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UN Reform and Collective Security

***The Report of the UN High-level Panel on Threats, Challenges and Change
of December 2004
and the Recommendations of the UN Secretary-General from March 2005***

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UN Reform and Collective Security
The Report of the `UN High-level Panel on Threats, Challenges and Change´
of December 2004 and the recommendations of the UN Secretary-General of March 2005
by Bardo Fassbender
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Foreword

The year 2005, it is to be hoped, will be a decisive year for thorough reform of the United Nations. The High-Level (heads of state and government) Plenary Meeting of the 60th Session of the UN General Assembly (Millennium +5 Summit) is due to meet in mid-September 2005 to discuss the future institutional and sectoral development of the UN. On the agenda are the new challenges of global security, poverty eradication, the implementation of human rights, gender equality and the long-awaited institutional reform of the UN.

The Heinrich Böll Foundation is accompanying this process by taking part in German and international discussions on these central issues and providing comprehensive background information. The Foundation has commissioned Bardo Fassbender of the Institute for International and European Law of Humboldt University in Berlin to comment on the report of December 2004 published by the *High-Level Panel on Threats, Challenges and Change*, a body established by UN Secretary-General Kofi Annan. This report constitutes one of the most important documents in the discussion on UN Reform. Kofi Annan has taken up many of the recommendations of the High-Level Panel in his report outlining the possible direction of reform, *In Larger Freedom* of 21st March 2005.

In this study, Bardo Fassbender summarises the most important issues in the *High-Level Panel's Report* and the recommendations of Kofi Annan's report on reform. He puts the High-Level Panel's report in the context of previous and recent UN reports on reform and sketches out the international discussion on reform which preceded the two reports. Finally he analyses the chosen recommendations of the High-Level Panel's report, for example that of the creation of a Peacebuilding Commission, the use of military force between states, institutional reforms and amendments to the UN Charter. He derives 14 theses which would make the co-ordination and revaluation of the complex process of UN reform possible.

In April 2005 - shortly after the first publication of the Global Issue Paper Nr. 17 – Kofi Annan amended his report with an *Explanatory Note* on the recommendation of the creation of a Peacebuilding Commission. In this, the UN Secretary-General was reacting to the criticism from the G77 countries of the *Peacebuilding Commission* as proposed by the High-Level Panel. The proposal from Kofi Annan was positively accepted by the international community. It envisages a commission composed equally by members of the Security Council and the Economic and Social Council (ECOSOC) – contrary to the proposals of the High-Level Panel – to establish equilibrium between the main UN bodies. The proposal also recommends that the commission limits itself to peacebuilding after a conflict, rather than taking on an early warning role.

The Heinrich Böll Foundation is presently preparing a further working paper on the *Cardoso Commission on UN-Civil Society Relations*, focusing mainly on the relationship between the non-governmental organisations and the United Nations. We

hope that the current working paper will contribute to expanding the current debate on UN Reform, both politically and in terms of content, and that the background information on the different reform proposals put forward by the expert commissions will assist in providing an overall perspective on the UN reform.

Sascha Müller-Kraenner
Director of the Department for Europe and North America

Summary of the Working Paper in Theses:

1. The report of the *High Level Panel* from December 2004¹ owes its overarching importance, in comparison to earlier UN reform reports and proposals, to a number of circumstances: It deals convincingly with questions of both the form and content of fundamental UN reform in the peacekeeping sector. It links the outlook and the aims of “North” and “South” within the international community. It aims to take into consideration the positions of the current US administration but without yielding to it on central issues. It draws conclusions from the three-year “post-September 11” phase in world politics on the one hand, while also representing the conclusion of more than ten years of exhaustive discussion about institutional reform of the United Nations and the Security Council in particular.
2. In many passages, the report reflects assessments and insights that are widely shared by global political and scientific circles. There is broad agreement, for instance, on the fundamental difference between the international “architecture” when the UN was first established compared to the Cold War era on the one hand and the current era on the other hand. There is also widespread acceptance of the broad concept of collective security which informs the report, and an equal recognition of new threats to that security (poverty, infectious disease, environmental degradation, internal conflicts, terrorism, transnational organized crime), in addition to the “classic” threats from international (inter-state) armed conflicts and weapons of mass destruction.
3. However, there is much less agreement on the practical consequences that should result from these findings and fundamental suppositions in respect of new rules of international relations and International Law as well as institutional reform of the United Nations. The reception given to the report’s recommendations is likely to vary accordingly.
4. The report’s premise is the conviction of its authors that the United Nations is not just fundamentally capable of dealing with the main geo-political problems – understood, in the broadest sense, as the creation of a “secure world” as the title of the report makes clear – but is, in fact indispensable to that end, and that individual shortcomings can be solved by reform. This premise is by no means generally accepted, and is certainly not shared by those circles largely responsible for US foreign policy.
5. The members of the panel – and, more cautiously, also the UN Secretary-General – support the current almost universally recognised view under International Law that the Security Council possesses broad authority both to defend the security of a state from external threat (including threats from non-state actors such as terrorist and criminal groups), to prevent and respond to with serious human rights violations within a state, and in particular to take political, economic and military measures according to Chapter VII of the UN Charter. As such, both reports make an important contribution to a more coherent view of a question long disputed both politically and in International Law.

¹ UN Doc. A/59/565; <http://www.un.org/secureworld/>

6. On the question of the legitimacy of the use of military force *by individual states* the report adopts a conservative position. It adheres to the norms of the UN Charter as they were determined in 1945, and emphasizes the central role of the Security Council. It supports neither the legitimacy under International Law of a “humanitarian intervention” without the express authorization of the UN Security Council, such as maintained by the NATO states in the case of the Kosovo war, nor the expansive interpretation of the right to self-defence proclaimed by the current US administration. The report holds firm to the primacy of UN authority over that of the regional organisations by requiring explicit authorization from the Security Council for every use of military force by such organisations.

7. Institutionally, the report argues in essence for a strengthening of the Security Council, to which it assigns a central role in all phases of international peacekeeping (early warning, prevention, restoration of peace in the event of a breach of the peace, reconstruction in the *post-conflict phase*). This approach corresponds to the assessment the Security Council alone has shown itself to be a viable and effective organ of the UN in the period since 1990. Aside from the Security Council, the report’s authors show little interest in the other main bodies of the UN. The relevance and potential of the General Assembly and the Economic and Social Council in dealing with the world’s security problems are assessed, probably correctly, as slight. The International Court of Justice is not mentioned at all. The proposals for reform of the Human Rights Commission also appear to be somewhat non-committal.

8. The panel’s proposal to assign broad powers to a new *Peacebuilding Commission* as a subsidiary organ of the Security Council that would undertake preventive monitoring and supervision of sources of conflict is unlikely to be capable of winning a majority. Most of the G-77 states reject it and the UN Secretary-General has not addressed it in his report.

