

NELCO
NELCO Legal Scholarship Repository

New York University Public Law and Legal Theory
Working Papers

New York University School of Law

8-1-2011

The Outlook for UN Reform

Simon Chesterman

Global Professor and Director of the New York University School of Law Singapore Program, chesterman@nus.edu.sg

Follow this and additional works at: http://lsr.nellco.org/nyu_plltwp

 Part of the [Human Rights Law Commons](#), [International Law Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Chesterman, Simon, "The Outlook for UN Reform" (2011). *New York University Public Law and Legal Theory Working Papers*. Paper 295.

http://lsr.nellco.org/nyu_plltwp/295

This Article is brought to you for free and open access by the New York University School of Law at NELCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Public Law and Legal Theory Working Papers by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

The Outlook for UN Reform

*Simon Chesterman**

I. Context	3
II. Institutions	4
A. The Security Council.....	5
B. ECOSOC	9
C. The General Assembly	10
D. A Human Rights Council	11
E. A Peacebuilding Commission	13
III. Norms	16
A. Self-Defence.....	17
B. Responsibility to Protect.....	19
IV. Conclusion	23

In addition to the perennial problems of dysfunctional institutions, inadequate resources and ephemeral political will, the United Nations has always faced crises of expectations. At the beginning of the 1990s the United States, while proclaiming itself the victor of the Cold War, magnanimously asserted that this provided an opportunity for the UN to fulfil its long-promised role as the guardian of international peace and security. The Security Council saw new possibilities for action without the paralyzing

* Vice Dean and Professor of Law, National University of Singapore Faculty of Law; Global Professor and Director of the New York University School of Law Singapore Programme. This paper draws on some material first published in the *Singapore Year Book of International Law*. See also Simon Chesterman, Thomas M. Franck, and David M. Malone, *Law and Practice of the United Nations* (Oxford University Press, 2008).

DRAFT

veto; Secretary-General Boutros Boutros-Ghali laid out grand plans with *An Agenda for Peace*. In the words of US President George H.W. Bush the rule of law would supplant “the rule of the jungle.”

The rhetoric was euphoric, utopian and short-lived. International security issues continued to be resolved by reference to Great Power interests; development remained an area where words were more plentiful than resources. Rhetoric is not nothing, however, and the language of human rights and the rule of law became more accepted through this period, as was the principle of greater international engagement in areas previously considered to lie solely within the domestic jurisdiction of member states. Whether such principles should be supported by action, however, remained a bone of some contention.

In this context, the question of reform has always begged the question of whether that reform must take place primarily in the structures, procedures and personnel that make up the United Nations, or in the willingness of member states to use them.

Past efforts at creating and changing the international institutions of peace and security have tended to be led by political will, which is most plentiful in a time of crisis. World War I was the backdrop for establishment of the League of Nations; the League’s failure to prevent World War II led to its replacement by the United Nations. Importantly, US President Franklin Roosevelt pushed for the negotiation of the UN Charter to be held in San Francisco while the bombs of World War II were falling. Unlike the Covenant of the League of Nations, which was negotiated as one agreement among many at Versailles in 1919, the Charter’s references to “the scourge of war” were reinforced by daily reports of final battles in the worldwide conflict.

For some, the US-led invasion of Iraq in March 2003 was a similar challenge not merely to the institutions but to the very idea of international order. The war split the Security Council, divided NATO and prompted the creation of a high-level panel to rethink the very idea of collective security in a world dominated by US military power. The 2005 reform effort was, at best, partially successful. What I would like to do in this presentation is take it as a learning experience that may assist us as we consider the prospects for future reforms.

Underlying this discussion is a foundational question that I ask students in my United Nations Law and Practice class every year: what *is* the UN? This seemingly

simple question can lead you towards at least two very different answers. Is the UN a *thing*, an independent entity, a political institution with a measure of freedom of action? Or is it a *place*, a standing diplomatic conference, a venue where powers great and small gather to discuss the issues of the day and, occasionally, engage in joint action?

I'll come back to this existential question at the end, but before we get there I would like to say something about the context of UN reform and then consider some recent prominent efforts to reform institutions and norms.

I. Context

Many discussions of reform tend to imply that major changes in the United Nations are both too hard and too easy. Those who say reform is too hard forget that, in the right circumstances, likeminded countries were able to negotiate the UN Charter and amend it three times, including an expansion of the Security Council in the face of superpower reluctance. Those who suggest reform is therefore easy forget that amending the Charter took years and depended on a perfect storm of the circumstances driving reform — the near doubling of the membership — corresponding directly to the reform agenda of expanding key institutions.

The UN Charter is much like a constitution. And, like most constitutions, it is designed to be difficult to amend. Article 108 of the Charter requires an amendment to be ratified by two-thirds of the UN member states, including all five permanent members of the Security Council (the P-5). The three amendments that have been made to the Charter all took place in the period 1963-1973. The first amendment expanded the membership of the Security Council from 11 to 15 and increased the number of votes necessary to pass a resolution from seven to nine; it also expanded the membership of the Economic and Social Council (ECOSOC) from 18 to 27. The second amendment corrected the amendment procedures themselves, in line with the increased size of the Council, requiring that nine (rather than seven) members be required to support a call for a General Conference of Member States for the purposes of reviewing the Charter. The third amendment further increased the membership of ECOSOC from 27 to 54.

