

## REFORMING THE UNITED NATIONS: NEW PROPOSALS IN A LONG-LASTING ENDEAVOUR

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## 1. INTRODUCTION

### 1.1 Earlier discussion

The history of academic analysis of United Nations law is characterised by a history of proposals to reform this branch of international law.<sup>1</sup> As it is known, at the origin of UN law lies a rather idealistic world sight, understandable in view of the fact that during the drafting process of the Charter the main contributors to this text were close to success in a long-lasting battle against an enemy intended to put into question the basic achievements of the history of civilization.<sup>2</sup>

This threat set free countervailing forces of a dimension never before known, resulting in the creation of a coalition of states representing for the first time in modern history of international law a 'State Community', interested not only in defending egoistically their own immediate interests on the basis of the principle of reciprocity, but which seemed to fight for common goals and overarching principles. The year 1945 constitutes a watershed not only for the fact that fascism and belligerent nationalism was subdued, but this event also leads to a total redefinition of inter-governmental relationship and, therefore, of international law. This period was one of idealism that led even to a rekindling of the 'old flame' of natural law,<sup>3</sup> perceived to have been suffogated long before

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1. It is interesting to note that proposals to reform UN law have been brought up quite early on. These proposals were partly moderate, as they aimed to overcome some deficiencies that showed up soon after the Charter came into force. In part they were, however, radical in nature as their goal was to put a different system at the place of the existing order. See in this context, for example, A. Martin and J.B.S. Edwards, *The Changing Charter – A Study in United Nations Reform* (London, Sylvan Press 1955); Q. Wright, *International Law and the United Nations* (New Delhi, Asia Publishing House 1960). With regard to more recent reform proposals see, for example, K. Hüfner, ed., *Die Reform der Vereinten Nationen* (Opladen, Leske & Budrich 1994); E.-O. Czempiel, *Die Reform der UNO* (Munich, Beck 1994); J. Müller, ed., *Reforming the United Nations*, Vols. I-III (The Hague, Kluwer Law International 1997); S. von Schorlemer ed., *Praxis-Handbuch UNO* (Heidelberg, Springer 2003); E.C. Luck, 'Reforming the United Nations: Lessons from a History in Progress', in J.E. Krasno, ed., *The United Nations – Confronting the Challenges of a Global Society* (London, Rienner 2004) pp. 359-397. It is surprising to see how this reform discussion is characterized by a factual continuity but not with regard to the content. The new reform proposals which are to be discussed here draw very little on earlier contributions.

2. On the historic background of the foundation of the UN see, for example, L. Kopelmanas, *L'Organisation des Nations Unies* (Paris, Librairie du Recueil Sirey 1947); G. Murray, *From the League to U.N.* (London, Geoffrey Cumberlege 1948); C. Eagleton, *International Government*, rev. edn. (New York, Ronald Press 1948); G. Schwarzenberger, *Power Politics* (London, Steven & Sons 1951) esp. pp. 342 et seq.; A. Vandenbosch and W.N. Hogan, *The United Nations – Background, Organization, Functions, Activities*, 2 vols. (New York, McGraw-Hill Book 1952).

3. See, in this context, A. Verdross, *Völkerrecht* (Vienna, Springer 1950) pp. 28 et seq.; C. de Visscher, *Théories et réalités en droit international public* (Paris, Pedone 1953); U. Scheuner,

by a positivist perspective which seemed to explain far better the behaviour of states. This new thinking lasted, however, only briefly as it appeared to be irreconcilable with the hard realities of a post war era characterized by the outbreak of the Cold War.

It has to be recognized that the Charter system displayed a considerable amount of flexibility when it was confronted with the great challenges of the post war time. For example, one can consider the GA Uniting for Peace Resolution of 3 November 1950,<sup>4</sup> whereby the blockage of the Security Council (SC) due to the Cold War could be circumvented by a statement of the GA acknowledging the presence of the elements indicated in Article 39. Another important example concerns the possibility for the SC to adopt decisions even if not all the permanent members were present and the adoption of the so-called consensus procedure in the decision making process of the GA during the 19th session (1964/1965), in a time when the USSR and France had not paid their membership contributions and risked, therefore, the suspension of their voting rights according to Article 19 of the UN Charter.<sup>5</sup>

All in all, these developments were important as they kept the UN system alive. They were not far-reaching enough to iron out systemic deficiencies, but as a result this order adapted to a system of international relations mainly characterized by the East-West conflict. After the collapse of most of the Communist regimes new challenges arose. It seemed that the time had come when the UN system could, finally, take a lead. The main problem was that the Cold War may have hindered the UN in many of its natural functions, but as this hindrance had gone after nearly half a century the international system looked widely different from that the drafters of the Charter had before their eyes. On 31 January 1992 there was a SC meeting of Heads of State or Government, which asked the United States Secretary-General (UNSG) to prepare 'an analysis and recommendations of ways of strengthening and making more efficient the capacity of the United Nations for preventive diplomacy, for peacemaking and for peacekeeping'. As a result, the then UNSG Boutros Boutros-Ghali presented, in the same year, a ground-breaking report, entitled *An Agenda for Peace*,<sup>6</sup> which contained also several proposals for reform. The GA swiftly established a Working Group to further develop these proposals. Finally, the UNSG obtained a mandate to pursue preventive diplomacy and to further enhance the Secretariat's early warning system.<sup>7</sup> In 1995 a Supplement to *An*

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'Naturrechtliche Strömungen im heutigen Völkerrecht', 13 *ZaöRV* (1951) pp. 556-614; R. Laun, *Naturrecht und Völkerrecht* (Göttingen, Vandenhoeck & Ruprecht 1954).

4. A/RES/377(V) of 3 November 1950.

5. See E. Klein, in W. Graf Vitzthum, *Völkerrecht* (Berlin, De Gruyter 2004) pp. 296 et seq.

6. A/47/277-S/2411.

7. See 'General Assembly takes decisive first step on UN Reform', <[www.un.org/reform/focus.htm](http://www.un.org/reform/focus.htm)> (28 February 2005), p. 5.

*Agenda for Peace* followed,<sup>8</sup> and the Working Group obtained the mandate to continue considering both documents in four key areas (preventive diplomacy and peacemaking, post-conflict peace-building, coordination and sanctions) for which sub-groups were established.<sup>9</sup>

On a whole, these suggestions were directed at fine-tuning the whole system, at re-directing its activities to new, important challenges and to taking advantage of its capacities in the best possible way. The constitutional framework was, however, taken as a given, unmodifiable fact. In that, this discussion was to a certain extent very realistic. In fact, all the previously made suggestions for dramatic changes were doomed for failure from the beginning, especially when they intended to touch upon the privileges of the Permanent Five.

## 1.2 Present reform efforts

At last, time seemed to have come when it was necessary and possible to undertake far-reaching reforms. The necessity of such reforms was best demonstrated by the precipitating developments in the Gulf region and the growing understanding that fundamental global issues, such as underdevelopment, the upcoming of new pandemics, terrorism and nuclear proliferation could be tackled only by common efforts. The possibility of such reforms should be first of all an immediate consequence of their necessity. Contrary to what was thought initially, the many violations of UN law did not render this law obsolete, but gave rise to a counter-tendency. The real danger that the role of the UN would be severely diminished prompted declarations of commitment towards this institution on a very broad scale.

It was – on the one hand – this urgency and this momentum that convinced the UNSG Kofi Annan to establish a High-level Panel of Eminent Persons to assess current threats to international peace and security in autumn 2003. It also prompted him to evaluate how well the existing policies and institutions have done in addressing those threats; and to recommend ways of strengthening the UN to collective security. On 1 December 2004 the report entitled *A more secure world: Our shared responsibility* was presented to the UNSG<sup>10</sup> (hereinafter: the ‘HLP Report’).

On the other hand, the necessity for a comprehensive evaluation of the challenges and opportunities of the UN was, in any case, cited as a consequence of the United Nations Millennium Declaration, adopted by all UN member states in 2000. Two hundred and fifty experts undertook the so-called Millennium Project, which required them to produce a plan of action to achieve the Millen-

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8. A/50/60/S/1995/1.