9. On the question of Security Council reform (expanding it to include additional permanent and/or non-permanent seats, veto right), the report has not achieved a breakthrough. It accepts the dominant role of the current five permanent Council members as a *realpolitical* fact unlikely to be changed through the path of reform. That aside, it also introduces two models of expansion which reflect the positions of the two antagonistic “main camps.” It remains unclear, how the many differences that have prevented reform of the Security Council over the last ten years could be overcome in the coming months,

10. The position of the US government is of crucial importance to the success of UN reform. The Bush administration does not share the premise of the panel’s report, that the world’s security problems, in particular those of their own country, can be dealt with through the mechanisms of “effective multilateralism.” The administration assigns these mechanisms, including the UN organisation, a much more modest and geographically limited role, if at all. Institutionally, it is likely the Bush administration will continue to support only a minimum solution to the expansion of the Security Council, a position which is not majority-capable in the General Assembly. There is clear dissent between the report’s conclusions about the legitimacy of the use of military force under International Law and the declared positions of the US government.

11. Only a few of the report's proposals refer to formal changes to the UN Charter, the prerequisite for which would be corresponding resolutions by the UN General Assembly, which could be passed in the autumn of this year. Aside from a change to Art. 23 (composition of the Security Council and election of the Non-Permanent Members), which would be necessary in the case of reform of the Security Council, the proposals only aim at the deletion of provisions considered to be outdated. The nature of these proposals is closer to text correction than reform.

12. The proposed reforms are overwhelmingly processes meant to be partly initiated by declarations of intent from UN organs. The success of this procedural reform will be decided by the political developments of the coming years. It is not difficult to predict that reforms will probably only be achieved in individual areas and even then to differing degrees.

13. It is to be expected that political debate in the coming months will gradually focus on the question of Security Council reform. This is, on the one hand, regrettable because a large number of other important questions dealt with in the panel's report will be pushed to the background. On the other hand, it is hardly surprising since a good number of governments have invested considerable resources and political prestige in the issue of Council reform over the past few years. Security Council reform in itself is also a relatively specific project.

14. The disputes over Council reform, with the expected vote battles in the General Assembly and a difficult and probably drawn-out ratification phase, could lead the United Nations into a serious crisis. The legitimacy of the Security Council, in particular, could be (further) weakened. The disputes could also become a strain for the European Union and its common foreign and security policy.

1 The Mandate and the Composition of the Panel

The mandate of the panel established by the UN Secretary-General in 2003 (the group's first meeting took place in December 2003, the last in November 2004) is formulated in the *Terms of Reference* (p. 90 of the report). Against the background of the terrorist attacks of September 11, 2001, the US reaction and the US-British war against Iraq in spring 2003, the UN Secretary-General formulated the panel's task as follows:

“The aim of the High-level Panel on Threats, Challenges and Change is to recommend clear and practical measures for ensuring effective collective action, based upon a rigorous analysis of future threats to peace and security, an appraisal of the contribution collective action can make and a thorough assessment of existing approaches, instruments and mechanisms, including the principal organs of the United Nations.”

Expressly excluded from the mandate was the formulation of recommendations on individual political questions or particular conflicts or regions. Moreover, the mandate stated that the panel's work should restrict itself to the “field of peace and security, broadly interpreted“ and should only take account of other questions including

economic and social questions insofar as these were relevant to future threats to world peace.

The panel, which was supported by a secretariat in New York, had sixteen members appointed with regard to the regional proportions of the composition of the UN Security Council. All five permanent Security Council members were represented by one of their own nationals. There were four members from Asian states (Thailand, India, Japan, Pakistan), two each from Africa (Ghana and Tanzania) and Latin America (Brazil and Uruguay) and one member from an Arab country (Egypt), as well as Australia and Europe (Norway). Of the states attempting to gain a permanent Security Council seat, Germany, Nigeria and South Africa were not represented. A breakdown according to the UN regional groups and including the permanent Council members provides the following composition: Western Europe and Others Group (WEOG): 5, Eastern Europe: 1, Asia and Africa: 8, Latin America, 2. Significantly, this composition gave a majority to representatives of the developing countries.

Chairman of the panel was the former Thai prime minister Anand Panyarachun not, as originally planned, the former Norwegian prime minister Gro Harlem Brundtland. A majority of the panel were *elder statesmen*; the average age was over 70. Former Australian foreign minister Gareth Evans appears to have played an important role in drawing up the report.

2 Structure and Content of the Report and the Follow-up of the UN Secretary-General and the UN General Assembly

2.1 The panel's report is clearly laid out and is divided into four main parts. In Part 1 (*Towards a new security consensus*) the attempt is undertaken to identify basic conditions of the current international system – in comparison to the situation directly after the Second World War – that are the pre-requisites for an effective safeguarding of world peace. Consistent with the results of globalisation research, the report draws attention to the growing interdependence of States, but also to issues of international politics. The sovereignty of States is understood not just as the right to autonomy but also as responsibility for the well-being of the State's people as well as that of other peoples. Effectiveness, efficiency and fairness are described as basic elements of a credible system of collective security.

Part 2 of the report (*Collective security and the challenge of prevention*) devotes itself to individual categories of threats to international security in the broad sense, which can be met with preventive measures. The "classic" inter-state war appears only in second place, and even here in connection with internal conflicts (civil wars). The report lists the main threats to peace as *poverty, infectious disease and environmental degradation*. There follow as causes or sources of further threats to peace: *weapons of mass destruction (nuclear, radiological, chemical and biological weapons), terrorism and transnational organized crime*. With the two last-named categories, the report's authors also recognise dangers emanating from non-governmental actors as threats to world peace and international security under the terms of the UN Charter.

In its third part (*Collective security and the use of force*) the report returns to a more narrowly defined concept of security as the questions dealt with here – admissibility

and legitimacy in International Law of the use of military force measured against the corresponding norms of the UN Charter – refer mainly to threats to peace from inter-state war as well as – with some limitations – international terrorism.

Part 4 of the report suggests, under the title *A more effective united nations for the twenty-first century*, institutional reforms to the main organs of the United Nations (with the exception of the International Court of Justice). Among other suggestions is the establishment of a *Peacebuilding Commission* as a subsidiary organ of the Security Council. At the end of part 4 are the panel’s proposals for specific changes to the text of the UN Charter.

The Report of the High-Level Panel in the context of current and past UN Reform Reports

We the peoples: civil society, the United Nations and global governance.
Report of the Panel of Eminent Persons on United Nations-Civil Society Relations („Cardoso-Report“).
UN-Doc. A/58/817, 11th June 2004; <http://www.un.org/ga/58/>

Implementation of the United Nations Millennium Declaration.
Report of the Secretary-General.
UN Doc. A/59/282, 27th August 2004²; <http://www.un.org/ga/59/>

A more secure world: our shared responsibility.
Report of the High-level Panel on Threats, Challenges and Change.
UN-Doc. A/59/565, 29th . November 2004, <http://www.un.org/secureworld/>

Investing in development: A practical plan to achieve the Millennium Development Goals.
January 2005. UN publication, Sales No. 05.III.B.4, www.unmillenniumproject.org

In larger freedom: towards development, security and human rights for all.
Report of the Secretary-General.
UN Doc. A/59/2005, 21st March 2005, <http://www.un.org/largerfreedom/>

Earlier Reports

An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping.
Report of the Secretary-General.
UN Doc. A/47/277 – S/24111, 17th June 1992, <http://www.un.org/Docs/SG/agpeace.html>

Report of the Panel on United Nations Peace Operations (“Brahimi Report”).
UN Doc. A/55/305 – S/2000/809, 21st August 2000, <http://www.un.org/ga/55/>

The Responsibility to Protect.
Report of the International Commission on Intervention and State Sovereignty.
Ottawa, Canada, December 2001, http://www.idrc.ca/en/ev-9436-201-1-DO_TOPIC.html

Strengthening of the United Nations: An agenda for further change.
Report of the Secretary-General.
UN Doc. A/57/387, 23rd September 2002, <http://www.un.org/ga/57/>

² See also reports of the same name of 2002 and 2003, UN Doc. A/57/270 and A/58/323.