DRAFT

Since the Security Council is widely seen as the most influential part of the UN system, much discussion of reform focuses on its membership. In 1993, the General Assembly established an open-ended working group (that is, open to all members of the United Nations) to consider, among other things, the question of increasing Council membership.¹ More than a decade into its deliberations, there was still no agreement on an appropriate formula for Council representation and the body jokingly came to be referred to as the “never-ending working group.” Issues of general consensus are that the Council should be expanded and should probably include new permanent members — but perhaps without granting newcomers the coveted veto, currently held by only the P-5.

The barriers to change are significant. There is, however, much that can be done to improve the effectiveness of the United Nations without amending the Charter. Indeed, in the case of the Council, there is a tendency to conflate the question of the Council’s “representativeness” with that of its effectiveness. Would expanding the Council’s membership make it more capable of responding to threats to international peace and security? It is arguable that other areas of reform, such as transparency of Council decision-making practices, the analytical role of the UN Secretariat, the availability of forces under UN command, and financial and human resources devoted to peacekeeping would better address the problems the Security Council currently faces. For this reason, the position of some governments has long been to support Council expansion in theory while opposing any specific reforms to membership in practice.

II. Institutions

Representatives of the various governments participating in the lead-up to the 2005 World Summit spent a lot of time on the question of institutional change within the United Nations. This section briefly considers three existing institutions — the Security Council, the Economic and Social Council (ECOSOC), and the General Assembly — and the creation of two new bodies in the form of a Human Rights Council and a Peacebuilding Commission. The depressing conclusion is that many

¹ GA Res 48/26 (1993).

countries fought to protect their ability to sit on these bodies rather than ensuring that they might have something interesting to say.

A. The Security Council

The High-Level Panel on Threats, Challenges, and Change agreed on four principles for reform of the Council. First, any reform should increase the involvement of those who contribute most to the United Nations financially, militarily, and diplomatically. This should be understood as meaning contributions to United Nations assessed budgets, participation in mandated peace operations, contributions to voluntary activities of the United Nations in the areas of security and development, and diplomatic activities in support of United Nations objectives and mandates. Among developed countries, achieving or making substantial progress towards the internationally agreed level of 0.7 per cent of GNP for ODA should be considered an important criterion of contribution. Secondly, reform should bring into the decision-making process countries more representative of the broader membership, especially of the developing world. Thirdly, any reform should not impair the effectiveness of the Security Council. And fourthly, reform should increase the democratic and accountable nature of the body.²

What these principles might mean in terms of an actual change to the membership, the Panel could not agree on. It presented two models.

Model A provided for six new permanent seats, with no veto being created, and three new two-year term non-permanent seats, divided among the major regional areas as follows:

<i>Regional area</i>	<i>No. of States</i>	<i>Permanent seats (continuing)</i>	<i>Proposed new permanent seats</i>	<i>Proposed two-year seats (non-renewable)</i>	<i>Total</i>
Africa	53	0	2	4	6
Asia and Pacific	56	1	2	3	6

² A More Secure World: Our Shared Responsibility (Report of the High-Level Panel on Threats, Challenges, and Change), UN Doc A/59/565 (2004) available at <<http://www.un.org/secureworld>>, para 249.

DRAFT

<i>Regional area</i>	<i>No. of States</i>	<i>Permanent seats (continuing)</i>	<i>Proposed new permanent seats</i>	<i>Proposed two-year seats (non-renewable)</i>	<i>Total</i>
Europe	47	3	1	2	6
Americas	35	1	1	4	6
Totals model A	191	5	6	13	24

Model B provided for no new permanent seats but created a new category of eight four-year renewable-term seats and one new two-year non-permanent (and non-renewable) seat, divided among the major regional areas as follows:

<i>Regional area</i>	<i>No. of States</i>	<i>Permanent seats (continuing)</i>	<i>Proposed four-year renewable seats</i>	<i>Proposed two-year seats (non-renewable)</i>	<i>Total</i>
Africa	53	0	2	4	6
Asia and Pacific	56	1	2	3	6
Europe	47	3	2	1	6
Americas	35	1	2	3	6
Totals model B	191	5	8	11	24

The Secretary-General confined himself to endorsing the Panel's two options, but he also stressed that the absence of consensus should not become an excuse for postponing action.³ Though he was under considerable pressure to adopt this position, Kofi Annan thereby encouraged a paralyzing debate over seats on the Council that took time from consideration of other issues and divided member states in a process that was intended to unite them. The efforts of the G-4 (Japan, Germany, India, and Brazil) to promote Model A's vision of six new permanent seats ran aground on the African Group. Paralysed by the overlapping constituencies of the Non-Aligned Group and the Group of 77 (G-77), African countries could not decide between the competing claims of Nigeria, South Africa, and Egypt, with Kenya and Senegal later playing spoilers' roles. This was interpreted by some as a failure of African diplomacy; others suggested that the G-4 had engineered its own destruction by taking African cooperation for granted and presenting the African Group with a fait accompli. Such divisions were welcomed by those states that saw new permanent

³ In Larger Freedom: Towards Development, Security, and Human Rights for All (Report of the Secretary General), UN Doc A/59/2005 (2005) available at <<http://www.un.org/largerfreedom>>, para 170.

DRAFT

seats as being likely to undermine their own influence on the Council due to over-representation of permanent members from their region — most obviously the presence of four European permanent members.