9. See ‘General Assembly takes decisive first step on UN Reform’, *supra* n. 7, at p. 5.

10. See *A more secure world: Our shared responsibility*, Report of the High-level Panel on Threats, Challenges and Change, A/59/565, 2 December 2004.

niun Development Goals by 2015. An in-depth-analysis of these goals, of the prospects to achieve them, and of the instruments and means necessary for this aim can be found in the Millennium Project Report<sup>11</sup> (also called the ‘Sachs-Report’;<sup>12</sup> hereinafter: MPR). In September 2005, a gathering of world leaders took place in New York to review progress made since the United Nations Millennium Declaration and to set the course for the further reform discussion with more precision. The result of this meeting was the *2005 World Summit Outcome*.<sup>13</sup> In preparation for that summit the UNSG had to comment on the progress made with the implementation of the Millennium Declaration.

In its report entitled *In larger freedom: towards development, security and human rights for all* on 21 March 2005 (hereinafter: the Annan Report) the UNSG presented its findings.<sup>14</sup>

It is evident that the Annan Report draws heavily on the HLP Report and also on the studies for the Millennium Project. It contains, of course, also many personal ideas, convictions, and proposals by Kofi Annan. Both the HLP Report and the Annan Report received immediate international attention. Initial commentaries to the HLP Report remarked that this was an important, realistic, though not ground-breaking contribution to the long-lasting reform endeavour.<sup>15</sup> Once the report by the UNSG was published public discussion focalized on this document even though the greatest attention was still devoted to those aspects that had already been treated in the HLP Report. These documents were subject to intense debates by the UN member states and also by private institutions and academics. This resulted in several documents of outstanding importance. Firstly, the President of the General Assembly (UNGA), Mr Ping, prepared a draft outcome document of the high-level plenary meeting of the UNGA in September (hereinafter: Ping document).<sup>16</sup> On a whole, the draft document already foreshadowed what would become reality in September. Ping’s contribution was more prudent than the HLP Report or the Annan Report, and it further reflected more the viewpoint of governments and departed therefore less from traditional international law. The final document, the *2005 World Summit Outcome* (hereinafter: Outcome Document),<sup>17</sup> continued to adhere to this approach. The central provisions of the Ping document, vague as they

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11. See the report *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals*, United Nations publication, Sales No. 05.III.B.4, <[www.unmillenniumproject.org](http://www.unmillenniumproject.org)>.

12. Named with reference to Professor Jeffrey Sachs, the director of this study project.

13. A/60/L.1, 20 September 2005.

14. A/59/2005.

15. See, for example, C. Stelzenmüller, ‘Und sie bewegt sich doch’, *Die Zeit*, 2 December 2004, p. 8, ‘Angekratzte UNO will sich neu definieren’, *Die Presse*, 3 December 2004, p. 4; R. Thakur, ‘Wieder vereinte Nationen?’, 60 *Internationale Politik* (2005) pp. 102-107.

16. *Revised draft outcome document of the high-level plenary meeting of the General Assembly of September 2005 submitted by the President of the General Assembly*, 22 July 2005, A/59/HLPM/CRP.1/Rev.1.

17. *2005 World Summit Outcome*, 20 September 2005, A/60/L.1.

already were, were further watered down, so that their capacity to express an obligation went all but lost. If the most innovative aspects of the HLP Report or the Annan Report are no longer present in the 2005 World Summit Outcome, at the same time also the most problematic aspects have disappeared. It is obvious that a less innovative, more conservative approach is also a safer one. This does not mean, however, that any consideration of the present discussion on the UN reform should concentrate only on the last document mentioned. It is rather the case that the real meaning of this document cannot be fully grasped without reference to the reports prepared previously. Many formulations in the Outcome Document remained rather unprecise and left sufficient room for an extensive interpretation. In this regard, again the previously mentioned documents are of pivotal importance as an interpretative tool. Furthermore, it can be argued that the Outcome Document, representing such a paltry result, can hardly constitute the only basis for any attempt to give new guidance to the UN. The documents presented from December 2004 to September 2005 have, therefore, to be seen as a package whose various elements are drawing their authority from sources of different quality. Nonetheless they do bear autonomous testimony to the present ongoing reform process. At the least they convey an image of international law, its strengths and faults as it is seen by leading decision makers, who are participating in many ways in the making of international law.

In sum, at present as never before in the past a very rich panoply of reform proposals is available and these proposals should be suited to engender a wide-spread and informed discussion on the future of the UN system.

Finally, reference has also to be made to a first and very detailed commentary to the Annan Report prepared by the Netherlands Advisory Council on International Affairs (AIV) (hereinafter: AIV Report).<sup>18</sup>

In the following, some principal merits and weaknesses of the reports presented shall be examined. Particular attention shall be given to the HLP Report as it is the most daring, innovative and stimulating document. The following analyzes the extent to which these reports mark a real progress, which aspects merit further consideration and which proposals should better be abandoned for the sake of the very goals which stand behind the whole project. Finally, the most likely direction of the reform discussion as a whole is examined.

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18. The AIV is an independent advisory body responsible for advising the government and parliament on matters relating to foreign policy, development cooperation and defence. The present advisory report was prepared by a committee of the Council, chaired by Professor Nico Schrijver and with Mr Tiemo Oostenbrink serving as executive secretary. This report is reprinted in 52 *NILR* (2005) pp. 317-344. Page references in connection with this report refer to this review.

## 2. FREEDOM FROM FEAR

### 2.1 General remarks

As already stated the reform proposals mentioned deserve praise for the fact that they do not only address the most visible deficiencies of the UN system proposing symptomatic relief. To fight 'the scourge of war' has always been a primary goal of the UN, but the aspirations of modern human mankind go much further. Kofi Annan takes recourse to the larger concept of 'freedom from fear', which is based on a very broad security idea addressing the most threatening challenges of modern times.<sup>19</sup> In this context the system of collective security, the prohibition of the use of force, terrorism, organized crime and the threats stemming from nuclear, biological and chemical weapons are considered.

All these challenges are mentioned also in the HLP Report, but it is the Annan Report that offers a more systematic, original view. It is in this area, under certain aspects, also more daring as the HLP Report.

### 2.2 Recourse to force

#### 2.2.1 *Central importance of this issue*

Of the whole reform concept contained in the HLP Report the proposals regarding amendments to Chapter VII are clearly pivotal, although the reform agenda as a whole goes, of course, far beyond. The fate of the UN seems to be strongly connected with the operation of the instruments foreseen in this chapter. Perhaps in a short-sighted way, and possibly also too closely attached to the realities of the post-war world, security is often defined as military security. The UN is expected to play its role only when the struggle between conflicting interests escalates, even though the elements in the Charter designed for conflict prevention are numerous and easy to identify. As we will see later on, the HLP Report adopts a different approach and attempts exactly to take advantage of the whole potential for peace preservation the Charter offers. This change of perspective also becomes evident by the fact that the first part of the report is dedicated exactly to this broader security concept. Nonetheless, when substance is weighted against length and form it becomes clear that the traditional meaning of security policy is still preponderant. Accordingly, this section starts with an analysis of the changes the reports propose to be made with regard to the traditional, core instruments of peace preservation.

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19. The expression 'freedom from fear' is drawn from the Annan Report which is based on the 'four freedoms' developed by President F.D. Roosevelt in the State of the Union address of 6 January 1941: freedom of speech, freedom of every person to worship God in his own way, freedom from fear and freedom from want. See AIV Report, p. 320.

As the Annan Report more or less endorses the findings of the HLP Report, I shall concentrate in the following on this latter document. It will also be shown that once it was up to the governments to take position on this issue the traditional position prevailed.

### 2.2.2 *Right to self-defence*

#### 2.2.2.1 The norm and the actual challenges to it

It can be argued that the abusive recourse to Article 51 of the Charter taking place with particular frequency in the last years has been one of the main reasons for the present reform initiative to be started. Never before since 1945 has the traditional interpretation of this institute been under such pressure.<sup>20</sup> Calls for a 're-interpretation' of this institute (whereby, mostly, an abandoning of great part of the relevant restrictions is meant) are becoming ever more impellent.<sup>21</sup>

To explain briefly the opposing views reference should first be made to the text of Article 51,<sup>22</sup> which provides that the 'inherent right of individual or collective self-defence' is given 'if an armed attack occurs'. This formulation seems to take into consideration only a certain segment of the whole development of an armed attack from the preparatory stage to the possible duratory consequences on territorial sovereignty. It seems to require that the attack has already started and is still ongoing. Neither the preparatory stage nor the period after the hostilities have ceased are relevant. Even during the period of ongoing hostilities the right to self-defence is far from being unrestricted. Both the requirement of proportionality and the provision attributing the SC preference for taking measures necessary to maintain international peace and security seem to relegate the right to self-defence to a secondary role. In addition, the structure of Chapter VII of the UN Charter implies that measures of collective security are given absolute preference. Only as an exception, if and so long as the SC remains inoperative states can act individually or collectively in defence of their immediate, vital interests. As in practice inactivity of the SC came to be

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20. A good exposition of the traditional interpretation of this institute can be found in A. Randelzhofer, 'Article 51', in B. Simma, *The Charter of the United Nations – A Commentary*, 2nd edn, Vol. I (Oxford, Clarendon Press 2002) pp. 788 et seq.