2.2 UN Secretary-General Kofi Annan has used the report of the *High Level Panel*, along with the results of the Millennium Project from January 2005³, as the foundation of his own report issued on 21 March 2005⁴ which bears the title *In larger freedom: towards development, security and human rights for all*. In this report, which the Secretary-General presented to the General Assembly personally, Kofi Annan addresses the governments of the UN Member States and challenges them not to miss the “historic opportunity” offered by the year 2005 for wide-ranging UN reform with the aim of realising the goals of the year 2000 Millennium Declaration:

“In September 2005, world leaders will come together at a summit in New York to review progress since the Millennium Declaration, adopted by all Member States in 2000. The Secretary-General’s report proposes an agenda to be taken up, and acted upon, at the summit. These are policy decisions and reforms that are actionable if the necessary political will can be garnered.”⁵

At the same time the Secretary-General emphasised the interdependence of security, development and human rights: “The world must advance the causes of security, development and human rights together, otherwise none will succeed. Humanity will not enjoy security without development, it will not enjoy development without security, and it will not enjoy either without respect for human rights.”⁶ Correspondingly, he presented his proposals as a “package” taking into account the demands and interests of the various groups of states, which should be adopted in its entirety: “I urge you to treat my proposals as a single package.”⁷

The Secretary-General’s report deals with the issue of development cooperation in the second section under the heading: *Freedom from want*. Questions of international security, at the centre of the report by the *High Level Panel* are addressed in the third section entitled *Freedom from fear*. There follows a fourth section: *Freedom to live in dignity*, in which the protection of human rights is placed in direct relation to the rule of law and the democratic form of government. The fifth section (*Strengthening the United Nations*) is devoted to questions of institutional reform of the main bodies of the United Nations and amendment of the Charter. In the appendices, which follow the contents of the individual sections, the report formulates direct recommendations to the heads of state and government assembled in New York.

On reform of the Security Council, the Secretary-General remarked in his speech to the General Assembly:

“I urge Member States to make the Security Council more broadly representative of the international community as a whole, as well as of the geopolitical realities of today.

³ Investing in Development. A Practical Plan to Achieve the Millennium Development Goals; <http://www.unmillenniumproject.org>; cf. Martens 2005.

⁴ UNDoc. A/59/2005; <http://www.un.org/largerfreedom/>

⁵ In larger freedom: Executive summary, introduction.

⁶ Ibid.

⁷ Speech of the UN Secretary-General at the General Assembly, 21st March 2005; UN Press Release SG/SM/9770-GA/10335-ORG/1438.

This important issue has been discussed for too long. I believe Member States should agree to take a decision on it – preferably by consensus, but in any case before the Summit – making use of one or other of the options presented in the report of the High-Level Panel.”⁸

In its proclamation of the three freedoms, the General Secretary’s report echoes a historic document – the founding document of the anti-Hitler coalition of the Second World War – that stood at the very beginning of the history of the United Nations. In the Atlantic Charter of August 14, 1941, US President Franklin D. Roosevelt and British Prime Minister Winston Churchill posited as their essential war aim:

“After the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that *all the men in all the lands may live out their lives in freedom from fear and want.*”⁹

Alongside these two freedoms from fear and want, Kofi Annan places the freedom to live in dignity. At the end of his report, the Secretary-General again quotes President Roosevelt. This comparison of the present with the founding era of the United Nations, which suggests nothing less than a new foundation of the UN, is courageous but fraught with risk. For if the suggested reforms, or a substantial part of them, fail it would cast a heavy shadow on the organisation.

2.3 The UN General Assembly discussed the Report of the Secretary-General on 6, 7, and 8 April 2005. In the course of the three sessions 83 delegations of the Member States addressed the Assembly.¹⁰ There was overwhelmingly positive reaction to the Secretary-General’s proposals in general terms. However most delegations avoided specific commitments. A number of responses, including those of the representatives of the People’s Republic of China and the United States expressed opposition to “artificial time limits” on thorough discussion. “China [is] not in favour of setting an artificial time limit for Council reform, and still less interested in forcing through any immature proposals which lacked consensus”, declared the Chinese Representative.¹¹

On 15 April 2004, the General Assembly adopted by consensus – on the basis of draft A/59/L.60 - Resolution 59/291 on “Preparation for and organization of the High-level Plenary Meeting of the General Assembly” to take place from September 14 - 16, 2005 at the level of Heads of State and Government.¹² The General Assembly decided, *inter alia*, to begin consultations on the Report of the Secretary-General, grouped thematically according to the four main sections of the report and followed by four *interactive round-table sessions* at the end of September. The resolution says a separate session on Financing for Development should be held on September 14, directly after the first plenary meeting, with the participation of representatives of civil society and the private sector. It was also decided to hold informal interactive hearings on 23 and 24 June 2005 with representatives of non-governmental organisations, civil

⁸ Ibid.

⁹ Wording of the Atlantic Charter, Ingo v. Münch (Ed.), *Dokumente des geteilten Deutschland*, vol. 1, 2nd ed., Stuttgart 1976, p. 3 f.

¹⁰ Summaries of the speeches in: UN Press Releases GA/10337, GA/10338 and GA/10339 6th, 7th and 8th April 2005.

¹¹ UN Press Release GA/10337 6th April 2005.

¹² UN Press Release GA/10342 15th April 2005.

society organisations and the private sector under the chairmanship of the President of the General Assembly and to ask the President of the General Assembly to issue a summary report on the hearings.

Brazil, Germany, India and Japan, who have formed an alliance to support each other's candidacy for a permanent Security Council seat, intend to promote reform of the Security Council over the coming months in the following three steps:

1. Adopt framework resolution by summer
2. Select new permanent members in the General Assembly
3. Adopt resolution to amend Charter¹³

Accordingly the draft of a so-called framework resolution should be presented to the General Assembly for a vote. The draft would ask the General Assembly to decide an expansion of the Security Council by six permanent and three-to-four non-permanent members. Only in the second step would the General Assembly be asked to determine which states should occupy the new permanent seats. Finally, in a third step towards the end of this year the relevant amendments to the Charter would be decided according to Art. 108 of the UN Charter. This last resolution would then be placed before the parliaments of the Member States for ratification according to the laws of their individual constitutions.

