlining its procedure and working methods. These proposals have argued for a variety of positions, such as formalizing a "no case exists" objections procedure,[19] eliminating or modifying the Note system.[20] As these proposals are detailed themselves[21] and about detailed provisions in the Statute, the Rules of Court and other instruments, it is impossible to enumerate and analyse them here. Also, some of these have already been adopted by the Court.

19. The Court itself has been very active in re-evaluating these matters and has adopted many measures to improve the administration of justice. Probably, the most important of these is the interpretation of provisional measures indicated under Article 41 of the Statute as binding.[22] This decision is no doubt a desirable one, although it may be considered an innovation. Another important innovation is to effectively permit the parties in a case to select members of a Chamber if they decide to request the formation of one.[23] Other important measures include the elimination of the judicial "exchange of notes" for decisions in the preliminary phases of most cases;[24] the promulgation of a new form of instruments called "Practice Directions";[25] the periodic revision of rules so as to streamline procedures including setting out a shorter time limit for presenting preliminary objections,[26] and providing for clearer guidance on counter-claims[27] and for receiving input

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18 See Sienho Yee, Arguments for Cleaning up Article 38(1)(b) and (1)(c) of the ICJ Statute, 4 Romanian JIL (2007), 33–43.

19 See Sienho Yee, A Proposal for Formalizing the "No Case Exists" Objections Procedure at the International Court of Justice, 4 Chinese JIL (2005), 393–416.

20 Dame Rosalyn Higgins, in Bowett et al., above n.6, 102–104.

21 See BIICL Study Group, in Bowett et al., above n.6, 73–75; unnamed speaker in ICJ Registry (ed.), A Dialogue at the Court, above n.7, 24–25.

22 La Grand, ICJ Reports 2001, 466.

23 From available information, one can tell that formally the parties do not choose; the reality is that they do.

24 ICJ Press Release 2002/12, para. 5. This mirrors, to a large extent, the proposal made by Dame Rosalyn Higgins, in Bowett et al., above n.6, 102–104.

25 See ICJ Annual Report 2005–2006, para. 19. The text of these directions can be found at www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0.

26 See new Art.79 of the Rules of Court.

27 See new Art.80 of the Rules of Court.

from international organizations regarding the construction of certain treaties.[28] In addition, the Court or perhaps the President acting alone seems to have been moving the parties forward in the proceedings faster than before and keeping a tighter control of the oral proceedings.[29] These no doubt have helped to improve efficiency to a great extent, and the Court appears to be functioning with relatively great dispatch recently, especially where provisional measures are requested.[30] Of course, the main culprits for delay in the proceedings are really the parties in a case themselves.

20. Outsiders such as the ILA would not have any comparative advantage, vis-à-vis the Court, in dealing with the concrete working out of these issues. Still it is worth considering whether the Court has performed well or has done enough to prepare itself to do so in "complex litigation" cases where intervention is in issue or where a cluster of cases based on the same factual or legal complex have been filed such as the *Legality of Use of Force* cases. Many issues are involved and it may be worthwhile for the Court to examine this question and perhaps provide further guidance in some form.[31]

21. The success of a judicial system normally results from the contribution of both the bench and the bar. While the Court has been making admirable efforts to promote the administration of justice, it is curious that there is neither an organized ICJ Bar nor a model code of conduct for practice before the Court. Such a bar and such a code would seem to be necessary for the promotion of professionalism in the practice before the Court. First of all, some of the problems if any before the Court have been caused by the poor quality of the practitioners, including agents and lawyers, litigating before the Court. Serious mistakes have been made. Fraudulent documents have been submitted. The President has had to give very clear directions to some advocates during oral proceedings. These problems may have been aggravated by the appearance of more and more lawyers who are not specialists in ICJ jurisprudence. A proper professional code of conduct may have prevented some of these from occurring. Secondly, the legal profession everywhere in the world prides itself on being able to promote professional competence and to apply a certain level of self-discipline and the organized bars around the world are performing this function. Perhaps the ways and means of organizing an ICJ Bar and adopting a Model Code of Conduct for practice before the Court should be considered.

1.2.5. Working conditions of the Court

22. The working conditions of the Court are apparently modest indeed, compared with other significant international courts and tribunals and even the highest national courts. As a result, proposals for improving these conditions have been made since a long time ago. The Court itself proposed in 1969 that the seat of the Court may be removed to another

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28 See new Art.43 of the Rules of Court.