Various alternatives were proposed with occasional signs of desperation on the part of the G-4. A draft resolution was tabled on 6 July 2005 to increase the size of the Council from 15 to 25, abandoning the changed regional arrangements and adding a new rotating seat from Eastern Europe.⁴ No action was taken, but the same draft was resubmitted on 5 January 2006 in the hope of keeping debate on expansion alive.⁵ Where 27 countries had sponsored the initial draft, however, only three signed onto the later effort — Brazil, Germany, and India — with even Japan deciding to cut its losses and wait for a more propitious moment to raise the issue in the future.

The fixation on Council membership distracted from two other aspects of the proposal, which were worthy of greater attention.

The first was the use of four new regions, which were not defined but simply identified as “Africa,” “Asia and Pacific,” “Europe,” and “Americas.” Among other things, this presumably would have merged Eastern Europe into “Europe,” while moving Australia and New Zealand, and Canada the United States from the “Other” into “Asia and Pacific” and “Americas” respectively. Israel, which only joined WEOG in 2000 might remain part of “Europe” or join the Asia group.

The second idea was the possible use of indicative voting, whereby members of the Security Council could call for a public indication of positions on a proposed action. A “no” under such circumstances would not have a veto effect — indeed, the vote itself would have no legal force. But it might provide a modest improvement in accountability for the use of the veto function.

Nevertheless, the emphasis has continued to be on membership, with extraordinary excitement when, for example, President Obama backed India’s bid in November 2010.⁶ Less attention was drawn to the fact that the United States had no

⁴ Draft Resolution on Security Council Expansion, UN Doc A/59/L.64 (2005), para 1.

⁵ Draft Resolution on Security Council Expansion, UN Doc A/60/L.46 (2006).

⁶ Sheryl Gay Stolberg and Jim Yardley, “Countering China, Obama Backs India for UN Council”, *New York Times*, 8 November 2010.

DRAFT

plans to support any larger reform package that might enable India to claim this seat. Five years ago, the United States endorsed Japan — prompting celebrations in Tokyo and riots in China. Russia has similarly endorsed Brazil’s candidacy. Britain and France are the most enthusiastic supporters of new permanent members — perhaps fearing that reform now is better than reform a decade or two hence when it is possible that a single EU seat might be proposed. China has shifted from openly opposing new candidates and now urges “compromise”.⁷ This appears to have encouraged some self-delusion on the part of aspirant states, as when China and Russia issued a statement declaring “the importance they attach to the status of India, Brazil and South Africa in international affairs, and understand and support their aspiration to play a greater role in the UN.”⁸ The ambiguous statement was reported in India under the headline: “China, Russia endorse India’s place in un Security Council”.⁹

From 2009, the Open-Ended Working Group has been replaced by what were intended to be negotiations, but by most accounts diplomats read their position papers and then leave.¹⁰ The most obvious solution is a variation of Model B, but perhaps with a longer period before rotation. Understandably, however, the aspirant states do not want to accept this.

Speaking on 22 June 2011, Secretary-General Ban Ki-moon, who had earlier stressed that Council reform was a matter for member states, said that he hoped that it was an issue that could be resolved during his second term of office. He said that reform was “too long overdue” and encouraged member states to continue negotiations based on a text then circulating.¹¹ That text, managed by the “Chair of the Intergovernmental Negotiations on the question of equitable representation and increase in the membership of the Security Council and other matters related to the

⁷ Neil MacFarquhar, “Change Will Not Come Easily to the Security Council”, *ibid*.

⁸ Sanya Declaration (BRICS Leaders Meeting), done at Sanya, Hainan, China, 14 April 2011, available at <<http://no.china-embassy.org/eng/zyxw/t815781.htm>>, para 8.

⁹ A.K. Bhattacharya, “China, Russia Endorse India’s Place in UN Security Council”, *Business Times* (New Delhi), 15 April 2011.

¹⁰ MacFarquhar, “Change Will Not Come Easily to the Security Council”.

¹¹ SG Off-the-Cuff, 22 June 2011, available at <http://www.un.org/apps/sg/offthecuff.asp?nid=1869>.

Council”, is presently limited to a menu of options with the entire document essentially in square brackets.¹²

B. ECOSOC

The UN Charter recognizes the connections between peace and security on the one hand, and development on the other. Two of the three councils established in the Charter deal with these issues: the Security Council and the Economic and Social Council respectively. The third council, the Trusteeship Council, now exists in name only, the last trust territory having become independent in 1994. The role of the United Nations in international economic matters is not quite so anachronistic, but decision-making on such matters, especially in the areas of finance and trade, has long since been overtaken by other forums.¹³

Nonetheless, the High-Level Panel found three areas in which the United Nations might play a significant role in economic and social development: providing normative and analytical leadership on topics such as the social and economic aspects of security threats; providing an arena in which states measure their commitments to achieving key development objectives; and engaging the development community at the highest level in a kind of “development cooperation forum”. Doing this effectively would require abandoning much of ECOSOC’s current agenda, which tends to focus on administrative issues and program coordination, in favour of a more focused agenda built around major themes in the Millennium Declaration.¹⁴

Such implicit criticisms were more restrained than other accounts of the relevance of ECOSOC, but were essentially rejected by the member states. The Outcome Document adopted in September 2005 reaffirmed ECOSOC’s role “as a principal body for coordination, policy review, policy dialogue and recommendations

¹² See Mie Hansen, Update on Security Council Reform (New York: Center for UN Reform, 5 April 2011) available at <<http://www.centerforunreform.org/node/435>>.