3 On the Status of the Reform Debate before the Report

3.1 Expansion of the Security Council

In a report of September 2002, UN Secretary-General Kofi Annan declared that the process of Security Council reform had come to a standstill. ("the stalled process of Security Council reform").¹⁴ It is true that by this point in time almost ten-years of negotiations at the various levels – including an "Open-ended working group" of the General Assembly – had lead nowhere.¹⁵ The strong pressure for reform in the first half of the 1990s had given way to disenchantment, even resignation, on the part of the concerned governments. Various divergent interests and intentions of the States and groups of States had become entangled into a Gordian Knot¹⁶ of reform, blocking the commonly proclaimed goal of expansion of the Council. Only the most important differences, which essentially continue to persist today, can be highlighted here:

- Although an expansion of the Council by nine non-permanent seats – according to the model which saw an increase in the number of these seats from six to ten in the year 1963 – met with general agreement, there was no agreement on the creation of new permanent seats. These were seen as an

¹³ "Reform '05" - Joint Position paper by Brazil, India, Japan and Germany on Security Council Reform, March 31, 2005; Text: <http://www.germany-un.org/>

¹⁴ Cf. Report: "Strengthening of the United Nations: An Agenda for Further Change", UN Doc. A/57/387 of 9th Sept. 2002, Para. 20.

¹⁵ Details of the negotiations: Winkelmann 1997, Fassbender 1998a und Fassbender 2003b.

¹⁶ Fassbender 1997.

indispensable element of any Council reform by some states, in particular the candidates for such seats (including Japan, Germany, Brazil and India), while being categorically rejected by other states (including Italy and Mexico).

- The candidacies of Japan and Germany for permanent seats met with broad support, but it was without question that a relevant majority in the General Assembly would only be attained if Africa, Asia and Latin America were also allocated new permanent seats at the same time. However, the regions concerned were unable to agree on countries that would represent them in this manner in the Security Council. In Africa, there was rivalry between Nigeria, South Africa and Egypt. In Latin America, Brazil's ambitions were rejected by the Spanish-speaking countries, in particular by Argentina and Mexico. In Asia, the candidacy of India was opposed in particular by Pakistan; China also adopted a negative stance towards India's intentions. The idea of so-called "rotating permanent seats", which was developed to overcome these difficulties, according to which a region would be represented for a certain number of years by one or two states, is not only a contradiction in itself but also much extremely contentious. It is not supported by those developing countries who are the main candidates for a permanent seat.
- A clear majority of UN members is in favour of abolishing or at least substantially restricting the veto right of the permanent members (Art. 27 §. 3 UN Charter). On the other hand, the current five permanent members („P-5“) reject such plans, and important regions and countries who are striving for a permanent seat (including Africa, Brazil, Germany, India and Japan) insist on joining the Council on an equal footing with the P-5. At the same time the United States is clearly not prepared to concede a veto right to African, Asian or Latin American developing and threshold countries.
- The administration of the current US president George W. Bush has expressed its views on the question of Council reform only rarely and without specifics. Before the Iraq War, it publicly if somewhat noncommittally supported the candidacies of Japan and Germany for permanent seats (without, however, commenting on the veto right), as well as a slight increase in the number of non-permanent seats.

3.2 Legitimacy of the Use of Military Force by a State against other State in International Law

The general prohibition on the use of force (Art. 2 Nr. 4 UN Charter), one of the supporting principles of the rule of International Law since 1945, is in crisis.¹⁷ While the ban on the use of force has certainly been often violated in the past, it has latterly become the norm to challenge it. The justification for the Kosovo intervention by the NATO states (1999) on the principle – highly contentious in International Law and not provided for in the UN Charter – of "humanitarian intervention" has weakened the

¹⁷ Cf. in extenso Fassbender 2004a.

prohibition on the use of force as a legal rule. The US-British attack on Iraq of spring 2003, which took place equally without the authorization of the UN Security Council, and the US claim, since the September 11th 2001 attacks, of a right of “preventive self-defence” call into question the principle of the Charter’s prohibition on the use of force.

The expectation in the years after the geo-political upheavals of 1989/90 that the UN security system established in 1944/45 would be revitalized has not been fulfilled. After the collapse of the approximate global military balance of power based on the bipolarity of the international order and its replacement by the military dominance of the United States, it seems obvious that the US is attempting to expand its room for manoeuvre. The current US government is determined to flout the restrictions of Charter law, if this, in their estimation, is necessary for the security of their country. Moreover, the Bush administration considers the privileged position of the other four Permanent Security Council Members to have essentially lost its foundation in the reality of international relations. The administration does, however, take the People’s Republic of China seriously as a future rival.

There has not been nor is there a sufficient majority of the Members of the International Community in favour of a more precise definition or qualification of Art. 2 Nr. 4 and Art. 51 of the UN Charter (Right to Self-defence) in one or other direction – relaxation or restriction of the unilateral use of military force. For the same reason, no adequately clear common law change in the legal position is to be expected.

4 Analysis of Selected Recommendations in the Report

4.1 The Definition of Collective Security: New Dangers and Challenges

Against the background of the experience of the Second World War, the UN Charter of 1945 saw the “classical” inter-state war as the main threat to world peace. It attempted to deal with this threat with an organised form of collective security, the centre of which is formed by the Security Council and its powers as defined in Chapter VII of the charter.

In contrast, the Panel Report speaks of a concept of *comprehensive collective security*, which is characterized by both new threat situations and new potential causes of threat.

“Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security. So defined, there are six clusters of threats with which the world must be concerned now and in the decades ahead:

- **Economic and social threats, including poverty, infectious disease and environmental degradation**
- **Inter-State conflict**
- **Internal conflict, including civil war, genocide and other large-scale atrocities**
- **Nuclear, radiological, chemical and biological weapons**
- **Terrorism**

• **Transnational organized crime. (Synopsis, Part 2)**

The threats are from non-State actors as well as States, and to human security as well as State security.” (Synopsis)

This expansion of the security concept corresponds with a strong emphasis on the necessity of preventive measures, as the title of the second part of the report – *Collective security and the challenge of prevention* – seeks to underline. While the “classic” breach of the peace could be effectively met by repressive means, with “new dangers” this is either no longer possible or the possibilities are limited. Poverty, environmental degradation and disease cannot be ameliorated or relieved by the deployment of military force. Nor can they be prevented by a single institution or organ of the international community, but only through coordinated deployment of various institutions and mechanisms.

As convincing as this comprehensive concept of international security is, it also has its problematical sides. Some critics see the emphasis of traditional development goals (the fight against poverty and disease; environmental protection) as merely a rhetorical gesture to the developing countries of the South, in an attempt to tie their specific agenda into the report and win them over to its overall aims. Others see the categorization of these development goals as security issues as a kind of trick to try and persuade the governments and the public of industrialised nations, particularly the USA, to increase development cooperation and the financial means expended on it not as a means in itself (which they would presumably not be prepared to do) but because it would be likely to guarantee their own security.

As with the concept of *human security*, critics of the all-encompassing concept of international security contend that the external security of a country like the United States of America or the Federal Republic of Germany is only very indirectly threatened by poverty and underdevelopment in the southern hemisphere and that it is therefore incorrect to place these threat situations on the same level as inter-state wars, civil wars and terrorism.

To see poverty, disease, environmental degradation and organized transnational crime as threats to world peace and international security, would necessarily lead to the recognition of corresponding powers of the Security Council under Chapter VII of the UN Charter. The Security Council would, for example, in the event of serious violations or degradation of natural environmental resources in a State or in the case of the persistent refusal of a government to combat poverty in a suitable and viable manner, be able to take non-military or even military measures against the country in question.