29 See generally ICJ Press Release 2002/12 and the Comptes Rendus in some of the recent cases.

30 See, e.g, La Grand (Germany v. the United States), provisional measures, ICJ Reports 1999, 9.

31 See BIICL Study Group, in Bowett et al., above n.6, 65–66; James Crawford, The International Court of Justice, Judicial Administration and the Rule of Law, ibid., 116–122; Lori F. Damrosch, Multilateral Disputes, in: Lori F. Damrosch (ed.), The International Court of Justice at a Crossroads (1987), 376–400.

location,[32] apparently when it was engaged in a diplomatic struggle with the host State for the construction of additional premises. Such proposals for a better resourced Court have also been made by others.[33]

23. In recent years, the Court has made many direct requests to the UNGA for improving its working conditions. Against a background of great successes at the Court in recent years, it is ironic to see that the Court has had to be wrestling, at the UNGA, with attempts to reduce judicial salaries and miserly grants of law clerk positions.[34]

1.2.6. The role of the Court and its current workload and type of cases in hand

24. The good news about the Court is that it enjoys a heavy workload. The bad news may also be that it enjoys a heavy workload. Furthermore, the heavy workload includes cases dealing with a variety of legal matters and, recently, cases of complex factual questions. The Court's Annual Report 2006–2007 noted in paragraph 11: "The subject-matter of these cases is extremely varied. As well as 'classic' territorial and maritime delimitation disputes and disputes relating to the treatment of nationals by other States, the Court is seized of cases concerning more 'cutting-edge' issues, such as allegations of massive human rights violations, including genocide, or the management of shared natural resources".

25. This situation may lead one to ask whether there may be tension between the Court's role as the principal judicial organ of the United Nations and the World Court and its workload and whether it might be more appropriate for some matters to be dealt with by other organs including other tribunals and the ICJ's own experts and assessors. The Court seemed to strike a good balance in the Genocide Convention case (merits) by seeming to apply a certain measure of the idea of "respect for institutional competence", both in declining to accept the challenge to its case law on a point of general public international law by the International Criminal Tribunal for the former Yugoslavia (ICTY) and in according "highly persuasive" value or "due weight" to the various factual findings and evidentiary decisions of the ICTY.[35] Perhaps, other response measures can be considered.

1.2.7. Measures to be taken at the UNGA

26. In recognition of the difficulty to amend the ICJ Part of the Charter, various proposals have been made for the UNGA to take measures to achieve the same aim without having to promote any formal amendments. The proposed measures include passing a resolution

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32 See A/7591 (20 June 1969) and Add. 1 and 2; ICJYB (1968–1969), 108, as cited in Karl, Article 70, above n.4, 1489.

33 BIICL Study Group, in Bowett et al., above n.6, 47–49.

34 See Statement by H.E. President Rosalyn Higgins before the UNGA 2007, 5–7, at www.icj-cij.org/presscom/files/3/14113.pdf; ICJ Annual Report 2006–2007, paras. 23–24; ICJ Annual Report 2005–2006, paras. 20–21.

35 ICJ, Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, ICJ Reports 2007, paras. 223, 402–407.

indicating its reluctance to elect judges over 70 years of age.[36] The UNGA is not anxious to take any such measures.[37]

27. In the light of this inaction and of the recent successes of the so-called "Like-minded Group of States" in pushing through its agenda in the negotiation of the Landmine Convention and the Rome Statute of the International Criminal Court, it is worth noting that no such "Like-minded Group of States" or "League of ICJ-Friendly States" seems to exist to promote the greater use of the ICJ or certain positions at the UNGA, such as pushing for female candidacies and more funding for the Court. Such a group, if large enough to constitute a critical mass of the UNGA membership, would be a force to reckon with.

2. Comments Received

28. The Preliminary Report was presented (by another member of the Study Group due to my absence) and discussed at the meeting of the UN Reform Study Group at the ILA Conference in Brazil in 2008. Comments were received at the Brazil Conference and also from various experienced judges and practitioners in the field. The comments received were generally positive, although there were some comments calling for further work. Given the limited mandate for the report as a survey, fair differences of opinion as well as the perceived difficulty if not impossibility in changing anything in the ICJ Statute, a decision has been made not to make any changes to this Preliminary Report. Rather, I will respond to some of the comments here and also describe some of the subsequent developments relating to issues dealt with in the Preliminary Report.

29. Some comments received from members of the Study Group address the scope, focus as well as the purpose of the Preliminary Report. These comments would change the mandate for this Report.

30. Some comments relate to the working method in writing up the Preliminary Report, calling for empirical validation such as interviewing or sending questionnaires to the Judges. While it is always desirable to seek empirical validation where possible, the survey nature, again, of this Report does not render the Report ripe for such an empirical treatment. Furthermore, given the busy schedule of the Court and the delicate nature of dealing with the Judges, such an effort may not be fruitful. Of course, I have taken cognition of the need for some kind of validation. For this reason I had sought comments from various experienced Judges[38] who had served at the Court for a long time as well as from veteran practitioners. Their comments had been incorporated in the Preliminary Report.