¹³ High-Level Panel Report, para 274.

¹⁴ *ibid.*, paras 275-279.

on issues of economic and social development, as well as for implementation of the international development goals”.¹⁵

C. The General Assembly

The General Assembly enjoys unique legitimacy through its near universal membership of states. Nevertheless, as the High-Level Panel concluded, an “unwieldy and static agenda” has led to repetitive debates. The Assembly has frequently squandered its normative role on debates about minutiae or thematic topics overtaken by real-world events. And its inability to achieve concrete conclusions on issues has undermined its relevance. Achieving the potential of this body, the Panel argued, requires more than procedural fixes. Instead, a new attitude towards the Assembly is required in order to enable it to perform its function as the main deliberative organ of the United Nations: “This requires a better conceptualization and shortening of the agenda, which should reflect the contemporary challenges facing the international community. Smaller, more tightly focused committees could help sharpen and improve resolutions that are brought to the whole Assembly”.¹⁶ The Secretary-General tentatively embraced these criticisms, reframing them as a call on the Assembly to streamline its agenda and procedures, as well as strengthening the role of its President.¹⁷

Such proposals were rejected. The Summit merely reaffirmed the central position of the Assembly as the chief deliberative body of the UN system and welcomed the measures it had already taken to strengthen that role.¹⁸

¹⁵ 2005 World Summit Outcome Document, UN Doc A/RES/60/1 (2005) available at <<http://www.un.org/summit2005>>, para 155.

¹⁶ High-Level Panel Report, para 242.

¹⁷ In Larger Freedom, para. 160.

¹⁸ World Summit Outcome Document, paras. 149-150.

D. A Human Rights Council

An important and provocative argument in the High-Level Panel's report concerned the Commission on Human Rights, which was said to have been undermined by "eroding credibility and professionalism":

Standard-setting to reinforce human rights cannot be performed by States that lack a demonstrated commitment to their promotion and protection. We are concerned that in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns.¹⁹

Identifying membership as the most difficult and sensitive issue, the Panel recommended avoiding the problem through universal membership.²⁰ Though it was generally accepted that the Panel's diagnosis of the problem with the Commission on Human Rights was correct, the Secretary-General's response took a different tack by proposing more limited membership for a Human Rights Council, whose members would be elected directly by the General Assembly by a two-thirds majority.²¹ The Outcome Document endorsed the principle of establishing a Council, but left all details to the sixtieth session of the Assembly that was about to begin.

Membership was the key fault line in subsequent negotiations, with the United States pushing for the two-thirds requirement recommended by the Secretary-General, as well as automatic exclusion of states that are the subject of coercive measures imposed by the Security Council related to human rights abuses or terrorism. (Some concerns were expressed within the State Department that more restrictive criteria could preclude the United States itself from membership.) Failure to include these provisions led the United States to vote against the draft resolution,²² which was adopted on 15 March 2006 by a recorded vote of 170 in favour to four against (Israel,

¹⁹ High-Level Panel Report, para 283.

²⁰ *ibid.*, para 285. The Commission on Human Rights had 53 members.

²¹ *In Larger Freedom*, para 183.

²² Explanation of Vote by Ambassador John R. Bolton, U.S. Permanent Representative to the United Nations, on the Human Rights Council Draft Resolution (New York: United Nations General Assembly, USUN Press Release 51(06), 15 March 2006) available at <http://www.un.int/usa/06_051.htm>.

DRAFT

Marshall Islands, and Palau joining the United States) with Belarus, Iran, and Venezuela abstaining. The United States also expressed opposition to the inclusion of term limits, which prevent states from serving more than six years out of every seven, apparently on the basis that this might mean that the United States would, occasionally, be forced to rotate off the new body.²³

The new Council has 47 members that are elected directly and individually by secret ballot by a majority of members of the General Assembly. This ballot is constrained by a requirement to distribute seats among the regional groupings (13 from the African Group; 13 from the Asian Group; six from the Eastern European Group; eight from the Latin American and Caribbean Group; and seven from WEOG).²⁴ When electing members of the Council, states are asked to “take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments”.²⁵ Once on the Council, members are to uphold the highest standards and cooperate with the new body; a member that commits gross and systematic violations of human rights may be suspended by a two-thirds majority of votes in the General Assembly.²⁶ The bar to expulsion is extremely high, but the key provision is individual election of members by an absolute majority of the General Assembly, as opposed to a majority of members present and voting. This should prevent regional slates being presented and remove regional solidarity as a rationale for appointing countries with dubious human rights records to the Council — a common problem confronting its predecessor, the Commission on Human Rights.

As in the case of the Security Council, more time and energy was focused on the membership of the Human Rights Council than on what it might do once constituted. Key substantive innovations include sitting through the year²⁷ (rather than for an annual six-week session) and undertaking a “universal periodic review, based

²³ Pressed to explain his opposition to the draft in late February 2006, US Ambassador John Bolton said that “My concern now, given the term limits, is that America will go off, and that will be to the detriment of the Commission”: Lawrence C. Moss, “New Council Opposed by Unusual Duo: US and Cuba”, *Miami Herald*, 13 March 2006.

²⁴ GA Res 60/251 (2006), para 7.

²⁵ GA Res 60/251 (2006), para 8.

²⁶ GA Res 60/251 (2006), paras 7-8.