The authors of the Panel Report do not go so far, however. In the section dealing with the fight against HIV/AIDS for instance, the report says only that the Security Council and UNAIDS should hold a second special session on “HIV/AIDS as a threat to international peace and security” to improve recognition of the problem and develop a long-term strategy to minimise the threat (§ 67). By adopting a half-hearted position on these new dangers (not, however, the danger of terrorism, cf. §§ 151 – 153, genocide and serious human rights violations, cf. § 203) it adheres implicitly to a determination of threats to world peace according to the standards of military-policing security.

4.2 Multilateral Prevention

The previous section has already emphasised that the comprehensive concept of international security that informs the panel's report, if taken to its logical conclusion, must perforce lead to the demand to strengthen preventive measures at the national and international level. For the majority of the so-defined threats to world peace and international security cannot be effectively dealt with using repressive (in particular military) means.

“The primary challenge for the United Nations and its members is to ensure that, of all the threats in the categories listed [the six clusters of threats], those that are distant do not become imminent and those that are imminent do not actually become destructive. This requires a framework for preventive action which addresses all these threats in all the ways they resonate most in different parts of the world.” (Synopsis, Part 2)

In each of the sections devoted to the individual categories of danger, the report proposes a cluster of preventive measures. The recommendations are primarily addressed to the UN Member States and international organisations (both regional and global). In the section on poverty, infectious disease, and environmental degradation, for example, the report calls for state development aid to be raised to the agreed goal of 0.7 percent of gross national income, the Doha round of WTO trade negotiations to be concluded by 2006 at the latest, Highly-Indebted Poor Countries to have their debt forgiven and for them to be given easier access to global markets, significantly higher financial means to be allocated to the fight against the HIV/AIDS pandemic, for greater support for the WHO Global Outbreak Alert and Response Network and improved environmental protection beyond the agreements of the Kyoto Protocol (§§ 60 – 72)

Whether and to what extent the panel report's numerous individual recommendations are appropriate, advisable or sufficient can only be determined by a more exact analysis, requiring specialized knowledge in the relevant individual areas (poverty eradication, environmental protection, protection of human rights, disarmament, or crime prevention). However it should not be denied that the Panel has provided a comprehensive overview not only of the often interconnected complex of problems, but also of possible – and realistic – solutions, without restricting itself in regard to the latter to vague general proposals. It is now up to all governments of the Member States and the NGOs to carefully examine the individual recommendations listed in Appendix I of the report, and where appropriate to implement them.

4.3 The Legitimacy of the Use of Military Force between States

On the question of the legitimacy of use of military force by individual states, the report takes a more conservative stance. It holds fast to the norms of the UN Charter, as drawn up in 1945, and emphasises the central role of the Security Council.

“[T]he Charter as a whole continues to provide a sound legal and policy basis for the organization of collective security, enabling the Security Council to respond to threats to international peace and security, both old and new, in a timely and effective manner.”(Abs. 301)

The members of the panel – and more cautiously also the UN Secretary-General¹⁸ – support the view, now almost universally recognized in International Law, that the Security Council possesses widespread powers both to defend a state from external security threats (including those emanating from non-state actors such as terrorists and criminal groups) as well as to prevent and respond to serious human rights violations within a state, and can adopt political, economic and military measures to do so.

“The Security Council is fully empowered under Chapter VII of the Charter of the United Nations to address the full range of security threats with which States are concerned. The task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has.” (Abs. 198)

“We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.” (Abs. 203)

With regard to this “responsibility to protect,” a development in International Law which has its beginnings in the Nuremberg Trials which followed the Second World War, has almost reached its completion.¹⁹ The worldwide abhorrence of the German crimes against the Jewish population had led to the realisation that the traditional freedom of a state under International Law to treat its own nationals “at will”, could no longer endure. But there was still a long way from this insight to the recognition of a right of the community of states to intervene in a country to ensure basic human rights, if necessary with military means.

The report does not, however, support either the legitimacy under International Law of a “humanitarian intervention” without authorisation of the Security Council, as the NATO states maintained they had in the case of the Kosovo War, nor the expanded interpretation of the right to self-defence currently proclaimed by the US government. The report adheres to the pre-eminence of the authority of the UN over that of the Regional Organisations (cf. Art. 53 §1 of the UN Charter) by requiring explicit authorisation from the Security Council for the use of military force by such organisations. The Secretary-General has subscribed to these opinions in his report, in particular characterizing the right of self defence as defined in Art. 51 of the Charter as adequate for the prevention of an *imminent threat* (§ 124).

¹⁸ Cf. Para. 125 of his report: “Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security. As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?”

¹⁹ Cf. Development of this limitation to the concept of sovereignty under International Law, Fassbender 2004b.

This underlining of the Charter's prohibition of the use of force is to be welcomed in principle.²⁰ Furthermore, any change to the relevant provisions of the UN Charter (Art. 2 Nr. 4, Art. 51, Art. 53) aimed at relaxing the prohibition would not enjoy the support of a majority of Members. However this state of affairs means that the problems that have arisen from the changes to the international security situation since the end of the Cold War and following the September 11th attacks have not been solved. In particular, the panel's conservative stance will not convince the US government or dissuade it from the current policies of its National Security Strategy. Thus, the contradiction remains between the normative circumstances of International Law and the openly-declared US policy of deviating from the norms of International Law at their own discretion to protect their own security. The future development of International Law with regard to the prohibition of the use of force is being withdrawn from the Charter's jurisdiction and abandoned to the vagaries of Customary International Law – with highly problematical consequences for the interpretation and application of this law.

The panel has tried to improve this unsatisfactory situation on the level of the law (or the legality) by positing five so-called *basic criteria of legitimacy* (§ 207). The main addressee of these precepts, which borrow heavily from the Christian-Catholic doctrine of Just War, is according to the wording of the report, the Security Council. In actual fact however, the panel is addressing itself to those states, which resort to military measures without explicit authorisation from the Security Council (cf. § 209). They should at the very least, the report says, restrict the use of force by submitting a decision to deploy force to an internal examination against the five benchmark criteria.

It is questionable whether this attempt to limit the use of force through an appeal to the conscience of the relevant governments is likely to be successful. The history of the doctrine of Just War does not offer grounds for such hope. The criteria are so indeterminate that they do little more than mark the outer limits of malpractice. When is the *seriousness of threat* great enough to justify deployment of military force? Which intention is *proper*? When is it a last resort, after the exhaustion of all others? When is a military response proportional?

In the last section of their report, which is devoted to the formal changes to the UN Charter, the panel proposes the deletion of Art. 47 of the Charter relating to the *Military Staff Committee* and the provisions referring to this committee in Articles 26, 45 and 46 (§ 300). The report does not however recommend striking Art. 43 - which since 1945 has become just as impractical - according to which all Members of the UN are obligated to place military forces at the disposal of the Security Council according to the requirements of special treaties. The retention of Art. 43 of the Charter is to be welcomed. Even if the conclusion of such treaty provisions is hardly to be expected even in the foreseeable future, this provision has great symbolic force. Art. 43 offers the United Nations those means, namely its own armed forces, whose existence is the prerequisite of the Charter's prohibition on the use of force in that it provides the vital link between protection and obedience to the law.²¹ Because of the direct link between Art. 43 and Art. 47 – and in order to retain the option of a change

²⁰ Explanation in Fassbender 2004a.