21. See, for example, W.H. Taft IV and T.F. Buchwald, 'Preemption, Iraq, and International Law', 97 *AJIL* (2003) pp. 557-563; J. Yoo, 'International Law and the War in Iraq', 97 *AJIL* (2003) pp. 563-576; W.H. Taft IV, 'Preemptive Action in Self-Defence', 98 *ASIL* (2004) pp. 331-333; K.-H. Kamp, 'Preemptive Strikes', 59(6) *Internationale Politik* (2004) pp. 42-47.

22. According to Art. 31 para. 1 of the Vienna Convention of the Law of Treaties '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

It can be argued, therefore, that the assessment of the ordinary meaning is the starting point of the interpretation process.

the rule and not the provisional exception the whole system was turned upside down and new challenges arose. These challenges were closely connected to the development of modern weaponry. A response to an armed attack which is intended to be effective and meaningful has to follow ever more closely to the attack itself, whereby the traditional criteria for a permissible self-defence are visibly put into question. One critical point is reached when an armed reaction is allowed to an *imminent attack*, i.e. – in a first attempt to define this situation – an attack which has not yet fully materialized, but is due to happen within a very short period and appears to be practically unavoidable. In practice, more technical details are necessary to identify with precision such a situation. To this avail usually recourse is made to the so-called *Webster-formula* of the *Caroline* case, which requires that ‘the necessity of self-defence is instant, overwhelming, leaving no choice of means, and no moment for deliberation, ... the act, justified by the necessity of self-defence, must be limited by the necessity, and kept clearly within it’.<sup>23</sup>

It is by no means uncontested in international law that the *Webster-formula* is still in force and that therefore this concept remains applicable under the UN system.<sup>24</sup> The majority of writers seem, however, to be in favour of this concept being part of the existing law.<sup>25</sup> In any case, however, also the majority of the literature on the topic propends to a restrictive interpretation of the faculty to resort to preemptive measures. If measures of this kind (i.e., measures against an imminent attack) are legitimate, preventive measures (i.e., measures of a prophylactic nature against a possible threat) are not. Even leaving aside the fundamental criticism against this rule (as it does clearly not correspond to the prevailing view) the practical application of this concept gives rise to more doubts than certainties. While the formula presented above seems to be precise and clear its components are in reality again in need of interpretation and, therefore, it is probably no coincidence that even in the specific case this formula was crafted for, the dispute over the responsibility in the *Caroline* case, it was not suited to permit the identification of a mutually acceptable solution.<sup>26</sup>

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23. See Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841), in 29 *British and Foreign State Paper* 1840-1841, p. 1138 (1857), cited according to Yoo, loc. cit. n. 21, at p. 572.

24. Critical in regard Ranzelzhofer, op. cit. n. 20, at p. 803, para. 39.

25. See, for example, R.N. Gardner, ‘Neither Bush nor the “Jurisprudes”’, 97 *AJIL* (2003) pp. 585-590.

26. In fact, while the British government declared that the elements of the *Webster-formula* for a self-defence case were given it nonetheless declared their apologies. The American government contested this presentation of the facts but accepted the apologies. See W. Meng, ‘The Caroline’, in R. Bernhardt, et al., *Encyclopedia of Public International Law* (hereinafter: *EPIL*), Vol. I (Amsterdam: North-Holland 1992) pp. 537-538.

### 2.2.2.2 National Security Strategy (NSS)

Recently, an attempt was undertaken to totally rewrite the law of self-defence. This attempt is to be found in the National Security Strategy (NSS) of the Bush administration issued on 17 September 2002:

'For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. ...

...

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in a age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while danger gather.'<sup>27</sup>

With this new strategy the US claim the right not only to preempt threats deriving from an 'imminent attack' in the traditional sense but also to preempt *emerging* threats. Thereby, the *Webster*-formula is definitely abandoned. Threats can be countered also if they are still in the preparatory stage. As a consequence, practically every intervention would become excusable and it would be nearly impossible to apply objective criteria in the ex-post evaluation process as to whether the intervention was justified.

What renders this new strategy so pernicious is not only its substantial content as such, but the terminology applied. In fact, this strategy comes at first sight clothed in the familiar dress of a right to pre-empt immediate threats, but in reality it is championing a pure and simple right to prevent an armed attack even if the threat is only a possible, potential one. It becomes also clear from reading the NSS that it was not the ambition of the drafters of this new strategy to formulate a new, generally applicable rule which should take the place of Article 51 of the Charter. The purpose seems rather to have been to exempt the US unilaterally from the strict rules of Article 2(4) and Chapter VII of the Charter and to assert 'a better right' for this country. In other words the NSS

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27. See *The National Security Strategy of the United States of America* (September 2002), <[www.whitehouse.gov/nsc/nss.pdf](http://www.whitehouse.gov/nsc/nss.pdf)>; reprinted also in Gardner, loc. cit. n. 25, at p. 586.

is far from trying to establish a new rule of self-defence based only on technical elements such as the power of new weapons, the range of new missiles or the ever shorter period remaining for an effective response. These technical elements could be relied on by all nations and therefore the only result of such a new rule would be to make it generally far more easy to resort to war. The intent was rather to privilege in this the countries fighting for the 'good' against the nations representing the 'evil'.<sup>28</sup> It is true that an international system based on the principle of sovereign equality of all members is not necessarily value-blind and therefore it is legitimate to pass judgment on the behaviour of states. The violation of commonly agreed rules can also be qualified as 'evil' if recourse to an emotionally loaded language – even at the cost of it being simplistic or childish language – is accepted. The existence of a mechanism of collective security itself bears evidence to the fact that the UN systems differentiates between acts that are in the common interest and other acts that have to be repressed.<sup>29</sup> The acceptance of the *jus cogens* principle and the *erga omnes* binding force of some core rules of international law demonstrates further that international law is becoming more and more hierarchical with values that are being attributed something like a constitutional nature.<sup>30</sup> These values are, however, not unilaterally set but the result of a consensual norm-creating process. To assert unilaterally to be the representative of the 'good' flies in the face of any modern understanding of international law. As this autoqualification is likely not to go uncontested absent an institution for a final verdict on this issue the situation can easily escalate. There are uncountable arguments that can be brought forward for the claim to be the representative for the 'good': political, ideological, religious and, respectively, the contrary to each position. In the end it becomes clear that the unilateral claim of moral superiority finds no justification in modern international law. On the contrary, values are the result of a process and the relative stability of the post-war period is to a large extent the result of the fact that countries have to refrain from asserting unilaterally their world vision.

As a consequence, it can be said that the NSS represents a serious challenge to fundamental elements of the peace order established in 1945.

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28. See A. Anghie, 'The Bush Administration Preemption Doctrine and the United Nations', 98 *ASIL* (2004) pp. 326-329 at p. 327.

29. Even the first use of armed force by a state in contravention of the Charter constitutes only *prima facie* of an aggression according to Art. 2 of Res. GA 3314 (XXIX) of 14 December 1974.

30. This is true even if there is wide-ranging disagreement over the exact content of these principles. Main aspects of this discussion are very well summarized by N. Walker, 'The EU and the WTO: Constitutionalism in a New Key', in G. de Búrca and J. Scott, eds., *The EU and the WTO – Legal and Constitutional Issues* (Oxford, Hart 2001) pp. 31-57.

### 2.2.2.3 Proposals for change

As already stated it seems likely that the HLP has been mainly created to find a quick answer to the challenges for the UN order deriving from unilateral measures – actually taking place or planned – in the Near East – and from general policy orientations such as the NSS. The main thrust of the report in this field has therefore been to counter a change of paradigm or at least the wide-spread sensation that such a change could be taking place. At the same time the report had to offer alternatives: if change is unavoidable – and the overall consensus is that this is the case – then proposals have to be made for solutions that maintain or even improve the security situation.