²⁷ GA Res 60/251 (2006), para 10.

on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments”.²⁸ Diffusing the political contests surrounding election of members and the annual fight over censoring resolutions has created the possibility for the Council to play a more constructive role than the Commission, but it is far from clear that agreement on what the Council should *not* be will ensure agreement on what it should do.

An indication that some things had changed was the decision in March 2011 to expel Libya from the Council. This unprecedented move followed the violent crackdown on anti-Government protestors by Muammar Al-Qadhafi’s regime.²⁹

E. A Peacebuilding Commission

The other major institutional change in the 2005 reform push was the creation of a Peacebuilding Commission. The High-Level Panel had rightly criticized the UN experience of post-conflict operations as characterized by “countless ill-coordinated and overlapping bilateral and United Nations programmes, with inter-agency competition preventing the best use of scarce resources.”³⁰ Its key recommendation to remedy this situation was the call for a Peacebuilding Commission to be established as a subsidiary organ of the UN Security Council under article 29 of the UN Charter.³¹ This new body was to have four functions. First, it would identify countries that are under stress and risk sliding towards state collapse. Secondly, it would organize, “in partnership with the national Government, proactive assistance in preventing that process from developing further”. Thirdly, it would assist in the planning for transitions between conflict and post-conflict peacebuilding. Fourthly, it would marshal and sustain the efforts of the international community in post-conflict peacebuilding over whatever period may be necessary. Other guidelines mapped out institutional and procedural considerations, including the need for the body to be small and flexible, considering both general policy issues and country-by-country

²⁸ GA Res 60/251 (2006), para 5(e).

²⁹ UN Press Release, GA/11050, 1 March 2011, available at <http://www.un.org/News/Press/docs/2011/ga11050.doc.htm>.

³⁰ High-Level Panel Report, para 38.

³¹ *ibid.*, paras 261-265.

strategies. It was to include representatives of the Security Council, the Economic and Social Council, the International Monetary Fund and the World Bank, donor countries, troop contributors, and regional organizations — as well as national representatives of the country under consideration.³² A Peacebuilding Support Office would integrate system-wide policies and strategies, develop best practices, and provide support to field operations. Among other functions, the office would submit twice-yearly early warning analyses to the Peacebuilding Commission to help it in organizing its work.³³

The Commission was generally considered to be one of the more positive ideas to come from the High-Level Panel and appeared likely to be adopted by the membership of the United Nations. When the Secretary-General drew upon this to present his own vision of the Peacebuilding Commission in his “In Larger Freedom” report of March 2005, he specifically removed any suggestion of an early warning function — anticipating pressure from governments wary that they might be precisely the ones under scrutiny.³⁴

Two essential aspects of how the Commission would function were left unresolved: what its membership would be, and to whom it would report — the Security Council or the Economic and Social Council. These issues ended up paralysing debate on the Commission in the lead up to the September 2005 World Summit and were deferred for later consideration. The World Summit Outcome document broadly endorsed the Secretary-General’s view of the Peacebuilding Commission as essentially limited to mobilizing resources for post-conflict reconstruction.³⁵

In one sense, the evolution of the Peacebuilding Commission is a fairly typical example of ideas and norms being diluted as they move through the policy and intergovernmental waters. Early warning died a fairly quick death even before reaching the Summit. A second attempt by the High-Level Panel to strengthen early warning by creating a Deputy Secretary-General for Peace and Security was dropped

³² *ibid.*, paras 264-265.

³³ *ibid.*, paras 266-267.

³⁴ *In Larger Freedom*, para 115.

³⁵ World Summit Outcome Document, para 98.

entirely.³⁶ The outcome document of the 2005 Summit did resolve to develop early warning systems for natural disasters, in particular tsunamis, but early warning of man-made disasters was the subject for a more tepid call for the international community to support the United Nations in developing such a capability at some point in the unspecified future.³⁷

On the post-conflict responsibilities of the Peacebuilding Commission, its role in planning and formulating strategy was more subtly undermined. The High-Level Panel had seen it as assisting in the “planning” for the transition from conflict to post-conflict.³⁸ The Secretary-General limited it to improving “United Nations planning for sustained recovery”.³⁹ By the Summit, it was limited to “advise[ing] on and propose[ing] integrated strategies”.⁴⁰ The Peacebuilding Support Office, meanwhile, did not receive the requested twenty new staff or any new responsibilities beyond assisting and supporting the Commission by drawing upon existing resources within the Secretariat.⁴¹

The General Assembly formally established the Peacebuilding Commission on 30 December 2005. Described as an “intergovernmental advisory body”, its standing members comprise seven members of the Security Council (ambiguously described as “including permanent members”), seven members of ECOSOC, five of the top providers of assessed and voluntary contributions, five of the top troop contributors, and a further seven elected by the General Assembly for regional balance.⁴²

Far from being a new Trusteeship Council, then, the Peacebuilding Commission began to look more like a standing pledging conference, one of the most

³⁶ High-Level Panel Report, paras 98, 293-294.

³⁷ World Summit Outcome Document, paras 56(f), 138.

³⁸ High-Level Panel Report, para 264.

³⁹ In Larger Freedom, para 115.

⁴⁰ World Summit Outcome Document, para 98.

⁴¹ *ibid.*, para 104.