²¹ Fassbender 2004a, pp. 253.

in the function and composition of the Military Staff Committee – the last-named article should also be retained. In any case, the mere formal existence of the committee is inoffensive and has not led to any problems over the past decades. The contention, on the other hand, that the text of the Charter must be brought into line with reality, is not convincing. If one were to take this argument seriously, more central parts of the Charter – such as the provisions on the prohibition of the use of force between States – would have to be changed first. However, amendment of Art. 47 § 2 on the composition of the committee could be considered.

4.4 Institutional Reforms

4.4.1 Security Council

On the question of Security Council reform (expansion, veto right), the report has not achieved a breakthrough. It accepts the dominant role of the current five Permanent Council Members as a *realpolitical* fact unlikely to be changed by any reform proposals. Aside from this, the report presents two models (A and B) for expansion of the Council, which reflect the positions of the two antagonistic “main camps,” – namely the supporters and opponents of new permanent seats. The panel was unable to agree a unified proposal.

The Transmittal Letter from the Panel Chair to the UN Secretary-General refers specifically to this division:

“[T]he members of the Panel disagree about the models put forth for Security Council expansion and the method for determining criteria for Security Council membership. Some members of the Panel believe strongly that only the model involving expansion of permanent membership, albeit without a veto, will equip the Security Council to deal with the new century’s threats. Others believe equally strongly that the alternative model involving elected, long-term but non-permanent members is the better way to proceed.”

It goes without saying that the first group included those panel members from countries who are striving to attain a permanent seat (Brazil, Egypt, India, Japan). However a majority of members considered an expansion according to Model B preferable to the other both in principle and for practical political reasons such as the difficulty of deciding on new permanent members.

However, the first group also rejected conceding the veto right according to Art. 27 § 3 of the UN Charter to new permanent members, although governments of the relevant candidates have so far declared they would not accept “second class” permanent membership, which would place them behind the current five permanent members. The panel explained:

“We recognize that the veto had an important function in reassuring the United Nations most powerful members that their interests would be safeguarded. We see no practical way of changing the existing members’ veto powers. Yet, as a whole the institution of the veto has an anachronistic character that is unsuitable for the institution in an increasingly democratic age and we would urge that its use be limited to matters where vital interests are genuinely at stake. “(Abs. 256)

The UN Secretary-General has essentially adopted the panel's recommendations in his own report (§ 170). More specifically, he has not come down on the side of either the supporters or the opponents of new permanent seats. However, he chose a formulation which leaves open the possibility of further structural change aside from the models A and B: "I urge Member State to consider the two options, models A and B, ..., *or any other viable proposals in terms of size and balance that have emerged on the basis of either model.*" (§ 170, Italics added)

It remains unclear how, in the coming months, the many differences that have prevented reform of the Security Council for the last ten years can be overcome. The stance of the US government will be of crucial importance. The US currently only explicitly supports the candidacy of Japan for a permanent seat – a candidacy which of course cannot be successfully pursued alone. However Washington is possibly prepared to accept some, preferably marginal, expansion of the Council's non-permanent members. The figure of 24 Members cited by both models put forward in the panel's report lies well above proposals for expansion that have in the past met with the sympathy of US officials (20 – 21).

The German government, along with Brazil, India and Japan, intends to introduce a draft resolution along the lines of Model A to the General Assembly in the autumn of this year. According to Art. 108 of the UN Charter, a resolution involving a change to the Charter requires a two-thirds majority of the General Assembly. The current five Permanent Council Members do not possess a power of veto in this vote, although they do have a veto right over the next procedural step which is ratification of the changes. It is difficult to say whether it is politically advisable to expend the effort needed to try and push through a resolution whose subsequent implementation would be extremely difficult or unlikely. It also remains open whether the African group of states will reach agreement by autumn on the states which would occupy the two permanent seats that would be offered to Africa under the terms of the draft resolution.

Notwithstanding its demand in principle for equal rights for Germany with the current P-5, the German government would probably be prepared to accept a permanent seat without a right of veto. Whether this also applies to other candidates more concerned with ensuring their international prestige, in particular Japan and India, is unclear. It also remains to be seen whether the current candidates for permanent seats – or at least some of them – would be satisfied with the lesser option of four-year rotating seats according to Model B, should expansion of the Council by permanent seats prove unachievable. Finally, there remains the possibility of a combination of the two models, so that some candidates are allocated a permanent seat while others are offered rotation according to Model B.

The Current P-5 and the Candidates for permanent and/or renewable Security Council Seats²²

Country	Share of Global Gross National Income (%)	Share of World Population (%)	Contributions to regular UN Budget 2004-06 (%)
USA	32.7	4.6	22.00
Japan	12.6	2.0	19.47
Germany	6.2	1.3	8.66
Britain	4.9	0.9	6.13
France	4.5	1.0	6.03
China	4.0	20.4	2.05
Italy	3.7	0.9	4.88
Mexico	2.0	1.7	1.88
India	1.6	16.7	0.42
Brazil	1.4	2.9	1.52
Russia	1.1	2.3	1.10
South Africa	0.3	0.7	0.29
Egypt	0.3	1.2	0.12
Nigeria	0.1	2.1	0.04
<i>P-5 together</i>	47.2	29.2	35.26

4.4.2 Peacebuilding Commission

The panel report proposes that the Security Council should – following consultations with the Economic and Social Council – establish a *Peacebuilding* Commission as a subsidiary organ according to Art. 29 of the Charter (§ 263). The panel’s main argument for this new body is the lack of an UN institution with the specific task of preventing the collapse of failed states and the escalation of conflicts to the level of wars, as well as to support states in transition from war to peace (§ 261). The report describes the tasks of such a commission thus:

“The core functions of the Peacebuilding Commission should be to identify countries which are under stress and risk sliding towards State collapse; to organize, 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 peacebuilding; and in particular to marshal and sustain the efforts of the international community in post-conflict peacebuilding over whatever period may be necessary.” (§ 264)

These proposals have met with strong criticism from the states of the southern hemisphere who see the proposed commission as a mechanism to subject developing countries – via a violation of their independence – to permanent monitoring and control and prepare the ground for political, economic and military intervention. They maintain that it would in effect be left to the Big Powers to decide which states they consider to be a “country under stress”.²³

²² Source: James D. Fearon, Comments on the Report of the High-level Panel, in: Yale Center for the Study of Globalization 2005, p. 89, 100. For the UN contributions: Scale of assessments for the apportionment of the expenses of the United Nations, Res. of the UN General Assembly A/RES/58/1 B 3rd March 2004. Addition of Nigeria data by the writer, BF.

²³ Cf. Muchkund Dubey, Comments on the Report of the High-level Panel, Yale Center for the Study of Globalization 2005, pp. 55, 64.

The Report of the UN Secretary-General reflects this criticism by recommending that the tasks of the commission be limited to improving and coordinating *post-conflict peacebuilding*:

“A Peacebuilding Commission could perform the following functions: in the immediate aftermath of war, improve United Nations planning for sustained recovery, focusing on early efforts to establish the necessary institutions; help to ensure predictable financing for early recovery activities ...; improve the coordination of the many post-conflict activities of the United Nations funds, programmes and agencies; provide a forum in which the United Nations, major bilateral donors, troop contributors, relevant regional actors and organizations, the international financial institutions and the national or transitional Government of the country can share information about their respective post-conflict recovery strategies, in the interests of greater coherence ...” (§ 115).