31. There were some specific comments relating to the optimal size of the Court, which was discussed in paragraph 8 in the Preliminary Report. The view expressed there is that no

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36 See BIICL Study Group, in Bowett et al., above n.6, 74.

37 The UNGA did take action (A/Res/50/54 (1995)) to remove the review jurisdiction regarding decisions of the UN Administrative Tribunal, but this is not a Statute or Charter amendment question.

38 These include President Rosalyn Higgins (as she then was), as noted in footnote ** above.

change should be made. As mentioned, several persons experienced in the affairs of the Court had been consulted previously. Subsequently I have discussed this issue with additional experienced persons.[39] They were all strongly against expanding the Court, saying that a bigger ICJ will make its business more difficult to manage.

32. In response to the view that the current size of the ICJ, with 15 members, is probably the optimal one for a world deliberative body, a counter-argument has been put forward: If the European Court of Human Rights (ECHR) with 47 members can work as a deliberative body, why can't an ICJ with a bigger number of members? This counter-argument however improperly fixates the attention on a comparison of the number of judges, while disregarding other more important factors. The size of the ECHR[40] is such that it does not adjudicate any case in plenary with all its 47 members, but only in a chamber—a very small slice of the court (this is true even of the Grand Chamber)—or an even smaller formation, leading to the result that the court is never representative of the entire "Convention space". On the other hand, the ICJ normally works *in plenary*, with judges representative of the whole world (or "the main forms of civilization and of the principal legal systems of the world", as stated in Article 9 of the Statute), and that is one of the important reasons why States resort to the ICJ for the settlement of their disputes. They hope that in that composition, the ICJ is more likely to be free of prejudices. If States would like to resort to a small part of the ICJ for the settlement of their disputes, they can take advantage of the Chamber facility available under the Statute. Experience has shown that very few States have done that.

33. Despite its demerit, the counter-argument enjoys some popularity. In the light of this, it may be of some importance to condition any enlargement of the Court on the consent of, or at least thorough consultation with, the Court itself, as the Court is the best institution to evaluate whether its enlargement may be detrimental to its character and effectiveness.

34. A question was asked as to whether express, specific provisions should be added to the Statute to ensure the representation on the ICJ of the "the main forms of civilization and of the principal legal systems of the world". As we know currently there are "unwritten rules" dealing with regional grouping and regional representation at the UN. So far these unwritten rules have worked well, and there is no indication that this will not be the case in the future, although there is some speculation about whether some big States may lose their "traditional representation", so to speak, if only the normal informal regime is relied upon. Furthermore, express, specific provisions may bring rigidity into the system that may be difficult to change in the future when for example there are changes to the regional groupings at the UN. In short, it is not advisable to add express, specific provisions on ensuring the representation on the ICJ of the "the main forms of civilization and of the principal legal systems of the world".

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[39] These included one former Judge who had served as a member of the Court for a long time as well as its Vice-President and President.

[40] See European Convention on Human Rights, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf; Rules of Court, http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Other+texts/Rules+of+Court/.

3. Subsequent Developments

35. Since the Preliminary Report was submitted in August 2008, there have been some developments relevant to the issues and proposals discussed above. It will be useful to review these briefly.

36. The Court continues to enjoy a heavy caseload, to conduct its business with dispatch and to command the respect and confidence of the world. New cases and requests for advisory opinion keep coming to the Court. Of course, the Court's work product has not gone without criticism,[41] as would be expected. One cannot but say that the Court enjoys general success. There is more or less general satisfaction with the Court.

37. There is no evidence that the various UN committees (including the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization[42]) have meaningfully considered issues relating to ICJ reform since the submission of the Preliminary Report. Apparently no need has been felt for such reform.

38. Regarding female members of the Court, an issue discussed in paragraph 10, Ms. Xue Hanqin of China and Ms. Joan E. Donoghue of the USA have been elected to fill the casual vacancies resulted from the resignation of two Judges. As far as female membership is concerned, these are encouraging developments.

39. The Court continues to innovate regarding its procedure and working methods, with the latest revision of its Practice Directions issued on 20 January 2009.[43] This shows that the Court is of course the master of its procedure and management and continuously adapting itself to the evolving needs in this regard.