⁴² GA Res 60/180 (2005), paras 1, 4.

important forms of coordination for donors that currently exists.⁴³ If it can succeed in sustaining attention on a post-conflict situation beyond the current limits of foreign policy attention deficit disorder, the Commission will have achieved a great deal. It is less clear that this additional layer of coordination will assist in how these new resources are spent.⁴⁴

A review completed in July 2010 considered the mixed experiences of the four countries that had been on the agenda of the Commission, identifying some problems of coordination both between different Commission configurations and in its interaction with the Security Council and other bodies. It also recommended an increase in resources to the Peacebuilding Support Office and greater attention to prevention.⁴⁵

III. Norms

The maintenance of world peace and security depends on there being a common global understanding and acceptance of when the application of force is both legal and legitimate: “One of these elements being satisfied without the other will always weaken the international legal order — and thereby put both State and human security at greater risk.”⁴⁶

The UN Charter prohibits the use of force with two exceptions: self-defence under article 51 and enforcement action authorized by UN Security Council under Chapter VII. During the Cold War, these rules were frequently violated with the Council paralyzed and article 51 only rarely providing credible cover for military adventures. In the post-Cold War era, the Council became more active but problems of defining the limits of article 51 remain, as do questions of what should happen

⁴³ Stewart Patrick, “The Donor Community and the Challenge of Postconflict Recovery”, in Shepard Forman and Stewart Patrick (eds), *Good Intentions: Pledges of Aid for Postconflict Recovery* (Boulder, CO: Lynne Rienner, 2000), 35 at 40-1.

⁴⁴ See further Simon Chesterman, “From State Failure to State Building: Problems and Prospects of a United Nations Peacebuilding Commission”, *Journal of International Law and International Relations* 2 (2006) (forthcoming).

⁴⁵ Review of the United Nations Peacebuilding Architecture, UN Doc A/64/868-S/2010/39, Annex (2010).

⁴⁶ High-Level Panel Report, para 184.

when the Council is divided (as it was over Kosovo in 1999 and Iraq in 2003), and what general principles are emerging (if any) as to how the United Nations should treat threats that are primarily internal.

A. Self-Defence

The first question, self-defence, has arisen specifically due to assertions that a right of pre-emptive action might be allowed in response to a gathering threat.⁴⁷ Intimations that this had been the justification for the US-led invasion of Iraq led to accusations that the United States had conflated anticipatory self-defence and preventive war.⁴⁸ (This was despite the formal legal argument that the action was undertaken by the United States in support of past Security Council resolutions dating back to Iraq's invasion of Kuwait.⁴⁹) The High-Level Panel stressed that "a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate."⁵⁰

This is debatable as a matter of law,⁵¹ but usefully separated out the most controversial aspect of the argument of expanded self-defence: where the threat in

⁴⁷ See The National Security Strategy of the United States of America (Washington, DC: President of the United States, September 2002) available at <<http://www.whitehouse.gov/nsc/nss.html>>.

⁴⁸ See, e.g., Miriam Sapiro, "Iraq: The Shifting Sands of Preemptive Self-Defense", *American Journal of International Law* 97 (2003) 599; Thomas M. Franck, "What Happens Now? The United Nations After Iraq", *American Journal of International Law* 97 (2003) 607.

⁴⁹ William H. Taft IV and Todd F. Buchwald, "Preemption, Iraq, and International Law", *ibid* 557.

⁵⁰ High-Level Panel Report, para 188.

⁵¹ "Anticipatory self-defense" remains a controversial sub-theme in the literature, which typically cites Israel's actions in the Six-Day War of 1967 and its destruction of Iraq's Osirak nuclear reactor in 1981. The normative impact of either case is debatable, however. The 1967 war provoked mixed views in the General Assembly; the Osirak incident, which successfully derailed Iraq's nuclear program for some years, is viewed positively today but was unanimously condemned at the time by the Security Council as a clear violation of the Charter: see Bruno Simma (ed), *The Charter of the United Nations: A Commentary*, 2nd edn (Oxford: Oxford University Press, 2002), vol I at 803-804; SC Res 487 (1981), para 1. Other incidents are occasionally cited by commentators, but states themselves have generally been careful to avoid articulating a right of self-defence that might encompass the first use of force — even if they have been unable or unwilling to rule it out completely. See generally Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, Hersch Lauterpacht Memorial

question is not imminent but still claimed to be real — such as the acquisition, with allegedly hostile intent, of the capability to make nuclear weapons. Might a state act unilaterally in such circumstances? The answer given by the Panel is worth quoting at length:

Those who say “yes” argue that the potential harm from some threats (e.g., terrorists armed with a nuclear weapon) is so great that one simply cannot risk waiting until they become imminent, and that less harm may be done (e.g., avoiding a nuclear exchange or radioactive fallout from a reactor destruction) by acting earlier.

The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment — and to visit again the military option.

For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.⁵²

On the question of what to do when the Council is divided, the Panel adopted a similar position to that of the International Commission on Intervention and State Sovereignty. The Commission’s report, *The Responsibility to Protect*, argued that the task is not to find alternatives to the Council as a source of authority but to make the Council work better than it has. Nonetheless, the High-Level Panel was realistic about the ability of the Council alone to constrain states that feel that they have both the obligation to their own citizens and the capacity to do; such states may feel that they must act “unburdened by the constraints of collective Security Council process.” Although such an approach might have been tolerated during the Cold War, however,

Lectures (Cambridge: Cambridge University Press, 2002), 97-108. During the 1962 Cuban missile crisis, for example, U.S. President John F. Kennedy acknowledged that nuclear weapons meant that “[w]e no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute maximum peril.” Nevertheless, the United States sought to justify the subsequent blockade of Cuba not on the basis of self-defence, but rather on the regional call for action from the Organization of American States: Abraham Chayes, *The Cuban Missile Crisis* (Oxford: Oxford University Press, 1974), 62-6.