The Secretary-General explicitly states: “I do not believe that such a body should have an early warning or monitoring function”(ibid.).

The Secretary-General also does not envision the Commission as a subsidiary organ of the Security Council but as an intergovernmental commission, made up of an identical number of members as the Security Council and the Economic and Social Council as well as representatives of countries providing troops and donor countries. It would be answerable to both the Security Council and ECOSOC (§§ 114, 116, 117). This would distance the commission clearly from the Security Council and its powers according to Chapter VII of the Charter and limit it to a consultative and advisory role only.

The basic usefulness of such a coordinating body for *post-conflict peacebuilding* is beyond dispute. However, as the panel report signals, this limited function means it would have to adapt its work to the specific situation in each country: “[The Peacebuilding Commission] should meet in different configurations, to consider both general policy issues and country-by-country strategies“(§ 265). In essence, therefore, the commission would be a framework within which all States and organisations engaged in a given task of reconstruction could coordinate their measures.

That the Report of the Secretary-General retreats from the Panel’s intention to equip the Commission with a comprehensive preventive role should not lead to a questioning of the corresponding powers invested in the Security Council according to Chapter VII of the Charter. On the contrary, the Council should energetically increase its efforts to confront threats to peace, and human rights violations.

4.4.3 General Assembly

The founders of the United Nations considered the General Assembly the most important UN body after the Security Council. In the UN Charter, the General Assembly is dealt with before all other organs (Art. 9 et sqq) and assigned broad jurisdiction: “The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter (Art. 10, 1st half-sentence). All other main organs report to the General Assembly on their work and their members are elected by the General Assembly. Nor is the General Assembly excluded from discussion of the issues of world peace and international security. It can concern itself both with general

issues and concrete threat situations (Art. 11 and 12). The primacy of the Security Council as posited in Art. 12 of the Charter refers only to the adoption of recommendations in the form of a resolution: where the Security Council is engaged in dealing with a specific conflict or situation, the General Assembly may not put forward a recommendation related to it, other than at the request of the Security Council (Art. 12 § 1).

In light of the current criticism of the General Assembly it is easy to forget its past achievements. The work of the General Assembly has prepared the ground for some of the most important developments in the international order and International Law over the last sixty years. This applies in particular to the development of international human rights safeguards, which are based on the General Assembly's 1948 General Declaration of Human Rights. The General Assembly played an essential role in the great post-Second World War decolonisation movement which reached its climax in the 1960s. The peoples of Africa, Asia and the Americas were able to depend on the General Assembly in their efforts to achieve independence: in 1960 the Assembly had expressly proclaimed the right to self-determination and independence of nations under colonial rule.²⁴ Membership of the United Nations and participation in the work of the General Assembly represented the most important political and legal form of integration of newly independent states in the international community. The General Assembly's *Friendly Relations Declaration* of 1970²⁵ was of major importance to the continuing development of International Law within the framework of the UN Charter. And the development of current Maritime Law as codified in the UN Maritime Law Convention of 1982 was greatly influenced by the General Assembly. Resolutions by the General Assembly often preceded the adoption of universal treaties.

Criticism of the General Assembly focuses in particular on the protracted and at times static nature of its agenda and on its interminable debates which are often repetitive and lost in questions of detail (cf. § 241). There is also criticism of the many subsidiary organs and programmes established by the General Assembly which are seen as costly and inefficient. This criticism is voiced by western States and in particular by the USA. It is partly based on the simple circumstance that in the course of decolonisation the West has lost its majority in the General Assembly and can no longer assert its will over the developing countries of Africa and Asia. The cumbersome nature of the debates is mainly attributable to the circumstance that almost 200 States are represented in the General Assembly, and every delegation has equal rights to speak, or propose a question for discussion by the Assembly. For many smaller states the General Assembly is the only significant international political forum in which they can raise their voice. Any reforms aimed at increasing the efficiency of the General Assembly must take this integrative function of the assembly into consideration.

²⁴ Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV) of the General Assembly, 14th December 1960; Text: United Nations Yearbook 1960, p. 49.

²⁵ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Annex to Resolution 2526 (XXV) 24th Oct. 1970. Text: United Nations Yearbook 24 (1970), p. 788; Christian Tomuschat (ed.), *Völkerrecht*, 2nd edition, Baden-Baden 2004, No. 6.

The panel does not have much to say on the subject of the General Assembly. The report devotes less than a page to the Assembly. It proposes better conceptualization and shortening of the agenda to reflect the contemporary challenges facing the international community and says smaller committees could sharpen and improve draft resolutions (§ 242). The report leaves open the question of whether there should be any changes to the current structure and function of the General Assembly's main committees, in which until now all substantial preparatory work for plenary sessions takes place. It seems reasonable to exclude the possibility that Member States could be prepared to relinquish their membership of these main committees. At the same time, there is already no shortage of smaller bodies such as sub-committees and separate committees of the main committees. The agenda and the resolutions of the General Assembly reflect the political interests and the specific concerns of the more important Member States and Regions, negotiated on the principle of *do ut des*. Organisational and institutional reforms are unlikely to be able to change that in any meaningful way.

The panel's proposal that the General Assembly should establish "a better mechanism to enable systematic engagement with civil society organizations" – in line with the recommendations of the Cardoso Report²⁶ – is somewhat vague and carefully formulated (§ 243). Until now, the General Assembly has provided Non-Governmental Organisations with little opportunity to participate in, contribute to, or inform themselves about its deliberations.²⁷ There are no relevant formal provisions, such as a resolution. In practice, NGO's are allowed to participate in the sessions of individual main committees and subsidiary organs without a right of audience, but not however in plenary sessions. The recommendations of the Cardoso Report do not go much beyond this status quo. Specifically, it suggests joint sessions of NGOs with the delegations of Member States "in contact with but outside the formal sessions of the General Assembly."

Compared with the Report of the High Level Panel, the Secretary-General's comments on the General Assembly are more carefully considered and more specific. While the Panel Report describes the General Assembly (only) as: "the main deliberative organ of the United Nations" (§ 242), the Secretary-General speaks more accurately in his report of "the chief deliberative, policy-making and representative organ of the United Nations" (§. 158). The Secretary-General also correctly draws attention to the problematic nature of the consensus procedure used to adopt an ever greater number of resolutions:

"[U]nfortunately, consensus (often interpreted as requiring unanimity) has become an end in itself. It is sought first within each regional group and then at the level of the whole. This has not proved an effective way of reconciling the interests of Member States. Rather, it prompts the Assembly to retreat into generalities, abandoning any serious effort to take action. ... [M]any so-called decisions simply reflect the lowest common denominator of widely different opinions." (Abs. 159)

The Secretary-General not only suggests, in line with the Panel's recommendation, shortening the agenda of the General Assembly and concentrating on the most

²⁶ Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, UN-Doc. A/58/817.

²⁷ Volger 2005, p. 14.

important issues as well as improving the working methods of the committees (§§ 160, 161, 162), he also proposes strengthening the role and the authority of the president of the General Assembly (§ 160).