At first sight, this is exactly what the report says. At the one hand, the chapter on Article 51 concludes with the following affirmation: ‘We do not favour the rewriting or reinterpretation of Article 51.’<sup>31</sup> At the other hand, some hints are given how the provisions on self-defence could be read in a way to tackle more effectively modern challenges to international security. The argumentation, however, by which the authors of the report reach the conclusion mentioned above, seems rather contorted, and at a closer look there appear even elements indicating that the conditions under which recourse to self-defence is possible are to be relaxed.

In paragraph 188 of the HLP Report we find the statement that the language of Article 51 of the Charter is restrictive, ‘[h]owever, 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’. As shown above, opinion in international law doctrine is not so unanimous whether an armed response to an imminent threat is permissible even though a solid majority seems to be in favour of such a right. If the answer to the question as to the existence of this right is in the affirmative then, however, the conditions attached to the exercise of this right are very restrictive. They are set out, as already mentioned, in the *Webster*-formula and this formula is far more demanding than the one cited in paragraph 188.

On the whole it can be said that the report does not give a true image of the complexities reigning in this field; it seems to deliver certainties where in reality doubts prevail. The reduction of complexity is not always a desideratum; it may make sense for a didactical text, but not for a legislative purpose which has to come to grips with reality in the broadest possible form. Otherwise the proposal risks to be either meaningless or – worse still – dangerous. To assess the risks lying in the text formulated by the HLP one should note that it is imaginable that advocates of the NSS could find their position confirmed by the text of this report.

It has to be recognized that the authors of the HLP Report refrained from

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31. See HLR Report, para. 192.

officially backing a right to preventive self-defence in cases where a threat is great but not imminent or proximate. For this case the report states as follows:

‘[I]f there are good arguments for preventive military action, with good evidence to support them, they should be put to the SC, 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.’<sup>32</sup>

It is not fully clear what the authors of this report had in mind when writing this statement. The formulation seems to imply that in cases of great danger not presenting all the requisites of an immediate threat the SC will react with mathematical certainty if the case is supported by good evidence.

The past experience shows that reality is different and the preparedness to act by the SC has been heavily influenced by subjective, egoistic considerations of its members. Therefore, this report evidences in a pivotal point an inconsistency in argumentation that opens a great gap in the security system and that puts into question the usefulness of the whole reform proposal. The Annan Report is, on this question, even more reductive than the HLP Report as it simply states that ‘[i]mminent threats are fully covered by Article 51 ...’.<sup>33</sup>

#### 2.2.2.4 Reaction of the State Community

It comes to no surprise that these proposals were not very warmly greeted by great part of the State Community. The Ping document takes account of this situation when it omits any direct reference to the bold ideas developed in the previous reports. These ideas are not, however, totally abandoned as in paragraph 76 the Ping document recognizes ‘the need to continue discussing principles for the use of force, as identified by the Secretary-General’. By this reference one of the most characterizing elements of the actual reform discussion should be preserved. In the Outcome Document, however, even this tenuous link to the Annan Report is cut. The chapter on the ‘use of force under the Charter’<sup>34</sup> reflects a position that could also be drawn from a mainstream textbook on international law. The commitment to multilateralism is stressed, the primary responsibility of the SC in the maintenance of international peace and security reaffirmed and no mention is made of a new (or newly interpreted) power to act for single states or of a new approach the SC should take in this field.

Nonetheless, this does not mean that the reform ideas propounded by the HLP or by the UNSG will no longer have any relevance. As the Outcome

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32. Ibid., para. 190.

33. Annan Report, para. 124.

34. Outcome Document, paras. 77 et seq.

Document constitutes a minimum compromise and central issues have simply been spared out it is probable that a meaningful continuation of the reform discussion will have to return to the positions described above. Therefore, it would be a great mistake to avoid a further consideration of these ideas as they appear to be, at least in part, heavily flawed and if they remain uncontested a wrong impression of the present state of development of international law in this field could be gained.

In this sense, it seems to be absolutely necessary to accept the challenge and to engage in a serious confrontation of the ideas presented in order to clear the way for a discussion that is better premised on international law as it presently stands and which leads to proposals that fit better to its future needs.

To do justice to the authors of the HLP Report and to the UNSG it should, however, also be pointed out that when drafting their proposals they might already have had in mind the new structure and working rules of the SC also set out in the respective reports. Therefore, in the following, also this part of the reform proposals shall be briefly examined before coming to a final conclusion on this broader issue.

### 2.2.3 *Proposals for a reform of the Security Council*

#### 2.2.3.1 Structure and the function of the Security Council

As has been shown, any reform to the rules on self-defence touches directly upon the system of collective security. These two elements are so strongly interconnected that any reform in this area has to address both aspects simultaneously.

The main reform proposals in this field are the following:

- The SC shall be enlarged from 15 to 24 members.
- This body shall become more representative of the different world regions which are distinguished in Africa, Asia and Pacific, Europe and Americas.
- There are two models: according to Model A six new permanent seats and three new two-year term non-permanent seats shall be introduced. According to Model B eight new four-year renewable seats and one new-two year non-permanent (and non-renewable) seats shall be introduced. No model would introduce any new powers.
- The existing veto powers shall not be abolished but factually restricted. First of all, the permanent members shall be asked to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses.<sup>35</sup> Furthermore an ‘indicative voting’ shall be introduced,

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35. HLP Report, para. 256.

whereby members of the SC could call for a public indication of positions on a proposed action. This first voting would have only an informative and no legal value. In particular, there would be no veto right. The second voting would take place under the ordinary rules and be the only binding one. As a result of this amendment the accountability of the veto function should be increased.<sup>36</sup>

- While the extension of the right to self-defence as resulting in the end from the text of the report was probably not intended the HLP explicitly endorsed a more proactive role of the SC in intervening in conflicts, even if they are merely internal:

‘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.’<sup>37</sup>

In principle it is correct that the powers of the UN to intervene in an unfolding humanitarian crisis is far larger than that of a single state to react by measures of self-defence. The whole Charter system was designed to give prevalence to collective measures and it was often argued that the insufficient working of this mechanism had attributed to self-defence a role originally not foreseen. There is much discussion in literature about the extension of the SC’s faculty to adopt sanctions according to Chapter VII. In any case, it appears to be very difficult to demonstrate that the SC is acting *ultra vires*, and even more difficult to prevent such situations.<sup>38</sup> On the other hand, full certainty on this issue seems not yet to be given. This is reflected in a stylistic element of an otherwise rather proactively oriented Annan Report. In fact, for the relevant issue this report does not contain a statement but a question whereby it becomes evident that not all doubts in this matter have yet been lifted. The relevant sentence goes as follows: ‘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?’<sup>39</sup>

The HLP has tried to put together a list of conditions that would allow the SC to authorize or endorse the use of military force. They regard the seriousness of the threat, the primary purpose of the proposed military action should be to halt

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36. Ibid.

37. HLP Report, para. 203.

38. See, for example, R. Higgins, ‘The New United Nations: Appearance and Reality’, in D. Freestone, et al., eds., *Contemporary Issues in International Law* (The Hague, Kluwer Law International 2002) pp. 143-159 at p. 151 and P. Hilpold, ‘The Continuing Modernity of Article 2(4) of the UN Charter’, in W. Inghaef, et al., eds., *Festschrift Rudolf Palme zum 60. Geburtstag* (Innsbruck, Berenkamp Verlag 2002) pp. 281-295.

39. Annan Report, para. 125.

or avert the threat in question, the measures should be measures of last resort and proportional and there should be a balancing of consequences: the consequences of action should not be worse than the consequences of inaction.<sup>40</sup>

These conditions should always be addressed by the SC and thereby the decisions by this body would not only be made more transparent, but at the same time a thorough assessment of all relevant elements should be assured.<sup>41</sup> As will be shown below this approach does not seem to be convincing.