40. The working conditions of the Court seem to have improved as of 2010. In contrast to the normal urgent tone when requesting further posts and funding, the Court's Annual Report for 2009-2010 noted that "Regarding the budget for the 2010-2011 biennium, the Court was pleased to note that its requests for new posts and for an appropriation for the modernization of the Great Hall of Justice, where it holds its hearings, were largely granted".[44]

41. In paragraph 21 of the Preliminary Report, a proposal was made for the consideration of "the ways and means of organizing an ICJ Bar and adopting a Model Code of Conduct for practice before the Court". The implementation of this proposal appears to be outside the purview of our Study Group. In addition, this proposal touches upon the competence of

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41 See, e.g., Yehuda Z. Blum, Consistently Inconsistent: The International Court of Justice and the Former Yugoslavia (Croatia v. Serbia), 103 American JIL (2009), 264-271; Sienho Yee, Notes on the International Court of Justice (Part 4): The Kosovo Advisory Opinion, 9 Chinese JIL (2010), 763-782.

42 See A/64/33 (2009); A/65/33 (2010).

43 See ICJ Press Release No. 2009/8 (http://www.icj-cij.org/presscom/files/3/14983.pdf).

44 ICJ Annual Report 2009-2010 (A/65/4), para. 291.

another study group of the ILA, namely, the Study Group on the Practice and Procedure of International Courts and Tribunals, co-chaired by Philippe Sands, Laurence Boisson de Chazournes and Campbell McLachlan. In the light of these factors and at the suggestion of various persons, I contacted Philippe Sands on 17 August 2008 by email to inquire into the possibility of working with that study group on these proposals. Subsequently the Preliminary Report was also sent to him. In 2009, the Study Group on the Practice and Procedure of International Courts and Tribunals started to draft a set of "The Hague Principles on Ethical Standards for Counsel appearing before International Courts and Tribunals". This set of principles has been adopted at the ILA Conference at The Hague in August 2010.[45] These principles are formulated in a general fashion to apply to all international courts and tribunals including the ICJ.

42. No effort however appears to have been made to organize an ICJ Bar, although the comments received indicate some interest in this proposal. Several experienced practitioners have sent comments expressing support for this proposal and for the view that such a Bar and a Code would work only if there are sanctions. It would seem that the inherent power of the Court to regulate practice before it encompasses the power to impose sanctions. This seems however a power that the ICJ has not been anxious to assert. One speculation is that the perceived special status of the agents and lawyers who represent sovereign States before the Court has resulted in the current situation.

43. Nor does any effort appear to have been made by anyone to organize an "ICJ Friends" group at the UNGA to promote the effectiveness and wider use of the Court, as discussed in paragraphs 26-27 in the Preliminary Report. The UN Secretary-General, as well as some member States of the UN (e.g., Norway and Switzerland), has called for the greater acceptance of the Court's jurisdiction and greater resort to the advisory proceedings in the context of promoting the international rule of law.[46] One wonders what has stopped them from channeling their efforts into a more organized endeavor.

4. Conclusions and Suggestions

44. As discussed above, the ICJ currently enjoys general success and there is more or less general satisfaction with the Court. The situation with the Court is such that no urgent reform is necessary. However, there are some desirable practical measures that may improve the effective use and appeal of the Court.

45. In the light of the general state of affairs regarding the Court and the UNGA directive of 1998 to the Special Charter Committee that ICJ issues should be considered "on the understanding that whatever action may be taken as a result of the consideration will have no implications for any changes in the Charter of the United Nations or in the Statute of the

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45 http://www.ila-hq.org/download.cfm/docid/90B50C71-23D6-4366-B5E488C89D96559A.

46 See generally Report of the Secretary-General, Strengthening and coordinating United Nations rule of law activities, A/63/226 (2008).

International Court of Justice",[47] no measures should be proposed that would require amending the Charter of the United Nations or the Statute of the Court.

46. Several desirable measures proposed in the Preliminary Report have been well received with one having received treatment in another ILA Study Group as mentioned above in paragraph 38. These measures fall under the broad umbrella of ICJ reform but will not necessitate amendment to the Statute. They may help to promote the effective use and appeal of the Court and to promote a "go to court not war" culture. Indeed, the greater use of the Court depends on the international community's ability to win over the hearts and souls of States. Colleagues may consider calling upon the relevant authorities and persons to study them. These measures are:

a. The adoption of a binding Code of Conduct for practitioners before the Court;[48]
b. The organization of an ICJ Bar that would have disciplinary power;
c. The study of the possible tension between the role of the Court and its current workload and type of cases in hand and any possible solutions;
d. The organization of an "ICJ Friends" group of States at the UNGA to promote positions and measures that are favorable to the ICJ such as greater financial support or greater female participation as Judges or staff members.

[47] A/RES/53/106, para. 4(e), at daccessdds.un.org/doc/UNDOC/GEN/N99/762/55/PDF/N9976255.pdf.

[48] As described in paragraph 38 above, another ILA Study Group has produced a draft code, which as such of course has no binding force.

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