In his concluding comment, the Secretary-General observes that none of these reforms will be achieved if Member States do not take an interest in the General Assembly at the highest level of government and ensure that their representatives participate seriously in the Assembly's debates with a focus on achieving results, remarking: "If they fail to do this the Assembly's performance will continue to disappoint them and they should not be surprised." (§ 164)

It is true that the foreign ministries of the Member States take little notice of the work of the General Assembly. While this may be understandable given the already-outlined shortcomings in its work, it results in a vicious circle whereby these shortcomings are not dealt with. The work of the Delegations in New York is not unaffected by the lack of interest of home governments. At the end of the annual general debate at the beginning of the autumn plenary meeting, the presence of delegations in the plenary chamber and in particular the Permanent Representatives of the Member States sinks rapidly.

4.4.4 Human Rights Commission (Council for Human Rights)

The work of the UN Human Rights Commission, a subsidiary organ of the Economic and Social Council according to Art. 68 of the UN Charter, has faced strong criticism in past years. The choice of commission members in particular has led to many disputes. Public opinion in the western states, and especially in the United States, has criticised that states with notoriously poor human rights records have been elected to the commission, or sought election, in order to prevent a negative assessment of their own behaviour (cf. § 182 of the Report of the Secretary-General).

As a means of avoiding these disputes over membership of the Human Rights Commission, the panel proposes that all UN Members should automatically belong to the Commission (*universal membership*) (§ 285). In effect, the Commission would become a committee of the General Assembly for human rights issues. Even if a practical division of responsibilities between the Commission and the General Assembly could be agreed to avoid doubling up on the same issues, it is extremely doubtful that a commission with almost 200 delegates could perform effective human rights work.

The panel members themselves seem to have harboured this misgiving, as they also propose the establishment of an *advisory Council or panel* of fifteen independent experts – comparable with the monitoring committees of the human rights treaties (§ 287).

For the long-term future, the panel report envisages the prospect of replacing the Human Rights Commission with a *Human Rights Council*, which would no longer be subordinate to the Economic and Social Council but equal to it and the Security Council (§ 291). It remains unclear how the composition of this body, which all UN Members could certainly not belong to, would be organised.

The Secretary-General has embraced this idea from the panel in his report although he offers the alternative possibility of establishing a Human Rights Council as a subsidiary body of the General Assembly:

“If the United Nations is to meet the expectations of men and women everywhere – and indeed, if the Organization is to take the cause of human rights as seriously as those of security and development – then Member States should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council. Member States would need to decide if they want the Human Rights Council to be a principal organ of the United Nations or a subsidiary body of the General Assembly, but in either case its members would be elected directly by the General Assembly by a two-thirds majority of members present and voting.” (Abs. 183)

The Secretary-General’s proposal raises serious questions of division of responsibilities and boundaries of competence between the Security Council, the General Assembly, the Economic and Social Council and the new Human Rights Council. The Report of the Secretary-General says nothing about the powers of the new Council; it appears they would correspond to those of the current Commission on Human Rights. The authority of the Security Council to take action against serious human rights violations as a threat to world peace with measures according to Chapter VII of the UN Charter, should remain unchanged.

After tentative analysis of the proposals from the panel and the Secretary-General it appears doubtful whether the recommended organisational changes could remedy the current substantial problems of the Commission on Human Rights. The readiness of the States to fulfil their obligations in International Law to protect human rights and facilitate effective monitoring of their behaviour is unlikely to be significantly increased by changes to the institutional framework within which they discuss human rights questions.

4.5 Amendments to the UN Charter

The Report of the High Level Panel proposes only a few formal changes to the UN Charter (§297-301). The UN Secretary-General has in the main assented to these proposals (§ 216-219). Apart from a change to Art. 23 (Composition of the Security Council and election of Non-Permanent Members), which would be necessary in the case of reform of the Security Council, the proposals are aimed solely at the deletion of provisions deemed outdated. This is not so much reform as text revision.

Firstly, the panel suggests revising the so-called enemy-state clauses of Art. 53 and 107. The victorious powers of the Second World War employed these provisions to exempt their measures against the defeated states, in particular Germany and Japan, from the authority of the United Nations.²⁸ It is the prevailing opinion – shared by the Federal Republic of Germany – that with the admission of the states in question to the United Nations, the enemy state clauses have lost their significance; according to Art. 4, §1 of the Charter, admission of these states means they are automatically

²⁸ Georg Ress / Jürgen Bröhmer, Commentary from Art. 53 UN Charter: Bruno Simma et al (Ed.), *The Charter of the United Nations: A Commentary*, 2nd Edition Oxford 2002, p. 854, 870 et sqq.; and Georg Ress, Commentary from Art. 107 UN Charter, *ibid.* pp. 1330.

recognized as *peace-loving*.²⁹ In Resolution 50/52 of 11 December 1995, the UN General Assembly assented to this view and declared its intention to delete the clauses by amending the Charter. No further action was taken as there was general agreement to resolve the issue as part of an overall reform of the Charter (and in particular the Security Council).

The Panel suggests “revising” the clauses not merely deleting them, so as not to retroactively call into question their validity – and therefore the legitimacy of the measures undertaken by the Allied Powers in Europe and Asia: “[R]evisions should be appropriately drafted to avoid retroactively undermining the legal provisions [intended is: effects] of these articles.” (§ 298)

The UN Secretary-General is less fastidious: “[I]t is high time to eliminate the anachronistic ‘enemy’ clauses in Articles 53 and 107 of the Charter. “ (§ 217) In fact, Art. 107 should be completely deleted and Art 53 insofar as it refers to “enemy states.” According to general principles of interpretation of International Law, no conclusion about the past validity of the provisions is connected to their deletion.

The Trusteeship Council of the United Nations, one of the principal organs of the organisation has, as is generally known, lost its function according to Chapter XIII since the establishment of the self-governing status of the last Trusteeship Territories – The Pacific Islands (1990/1994). The Panel and the Secretary-General now recommend deleting this chapter completely (§§ 299, 218). Thus they have not subscribed to proposals expressed elsewhere to retain the Trusteeship Council and assign it new functions – such as oversight of UN Administrations in areas directly supervised by the United Nations (Kosovo, in the past Namibia and East Timor); UN activities in the context of failed states; or functions in the sphere of universal environmental protection (responsibility for the global commons in the sense of the concept of the common heritage of mankind).

Interestingly however, both the Panel and the Secretary-General want to retain Chapter XII of the Charter dealing with the International Trusteeship System. This is evidently to preserve the future possibility of placing designated territories under the oversight or supervision of the United Nations. The responsible body would then be the General Assembly according to Art. 16 and 85³⁰ of the UN Charter, which if necessary could establish subsidiary organs (Art. 22).

Finally, the Panel and the Secretary-General recommend the deletion of Art. 47 of the Charter dealing with the Military Staff Committee as well as the references to the committee in Articles 26, 45 and 46 (§300). The Panel evidently expects this recommendation to be welcomed by states critical of the predominance of the current P-5: “It is no longer appropriate for the joint chiefs of staff of the five permanent members to play the role imagined for them in 1945.” (§ 300). But critics of P-5 are unlikely to be impressed by this “concession” since the Military Staff Committee has never played a practical role. For the reasons explained above in section 4.3 I consider the proposed deletions to be unnecessary and likely to be counterproductive.

²⁹ Ress / Bröhmer op cit. p.79 et sqq.

³⁰ In the case of a deletion of chapter XIII, Article 85 para 2 of the Charter must also be revoked, also the reference to Trusteeship Council in Article 7.

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