### 2.2.3.2 The Peacebuilding Commission

The HLP Report proposed as a supportive measure the creation of a Peacebuilding Commission<sup>42</sup> and a Peacebuilding Support Office.<sup>43</sup> According to the HLP Report the Peacebuilding Commission should provide proactive assistance to prevent the further degeneration of crisis situations and assist international peacebuilding processes. The Peacebuilding Support Office should provide appropriate Secretariat support. This proposal was taken up by Annan, however in a more restricted way. In fact, the Peacebuilding Commission should intervene only in the post-conflict reconstruction phase and should not have an early warning or monitoring function.<sup>44</sup> This constitutes a clear change of perspective. Without engagement in conflict prevention and early warning the possible contributions of this Commission to effective peacebuilding are severely limited.<sup>45</sup>

It is obvious that this restrictive approach has been commanded by prudence with regard to the attitude the governments would finally take in this regard. It is also obvious that the creation of an early warning mechanism or the adoption of preventive measures constitute a far greater interference with sovereignty than post-conflict assistance regularly demanded by the respective countries themselves and in any case taking place in situations of shattered sovereignty. On the other hand, this restriction in the task of the Peacebuilding Commission may explain why this proposal obtained the approval by the governments at the 2005 World Summit. It can be said that the establishment of this Commission

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40. HLP Report, para. 207.

41. Kofi Annan follows closely this approach when he states: 'I therefore recommend that the Security Council adopt a resolution setting out [the principles applying on decisions regarding intervention] and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force.' See Annan Report, para. 126.

42. HLP Report, paras. 261 et seq.

43. Ibid., paras. 266 et seq.

44. Annan Report, para. 115. Annan proposed, however, that member states could at any stage make use of the Peacebuilding Commission's advice. Ibid.

45. In this sense also the authors of the AIV Report who rightly point out furthermore that the Commission should not be financed out of voluntary contributions but rather by the regular budget. See AIV Report, p. 332. On the broad issue of monitoring see G. Alfredsson, et al., eds., *International Human Rights Monitoring Mechanisms* (The Hague, Martinus Nijhoff 2001).

as an intergovernmental advisory body is one of the few results of the ongoing reform debate that have to be seen positively notwithstanding the cautious approach adopted.

### 2.2.3.3 An assessment

If one tries to assess the value of these reform proposals as a whole one is confronted with a dilemma similar to that the drafters of this reform were confronted with: the mechanism of collective security needs a thorough overhaul but on the other hand those countries that would lose power by this reform are likely to oppose any such changes.<sup>46</sup> The HLP was very pragmatic when it came to the conclusion that the veto power of the Permanent Five, though having an anachronistic character could not realistically be changed.<sup>47</sup> At the same time it recognized that changes exactly in this field are crucial for the success of the whole reform attempt. The various attempts to circumvent this impasse are surely ingenious but they are transferring the basic dilemma only to a different level. The conflicting interests will become apparent as soon as new paths are opened and vested interests are thereby imperiled. While Annan has pursued this path in his report, the Ping document demonstrates that there was no consensus among the governments on this issue. No mention is made of the interesting models developed in this regard by the HLP. The Outcome Document goes a little bit farther as it declares 'early reform [of this body] as an essential element of our overall effort to reform the United Nations'.<sup>48</sup> It requires it to become more broadly representative, efficient and transparent,<sup>49</sup> but fails to give any hint in which way this should happen.

Also the attempts to devise objective rules which should help the SC to decide when an intervention should take place have given no satisfactory results. This is, first of all, pointing to the proposal by the HLP to introduce criteria for such an evaluation. While appearing convincing at first glance, a closer look reveals that these criteria give rise themselves to numerous questions of interpretation.<sup>50</sup> In the end the interpreter is not really better off and the decision taking body has hardly a really helpful guideline at hands. The

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46. This is missed by Thomas Franck when he writes: 'The veto needs to be rethought. First, when the Security Council has characterized a situation as a threat or breach of the peace in accordance with Article 39 of the Charter and laid down conditions with which the offending state must comply, that resolution should also stipulate that any decision to use collective measures in the event of noncompliance should be made by a majority of the Council, not subject to the veto.' See T. Franck, 'The Role of International Law and the UN after Iraq', 98 *ASIL* (2004) pp. 266-269.

47. HLP Report, para. 256.

48. Outcome Document, para. 153.

49. *Ibid.*

50. See P. Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', 12 *EJIL* (2001) pp. 437-467 at pp. 442 et seq.

introduction of such criteria could even be counterproductive: they could lend themselves to better disguise a purely partial motivation behind the smokescreen of seemingly objective considerations.<sup>51</sup> The Outcome Document emphasized primarily the responsibility of each individual state to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. With regard to the UN, first of all, measures under Chapter VI and VIII are called into mind. With regard to measures according to Chapter VII the text of the Outcome Document is very prudent. Such measures should be taken on a case by case basis and only if peaceful means be inadequate and national authorities manifestly failing to protect their people. There is, therefore, the possibility by the SC to adopt measures of humanitarian intervention but only as a measure of last resort. Furthermore, there is no automatism in this field and not even a general rule applies: the decision is taken, as mentioned, on a case by case basis.<sup>52</sup> On a whole this position reflects more or less the existing practice by the SC in this area which can be deduced from the relevant SC resolutions.

The UNGA was probably well advised not to try to change the material rules on the use of force at this stage of the discussion, but rather to further the institution building process with the creation of the Peacebuilding Commission. Its tasks may be limited, but it can nonetheless provide urgently needed assistance.

#### 2.2.4 *Conclusions*

It cannot be denied that the motivation behind the reform proposals in the HLP Report and in the Annan Report was honest and the relative effort impressive. In a situation where the strict prohibition of the recourse to force was under challenge as never before in the history of the UN the HLP, as well as the UNSG tried to formulate the necessary adaptations both to keep the rule in force and to open up the necessary leeway for an efficient reaction to modern time challenges. It has been shown, however, that many of these proposals are not truly convincing. With regard to the right of self-defence the proposals are probably too far-reaching thereby allowing too an extensive recourse to this exception. As a consequence, it is doubtful whether the rule itself (i.e., the prohibition of the use of force) would remain in force if this approach was adopted.

Also with regard to the mechanism of collective security it can be said without doubt that there is an impelling need for reform but it is less sure whether we have already reached a stage in the relevant discussion where a solution which would meet with a broad consensus is in sight. The relevant

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51. Ibid. Of a different opinion are, however, the authors of the AIV Report (p. 328) who refer, *inter alia*, to an earlier report on the issue of humanitarian intervention (AIV/CAVV, *Humanitarian Intervention*, Advisory Report No. 13, The Hague, April 2000) in which a far more positive attitude towards the institute of humanitarian intervention than this author's is taken.

52. Outcome Document, para. 139.

proposals in the HLP Report and in the Annan Report are more adherent to reality than the statements with regard to the right to self-defence. Some procedural changes, such as that on 'indicative voting' would bring about evident improvements. With regard to the introduction of criteria for the assessment of the appropriateness of intervention it was shown above, however, that expectations should not be placed too high.

On a whole, it is dubious whether these proposals can really transform the SC in a body that would be that much efficient to attribute the institute of self-defence the role that was originally thought for it. Thus we can say that we are confronted here with an awkward situation. On the one hand the need for urgent reform of the SC goes uncontested, on the other the very far-reaching reform proposals by the HLP and the UNSG have met with no enthusiasm by the State Community. Therefore, new ideas which should probably cling closer to the reality of international law as it has been formed by the consent of the State Community are needed.

### 2.3 Terrorism

Terrorism is at the one hand old as a phenomenon, at the other the disruptive capacity lying in it has lately assumed totally new dimensions.<sup>53</sup> The fact that both the HLP Report and the Annan Report are facing this issue squarely is a very important one as the attitude of the UN towards terrorism has often been an ambivalent one in the past. As the UN has offered the most eminent forum for the advocacy of the idea of national liberalisation, it has often proved to be difficult to find the point where freedom fight ends and sheer terrorism begins.<sup>54</sup>

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53. In international law the issue of terrorism has been the subject of increasing closer interest for a long time. See only M.C. Bassiouni, *International Terrorism and Political Crimes* (Dordrecht, Nijhoff 1988); Y. Dinstein, ed., 'International Legal Colloquium on Terrorism as an International Crime', 19 *Israel Yearbook on Human Rights* (1989) pp. 9 et seq.; Hague Academy of International Law, ed., *The Legal Aspects of International Terrorism* (The Hague 1989); D. König, 'Terrorism', in R. Wolfrum and C. Philipp, eds., *United Nations: Law, Politics and Practice*, Vol. 2 (Dordrecht, Nijhoff 1995) pp. 1220-1228. R.A. Friedlander and Th. Marauhn, 'Terrorism', *EPIL IV* (1999) pp. 845-858. After the attacks of 9/11 literature on terrorism has literally exploded. Only as examples the following contributions shall be mentioned: M.C. Bassiouni, 'Legal Control of International Terrorism: A Policy-Oriented Assessment', 43 *Harvard International Law Journal* (2001) pp. 83-103; T. Bruha, 'Neuer Internationaler Terrorismus: Völkerrecht im Wandel?', in H.-J. Koch, ed., *Terrorismus – Rechtsfragen der äußeren und inneren Sicherheit* (Baden-Baden, Nomos 2002) pp. 51-82; E. Hugues, 'La notion de terrorisme en droit international: en quête d'une définition juridique', 129 *Journal du droit international* (2002) pp. 753-771; C. Greenwood, 'International law and the "war against terrorism"', 78 *International Affairs* (2002) pp. 301-317; H.-J. Heintze, 'Ächtung des Terrorismus durch das Völkerrecht', in H. Frank and K. Hischmann, eds., *Die weltweite Gefahr* (Berlin, Berlin Verlag 2002) pp. 67-102; P.J. van Krieken, *Terrorism and the International Legal Order* (The Hague, T.M.C. Asser Press 2002).