⁵² High-Level Panel Report, paras 189-191.

“the world has now changed and expectations about legal compliance are very much higher.”⁵³

This was, predictably, an extremely sensitive topic. The Secretary-General essentially endorsed the Panel’s position on self-defence: that article 51 of the UN Charter covers self-defence against an “imminent attack.”⁵⁴ This dropped even those limited qualifications in the High-Level Panel’s description — that no other means would deflect the threatened attack and that the response is proportionate⁵⁵ — but this was presumably for economy of language rather than to mark a normative shift. He also called on the Security Council to adopt a resolution (leaving out the additional call for the General Assembly to do so also) setting out the principles according to which it would use force.⁵⁶ This was politely ignored by the Summit, which confined itself to reaffirming existing obligations and noting that “the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security”.⁵⁷

B. *Responsibility to Protect*

The High-Level Panel also incorporated the substance of *The Responsibility to Protect* in relation to its recommendations on Security Council guidelines in response to internal threats.⁵⁸ In particular, it embraced the rhetorical and political move from considering the question of the *inviolability* of sovereign states to their *responsibility*. This reflected the growing awareness that the pertinent question is not whether there is a “right to intervene” but what obligations there are on a state to protect the population within its territory. And, as the Panel noted, there is a growing acceptance that when a government is unwilling or unable to fulfil such obligations then these may devolve to the international community. Whether the responses open to

⁵³ *ibid.*, paras 196, 198.

⁵⁴ *In Larger Freedom*, para 124.

⁵⁵ High-Level Panel Report, para 188.

⁵⁶ *In Larger Freedom*, para 126.

⁵⁷ World Summit Outcome Document, para 79.

⁵⁸ Not coincidentally, former Australian Foreign Minister Gareth Evans was both an architect of *The Responsibility to Protect* and perhaps the most active member of the High-Level Panel.

international actors include the use of force remains controversial. The Security Council has a unique capacity to authorize the use of force, but it has been inconsistent and sometimes ineffective. Action has come too late, hesitantly, or not at all. Nevertheless, there has been a gradual recognition that Chapter VII of the UN Charter can appropriately authorize military action to redress catastrophic internal wrongs that reach the level of a “threat to international peace and security.”⁵⁹

The Panel proposed guidelines that could form the basis for such Security Council deliberations. The aim was not to produce agreed conclusions or guarantee that the best outcome would always prevail. Instead, the stated intention was to maximize the possibility of achieving Council consensus as to when it is appropriate to use force, to maximize international support for Council decisions, and to minimize the possibility of individual member states bypassing the Council:

(a) *Seriousness of threat.* Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

(b) *Proper purpose.* Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

(c) *Last resort.* Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

(d) *Proportional means.* Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

(e) *Balance of consequences.* Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?⁶⁰

⁵⁹ High-Level Panel Report, paras 201-203.

⁶⁰ *ibid.*, paras 206-207.

The Panel suggested that the Council might adopt these principles in a declaratory resolution, but also stressed that member states generally might subscribe to them as the appropriate guidelines for Council decision-making.⁶¹

Whether the Council is best served by acting in a principled manner is an open question. When it was first established there was no expectation that the Council would be bound by anything other than the political will of those states that were victorious in the Second World War. Now that the United Nations and the Security Council have become more active, however, taking on far greater responsibilities not merely in responding to threats to the peace but also acting to maintain the peace in a far broader sense, legitimacy requires more than reliance on discretion granted by the Charter.⁶²

In order for the Security Council to maintain the respect it needs to fulfil its role effectively, the Panel argued that its most important decisions have to be “better made, better substantiated and better communicated.” On questions of the use of force, the Council should develop agreed guidelines “going directly not to whether force can legally be used but whether, as a matter of good conscience and good sense, it should be.”⁶³

The Summit did not propose guidelines for the use of force and there is no indication that the Security Council plans to do so in the near future. Nevertheless, the Summit did endorse the concept of responsibility to protect — though in the section of the Outcome Document titled “Human Rights and the Rule of Law”, rather than “Peace and Collective Security”. There was, again, a progressive dilution of the norm in question. In order to avoid controversial debates over humanitarian intervention,⁶⁴ emphasis throughout this process had been placed on the threshold for international concern rather than what form any response might take. For the High-Level Panel, this was “genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved

⁶¹ *ibid.*, paras 208-209.

⁶² Simon Chesterman, “An International Rule of Law?”, *American Journal of Comparative Law* 56 (2008) 331.

⁶³ High-Level Panel Report, paras 205.

⁶⁴ See generally Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford Monographs in International Law (Oxford: Oxford University Press, 2001).