54. S.M. Malzahn, 'State Sponsorship and Support of International Terrorism: Customary

The international fight against terrorism has been severely hampered by the lack of a consensual definition of what terrorism is.<sup>55</sup> This is not merely a technical question, but constitutes politically and ideologically a highly loaded issue. Especially with regard to the Palestine conflict many attempts have been made in the past to link the qualification of the activities of Palestine armed groups with those of the Israeli troops. In particular, in the ambit of the attempts to draft a comprehensive convention, which should generically define terrorist offences not only ‘armed troops’, but ‘all parties to an armed conflict’ should be excluded from the application of such an instrument.<sup>56</sup> The HLP Report mentions generally the claim advanced by some that any definition should include state’s use of armed forces against civilians. The HLP correctly recalls that the legal and normative framework against state violations is far stronger than in the case of non-state actors and that therefore this linkage is not necessary.<sup>57</sup> It is clear that such a linkage would overload the issue and effectively halt any progress in the search for a definition. The same is true for the claim that peoples under foreign occupation have a right to resistance. The HLP again aptly notes that ‘there is nothing in the fact of occupation that justifies the targeting and killing of civilians’.<sup>58</sup>

As a consequence, the HLP Report strongly recommends to continue the efforts to find a definition for terrorism and provides also a series of elements that such a definition should contain.<sup>59</sup>

Kofi Annan gets in his report even more explicit on the issues mentioned above when he writes:

‘It is time to set aside debates on so-called “State terrorism”. The use of force by States is already thoroughly regulated under international law. And the right to resist occupation must be understood in its true meaning. It cannot include the right to deliberately kill or maim civilians.’<sup>60</sup>

He also fully endorses the High-level Panel’s call for a definition of terrorism,

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Norms of State Responsibility’, 26 *Hastings International & Comparative Law Review* (2002) pp. 83-114; N. Rostow, ‘Before and After: The Changed UN Response to Terrorism since September 11th’, 35 *Cornell International Law Journal* (2002) pp. 475-490.

55. On this struggle already going on for more than three decades see, for example, R. Higgins, ‘The General International Law of Terrorism’, in R. Higgins and M. Flory, eds., *Terrorism and International Law* (London, Routledge 1997) pp. 14 et seq.; A. Wüstenhagen, ‘Die Vereinten Nationen und der internationale Terrorismus – Versuch einer Chronologie’, in von Schorlemer, ed., op. cit. n. 1, at pp. 101-144.

56. See B. Saul, ‘Attempts to define “terrorism” in international law’, in 52 *NILR* (2005) pp. 57-83 at pp. 73 et seq.

57. HLP Report, para. 160.

58. Ibid.

59. HLP Report, para. 164.

60. Annan Report, para. 91.

even inviting world leaders to conclude a comprehensive convention on terrorism before the end of the sixtieth session of the UNGA.<sup>61</sup>

As it is known an *Ad Hoc* Committee established by the UNGA in 1996 has adopted in 2002 a Draft Comprehensive Convention on Terrorism ('Draft Convention') which leaves no room to justify criminal acts within the scope of that Convention by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature.<sup>62</sup> This approach does not yet, however, receive full endorsement by the State Community.<sup>63</sup>

It has already been mentioned that one characterizing feature of both reports is to find in the fact that they try to evidence the relations between fundamental challenges to international security of our time and to lay open the basic roots of the single threats. The results of this endeavour are not always convincing and the proposed explanations may even seem artificial. The chapters on terrorism appear, on the contrary, thoughtful and well formulated. In this field, especially according to the HLP Report, a comprehensive strategy becomes visible. This strategy should be promoted by the UN under the direction of the UNSG and should include, *inter alia*, dissuasion, the promotion of social and political rights, the fight against organized crime, the reduction of poverty and unemployment, efforts to counter extremism and intolerance, the development of better instruments for global counter-terrorism cooperation, the build-up of state capacity to prevent terrorist recruitment and operations, the control of dangerous materials and public health defence.<sup>64</sup>

The only problem with this approach may be that it is, perhaps, too perfect. As it mentions virtually all strategies that could be of some use in the struggle against terrorism it leaves open where political and financial resources, which are always scarce, should be effectively invested. In other words, it was of great value to obtain an extensively detailed picture of the complexity the fight against terrorism harbors. A strategy for a targeted multilateral action has, however, still to be developed.

It is remarkable that in this area the Ping document echoes very closely the Annan Report – a sign that there is a broad consensus in the State Community that the fight against terrorism has to be taken up seriously. At first sight the

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61. Ibid.

62. See the Report of the *Ad Hoc* Committee Established by General Assembly Resolution 51/210 of 17 December 1996, UN GAOR, 6th Session, 26th mtg., UN Doc. A/57/37 (2002), Art. 5, at 8.

63. For a critical assessment of the proposal by the Organization of the Islamic Conference to exclude from the scope of this Convention 'all activities of the parties during an armed conflict, including in situations of foreign occupation' see M. Halverstam, 'The evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed', 41 *Columbia Journal of Transnational Law* (2003) pp. 573-584. She rightly points out that '[t]here are few, if any, terrorist acts that are not, arguably at least, related to an armed conflict'. Ibid., p. 581.

64. HLP Report, para. 148.

Outcome Report seems to go along the same lines, but at a closer look this document reveals great differences with regard to the previously mentioned documents. Firstly, it does not mention the necessity to find a definition for what constitutes terrorism. The difficulties in this regard mentioned above prevailed. It is true that the Outcome Report welcomes the Secretary-General's efforts to devise a comprehensive counter-terrorism strategy. These efforts which should be carried on by the UNGA should also take into account the conditions conducive to the spread of terrorism.<sup>65</sup> In principle, this is a very sensible strategy.

It stands to reason, however, to take also notice of the possible dangers associated with it. First of all, acts of terrorism and possible causes having engendered them should not be placed on the same level. There is no justification for such acts and it is a pity that the clear statement of the UNSG in this regard<sup>66</sup> has not found its way in the Outcome Document. Creating such a link means further to reduce the disdainfulness of terrorism and this can in no way be accepted. Finally, it is probably not possible to identify single causes or even set of causes for terrorism. In the political discussion the causes indicated change according to the political orientation of the commentators. In the end, the whole discussion can become trivial and there is the serious risk that terrorism becomes finally accepted as a possible tool of politics (perhaps as a measure of last resort) or as a mere indicator of social illnesses which have first to be addressed.

In paragraph 85 of the Outcome Document we find an indirect reference to the present developments in the Middle East:

'We recognize that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international Conventions and Protocols. States must ensure that any measure taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.'

This paragraph implies that the rise in terrorist activities we have assisted in the last years did not lead to a new stage in the development of international law. On the contrary to what is sustained by some states the instruments at hand to combat this phenomenon are the traditional ones and also the restrictions posed for the use of these instruments did not change.

This position may be absolutely correct but it leaves open in which way this new challenge to international security (and, in the end, also to human rights) could be fought more effectively. There is the impression that there is no preparedness to develop international law further and the lack of consensus on a

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65. Outcome Document, para. 82. See also A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', 12 *EJIL* (2001) pp. 993-1001 at pp. 1000 et seq.

66. Outcome Document, para. 83.

definition raises doubts about the seriousness of the will to tackle this issue. The various invitations to enhance cooperation in this field cannot be the answer, at least not the only one. As it seems, old political divides have proven to be stronger than the insight that a strong commitment to look for new international instruments in this struggle is absolutely necessary.

It is surely true, however, that the broad debate on terrorism was not futile as in the meantime the UNGA has at least adopted a Convention on Nuclear Terrorism (13 April 2005) and adopted by consensus a resolution on the nomination of a Special Rapporteur on terrorism (21 April 2005).<sup>67</sup>

#### 2.4 Transnational organized crime

The fight against this phenomenon is an important piece in the jigsaw of a new comprehensive strategy to improve international security. In fact, transnational organized crime is a re-enforcing and amplifying element with regard to many of the threats described above. It plays a prominent role in drug-selling and prostitution thereby contributing to the spread of HIV/AIDS, it is a key element in the clandestine selling of nuclear material, it is involved in the abusive export and dumping of waste and it is strongly connected with terrorism both often being two faces of the same coin. It can bring down the civil structures of a country and create in this way a serious problem of international security.

On this issue, the HLP Report is far more articulate than the Annan Report as it documents both the multicausality of transnational crime as well as the multifaceted disastrous consequences deriving from this phenomenon on the society as a whole. In the Annan Report these aspects are not totally ignored but on a whole the perspective is narrower as this report emphasizes, first of all, the linkage between organized crime and terrorism.

To counter this threat the Annan Report considers it pivotal that the relevant conventions elaborated within the UN are ratified by the member states. Furthermore, they are invited to give adequate resources to the United Nations Office on Drugs and Crime. The HLP Report goes further and proposes, *inter alia*, the creation of a central authority to facilitate the exchange of evidence among national judicial authorities, the drafting of a comprehensive international convention on money-laundering and the establishing of a robust capacity-building mechanism for assistance in setting up the rule-of-law.<sup>68</sup>

It is disappointing to see that the Outcome Document has fallen far behind even the position taken by the UNSG. No word is made of the link between terrorism and transnational crime – a fact which adds to the doubts about the seriousness of the commitment to fight terrorism. This can be seen as a further indication that all in all, the Outcome Document follows a very prudent strategy

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67. See the AIV Report, p. 322.

68. HLP Report, paras. 172 et seq.

which emphasizes the sovereign rights of all members of the State Community, while the HLP Report proposes new strategies based on a stronger involvement of the State Community as such.

## 2.5 Proliferation of nuclear, radiological, chemical and biological weapons

In both the HLP Report and the Annan Report the threat resulting from the proliferation of nuclear, radiological, chemical and biological weapons receives central attention. It can be said, without doubt, that in both reports the chapters on this issue relate to the best parts of the whole document.

### 2.5.1 *Nuclear weapons*

The Treaty on the Non-Proliferation of Nuclear Weapons<sup>69</sup> has been called ‘one of the great success stories of arms control’,<sup>70</sup> a ‘landmark international treaty’.<sup>71</sup> At first sight the achievements seem to be truly impressive: with 189 treaty parties it is practically an universal instrument, the five Nuclear Weapon States<sup>72</sup> (NWS) have agreed to pursue and liquidate their stockpiles and in 1995 the Treaty has been extended indefinitely and without conditions. Since the early 1990s a so-called ‘safeguards system’ is in place. According to this system the International Atomic Energy Agency (IAEA) has been attributed special inspection powers. What seems to be impressive on paper proves, however, to be more sober in reality. Stockpiles and deployments of nuclear weapons by the NWS may have been reduced but the relevant process is far behind schedule.

With regard to membership India, Pakistan and Israel – three states possessing or alleged to possess nuclear weapons – have refused to sign the Treaty. More than 30 member states have not accepted any safeguard thereby weakening the effectivity of the control mechanism. The problem of ‘cheating’ is becoming rampant: membership of the Treaty gives access to nuclear technology for civil purposes. The possibility to withdraw from the Treaty on short notice and without having to dismantle facilities built up abusing the Treaty system is considered by some countries as an invitation to cheat.<sup>73</sup> This situation creates a typical prisoner dilemma where individual short term advantage is

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69. Signed at Washington, London and Moscow 1 July 1968, entered into force 5 March 1970; Treaty text available at <[www.state.gov/t/np/trty/16281.htm](http://www.state.gov/t/np/trty/16281.htm)> (visited on 12 May 2005).

70. Ibid.

71. <[www.un.org/Depts/dda/WMD/treaty/](http://www.un.org/Depts/dda/WMD/treaty/)> (visited on 12 May 2005).

72. These are the United States, France, the United Kingdom, the Soviet Union and the People’s Republic of China. Of course, it is an open secret that in the meantime there are much more states possessing at least the technical capacity to manufacture nuclear weapons.

73. See *The Economist*, 30 April 2005, p. 14, pointing in particular at Iran and at North Korea.

pursued at the cost of endangering the Treaty system as a whole.<sup>74</sup>

It is clearly perceptible that the proposals contained in the two reports pertain to a field in which the UN has had the primary responsibility for a long time and regarding to which it has acquired profound expertise from which both the HLP as the Secretary-General draw. It is also noticeable that the Secretary-General is personally involved in these issues more than in most other treated in his report. This may explain why the Annan Report in this field differs to a considerable extent from the HLP Report although the latter one would have given an excellent blueprint.

In the HLP Report the threats the World Community faces because of the proliferation of these weapons are described in both an alarming and a convincing way. The strategies that the HLP devises to counter these dangers seem also appropriate. They build on existing instruments, such as the Treaty on the Non-Proliferation of Nuclear Weapons which should be adapted to the new challenges. The verification powers of the IAEA should be improved and it should act as a guarantor for the supply of fissile material to civil nuclear users.<sup>75</sup> At present a great problem in the implementation process consists in the possibility of states to withdraw from the Non-Proliferation Treaty once they have – secretly – acquired the capacity to build nuclear weapons. In future, a state's notice of withdrawal from the Treaty shall prompt an immediate verification procedure<sup>76</sup> and the respective states shall be held responsible for the violations of the Treaty committed before.

Annan asks the member states outrightly to conclude arms control agreements that entail not just dismantlement but irreversibility. The moratorium on nuclear test explosions also should be upheld until the entry into force of the Comprehensive Nuclear Test-Ban Treaty can be achieved.<sup>77</sup> With regard to verification Annan endorses the HLP approach requiring the universal adoption of the Model Additional Protocol. He furthermore urges State Parties to supplement the Non-Proliferation Treaty in order to prevent non-state actors from gaining access to nuclear, chemical and biological weapons and to prevent illicit trafficking in these items. He urges member states to 'adopt effective national export controls covering missiles and other means of delivery for nuclear, biological and chemical weapons, rockets and shoulder-fired missiles, as well as a ban on transferring any of them to non-State actors'.<sup>78</sup>

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74. For an extensive discussion of the non-proliferation issue both from a legal and political viewpoint see the various contributions published in *The Nonproliferation Review*, Monterrey Institute of International Studies, <cns.miis.edu>.

75. HLP Report, para. 130.

76. Ibid., para. 134.

77. Annan Report, para. 98.

78. Ibid., para. 101.

### 2.5.2 *Chemical and biological weapons*

Particular attention is also devoted to the issue of chemical and biological weapons.<sup>79</sup> Two important conventions are in place in this field, the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, more commonly known as the Chemical Weapons Convention (CWC)<sup>80</sup> and the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC).<sup>81</sup> Both instruments clearly constitute an important step ahead, but still there is sufficient evidence that the stocks of biological and chemical weapons are rising notwithstanding the fact that both Conventions enjoy a very large adherence. The greatest problem in this field is, therefore, less one of lacking substantive provisions as one of insufficient compliance. It is interesting to note, that the CWC appears to be further evolved in this regard than the Convention on Biological and Toxin Weapons. For the CWC, as the much younger instrument, its drafters could take advantage of modern knowledge in compliance theory, thus taking care to integrate a specific monitoring mechanism in this Convention with the possibility of immediate inspections by the appositely created Organization for the Prohibition of Chemical Weapons in the case of suspicion of a violation.<sup>82</sup> With regard to the BWC efforts to draft an additional Protocol on verification have not yet brought any result.

The greatest problems with the assurance of non-proliferation of chemical and biological weapons rely in the fact that the relevant technology for many of these weapons is rather old and it is easily available and affordable. This means also that a meaningful verification process has to assume a totally different scale than with regard to nuclear weapons and it is decisively more difficult to carry out. In fact, the relevant laboratories are far more easy to hide than nuclear plants.