DRAFT

powerless or unwilling to prevent”, including situations where this is “actual or imminently apprehended”.⁶⁵ The Secretary-General raised the threshold, limiting it to situations where a government is unwilling or unable to prevent “genocide, ethnic cleansing and crimes against humanity” (omitting “large-scale killing” and serious violations of international humanitarian law).⁶⁶ The Summit added “war crimes” to this list but further raised the bar to situations where national authorities are “manifestly failing to protect their populations”.⁶⁷

Even so, the Secretary-General rightly called this aspect of the Outcome Document a “revolution in international affairs”.⁶⁸ It was a marked contrast to the apoplectic reaction to his own comments on humanitarian intervention in 1999⁶⁹ and perhaps the only important normative development from the Summit.⁷⁰ The language has been increasingly used in statements within the Security Council⁷¹ and in January 2006 was included in a unanimous Council resolution on the Great Lakes region of Africa.⁷² The test of its relevance is not whether states are compelled to intervene in response to humanitarian crises, but whether it is harder to say “no”.

⁶⁵ High-Level Panel Report, para 203, 207(a).

⁶⁶ In Larger Freedom, Annex, para 7(b).

⁶⁷ World Summit Outcome Document, paras 138-139.

⁶⁸ Kofi A. Annan, Speech at the Conclusion of the High-level Plenary Meeting of the General Assembly, UN Doc A/60/PV.9 (2005) available at <<http://documents.un.org>>.

⁶⁹ See generally Kofi A. Annan, *The Question of Intervention: Statements by the Secretary-General* (New York: UN Department of Public Information, 1999).

⁷⁰ See generally Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).

⁷¹ See, e.g., UN Doc S/PV.5319 (Resumption 1) (9 December 2005) at 4-5 (Nepal), 7 (France), 9 (United Kingdom), 10 (Norway), 13 (Slovakia), 15 (Liechtenstein), 17 (Republic of Korea), 19 (Rwanda); UN Doc S/PV.5353 (24 January 2006) at 4 (High Commissioner for Refugees), 9 (Argentina), 15 (Tanzania); UN Doc S/PV.5359 (27 January 2006) at 18 (Slovakia), 20 (Denmark); UN Doc S/PV.5359 (Resumption 1) (27 January 2006) at 2 (Canada), 46 (Guatemala); UN Doc S/PV.5376 (22 February 2006) at 11 (Peru). For less enthusiastic statements, see UN Doc S/PV.5319 (Resumption 1) (9 December 2005) at 2 (Algeria), 6 (Egypt).

⁷² SC Res 1653 (27 January 2006), para 10 (adopted unanimously). (The Security Council “*Underscores* that the governments in the region have a primary responsibility to protect their populations, including from attacks by militias and armed groups and stresses the importance of ensuring the full, safe and unhindered access of humanitarian workers to people in need in accordance with international law”.)

The hand-wringing response to ongoing massacres in the Darfur region of Sudan suggested that this negative aspect of the responsibility to protect may be working, but also that anxiety about doing nothing is a far cry from effective intervention to protect the population at risk. The current operations in Libya suggest the opposite problem. As I have written elsewhere, do something, do *anything*, is not a military strategy. It is far from clear how the Libyan conflict will play out, but that outcome will have consequences that reach far beyond Libya itself. R2P may have made it harder to say no, but what happens next will clearly affect the likelihood of whether future leaders will say yes.⁷³

IV. Conclusion

So let us return to where we began. What *is* the United Nations? Is it a *thing*, or a *place*? Well of course it is both and it is neither.

Effectiveness and legitimacy — examined here in the context of whether global institutions are adequate and whether coercive measures are regulated — are understood differently around the world. What was lost in the reform debate after Iraq is that an emphasis on the membership of such institutions, or even on the rules that might constrain the most powerful, may undermine the key value of the United Nations in serving as a forum to develop common positions on threats and formulate common responses. The concept of a “grand bargain” may yet be helpful — if only as a rhetorical device — in calling upon the industrialized nations to accept that their concerns about terrorism and weapons of mass destruction occupy a similar place that concerns about poverty and disease do in the global south. It is possible, indeed, that the legacy of the efforts at reform described here will be largely rhetorical — a Human Rights Council that differs from the Commission in name only, a new layer of inter-governmental bureaucracy still lacking a strategic approach to peacebuilding, and the promise of responsibility to protect without additional resources or political will.⁷⁴ Political compromises have, as they must, compromised the vision of reform

⁷³ See Simon Chesterman, ““Leading from Behind”: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya”, *Ethics and International Affairs* 25 (2011) forthcoming.

⁷⁴ Other proposed changes not discussed here were essentially cosmetic. References to “enemy states” in articles 53 and 107 of the UN Charter should be deleted. As the High-Level Panel noted, the UN Charter should reflect the hopes and aspirations of the present rather than the fears of 1945. Chapter XIII on the

DRAFT

laid out by the High-Level Panel and the Secretary-General. But the linkage between the security, development, and human rights priorities of the United Nations is likely to endure. The role of the UN's "chief administrative officer"⁷⁵ in articulating a vision of global order will persist. And expectations for what can be achieved by the World Organization will continue to be disappointed — even as they continue to rise.

Trusteeship Council should also be deleted. After the independence of Palau in 1994, the Trusteeship Council ceased to have any function and amended its rules of procedure to remove the obligation to meet annually, agreeing instead to meet as required. Thirdly, article 47 on the Military Staff Committee (and reference to it in articles 26, 45, and 46) should be deleted. The Military Staff Committee was intended to advise and assist the Security Council on the "employment and command of forces placed at its disposal", but remains little more than a curiosity. Its published records indicate that Committee has met once every two weeks since February 1946; in almost sixty years, it has done nothing of substance since it reported to the Council in July 1948 that it was unable to complete the mandate given to it two years previously. Meetings presently last a couple of minutes.

⁷⁵ UN Charter, art 97.