When emphasizing the importance of this issue and thereby preparing the ground for further initiatives Kofi Annan has probably plainly fulfilled the task that could be attributed to him. The technical details to ensure greater compliance in this area have to be elaborated by experts and it is evident that much work has still to be done in this regard.

The fact that no agreement whatsoever has been found in this area at the

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79. *Ibid.*, para. 103.

80. This Convention entered into force on 29 April 1997. For more information on this Convention see <[www.opcw.org](http://www.opcw.org)>.

81. This Convention entered into force on 26 March 1975. It was the first multilateral disarmament treaty banning the production and use of a complete category of weapons. See D. Boothby, 'Disarmament: Successes and Failures', in Krasno, ed., *op. cit.* n. 1, pp. 193-223 at p. 208. For more information on the Convention see also <[www.opcw.org](http://www.opcw.org)>.

82. See Boothby, *op. cit.* n. 81.

2005 World Summit is a further disappointment of this meeting. The relevant chapter which was still present in the Ping document<sup>83</sup> has disappeared in the Outcome Document.<sup>84</sup> Notwithstanding this failure, discussion on this subject will have to be re-initiated and the HLP Report, as well as the Annan Report, could constitute a good starting point for such an endeavour.

### 3. FURTHER REFORM PROPOSALS

#### 3.1 General remarks

The above analysis should demonstrate that the reform proposals published in the last months are standing out under many considerations among which the authority of their authors, the straightforwardness of their argumentation, but – above all – the systematic interrelation of the various proposals have to be mentioned first. In this context, with regard to the security issue, it has to be mentioned that both the HLP Report as the Annan Report are trying to look for the very roots of international conflict.

One idea behind this approach is that a fairer world order<sup>85</sup> would also help to overcome many of the most violent conflicts. Another basic premise is the conviction that all major challenges to the modern world order are in some way interrelated. This approach is both laudable and criticable. It is laudable because it helps to identify in some cases the real roots of international problems that seemed to date to be intractable. By this way also possible synergies in the fight against these threats can be evidenced. Some parts of these reports create, however, the impression that the relationship between the individual issues is more artificial than real and that – for the sake of obtaining a ‘great design’ – complex social and political issues are presented in an oversimplified manner.

Both the HLP Report as the Annan Report manage to address the great problems of international law and not only of UN law in a stricter sense. Relating all these issues to UN law meant indirectly to reinvigorate this body of norms and to confirm its status of a constitutional order.<sup>86</sup> The potential and the limits of this approach shall be briefly treated in the following.

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83. Ping document, paras. 77 et seq.

84. Kofi Annan has called this failure a ‘real disgrace’. See BBC News – World Edition, <[news.bbc.co.uk/2/hi/americas/4253358.stm](http://news.bbc.co.uk/2/hi/americas/4253358.stm)> (visited on 21 September 2005).

85. On the principle of fairness in international law see T. Franck, *Fairness in International Law and Institutions* (Oxford, Clarendon Press 1995).

86. See on this concept already A. Ross, *Constitution of the United Nations* (Copenhagen, Ejnar Munksgaard 1950). See also A. Verdross, *Die Quellen des universellen Völkerrechts* (Freiburg, Rombach 1973) p. 13. For a recent contribution to this issue see T.M. Franck, ‘Is the U.N. Charter a Constitution?’, in J.A. Frowein, et al., *Verhandeln für den Frieden – Negotiating for Peace, Liber Amicorum Tono Eitel* (Berlin, Springer 2003) pp. 95-106.

What are the main issues that are dealt with in this context in these reports? Top priority has been given to the following subjects: poverty reduction, development promotion, the fight against infectious diseases and environmental degradation, as well as the creation of a legal and political framework in which the rule of law, the respect for human rights and for democratic principles should be guaranteed.

Because this is a very broad agenda, the HLP, as well as the Secretary-General, have taken particular care to show the reciprocal relations between the various issues. It is obvious that not all aspects could be treated with the same care and in the same detail. It also is noticeable that both reports put a somewhat different emphasis on the various issues. Without doubt it can be said, however, that both reports contain thought provoking considerations and present really innovative approaches.

The Outcome Document evidences in this field a mixed result: while the necessity for action is emphasized in an unambiguous way, the commitment to concrete measures and actions is rather half-hearted.

### 3.2 Poverty reduction and development strategies

#### 3.2.1 *The status quo*

Concerning this issue it can be said that the difference between the HLP Report and the Annan Report is most perceptible. It appears evident that the latter report has been strongly influenced by the Millennium Project.

Already in the HLP Report poverty is presented as a problem growing continuously in dimension. The gap between rich and poor is becoming ever wider, both when rich and poor countries are compared as within the poorest countries. Poverty is both a cause for the further spread of infectious diseases and for environmental degradation and at the same time is a consequence of these phenomena. The report merits praise for emphasizing these relations. On the other hand, it is surprising that this document is lacking any indication how to tackle this problem directly. The HLP does not even make an attempt to do so. It would, however, be wrong to criticize the HLP for negligence. The position taken by this Group is rather symptomatic for the status a once prominent branch of international law, namely the international law of development, has fallen into. Driven by unrealistic claims for an international redistribution policy and delegitimized by endemic corruption in developing countries the sophisticated intellectual edifice constructed around the international law of development<sup>87</sup> is now shattered and has all but fallen into oblivion. Yet, while it

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87. For major contributions to this branch of law see M. Bulajic, *Principles of International Development Law: Progressive Development of the Principles of International Law Relating to the New International Economic Order* (Dordrecht, Nijhoff 1993); C. Tomuschat, 'New International Economic Order', *EPIL III* (1997) pp. 578-582; P. Slinn, 'The International Law

may be true that this whole approach was in many ways ill-conceived and that it has been a dead-end way from the beginning it constituted at least an important contribution to keep the discussion about poverty and about means to alleviate it alive. It was substituted by an attitude that was not a real alternative, evidenced by the ignorance of the special needs of developing countries, which is not in itself a valid instrument to bridge the existing differences in development.<sup>88</sup> The report mirrors the last two decades' *Zeitgeist* in this context: the persistence of the problem is acknowledged but in view of the lack of generally agreed solutions no futile attempt is undertaken to propose innovative solutions. All that came to mind to the HLP was to call the attention of the First World to the target for development aid set by the UN at 0.7 per cent of the gross national product,<sup>89</sup> to invite WTO members to strive to conclude the Doha development round at the latest in 2006<sup>90</sup> and to provide highly indebted poor countries with greater debt relief, longer rescheduling periods and improved access to global markets.<sup>91</sup>

In development theory there are many experts who have voiced strong doubts whether Official Development Assistance (ODA) makes any sense outside spontaneous relief in the presence of a catastrophe. The same has been said about debt relief as it provides no guarantee that financial means are used

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of Development: A Millennium Subject or a Relic of the Twentieth Century?', in W. Benedek, et al., eds., *Development and Developing International and European Law* (Frankfurt-on-Main, Lang 1999) pp. 299-318; T.W. Waelde, 'A requiem for the "New International Economic Order" – The Rise and Fall of Paradigms in International Economic Law and a Post-Mortem with Timeless Significance', in G. Hafner, et al., eds., *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in honour of his 80th birthday* (The Hague, Kluwer Law International 1998) pp. 771-803. For a critical position towards this role of the UN in this process see W. Bello, 'The Bretton Woods Institutions and the Demise of the UN Development System', in A.J. Paolini, et al., eds., *Between Sovereignty and Global Governance – The United Nations, the State and Civil Society* (Houndmills, MacMillan 1998) pp. 207-227.

88. Of course, the introduction of a market based economic system constituted regularly an improvement in comparison to the bureaucratic and dirigistic models in force before. In this respect it was correct to laud the introduction of a 'world wide market economy'. See, in this context, T. Oppermann and M. Beise, 'Auf dem Weg zur Weltmarktwirtschaft', 48 *Europa-Archiv* (1990) pp. 493 et seq.

As it is known, within the GATT/WTO-system over a long period efforts have been undertaken to assure the developing countries a more special and differentiated treatment. The most visible results were the addition of part IV to the GATT in 1965 and the adoption of the enabling clause in 1979. As the results in practice were, however, meagre and the distortions caused by these exemptions far-reaching during the Uruguay Round negotiations a new approach was chosen according to which the developing countries should be fully inserted in the multilateral trading system. Only few exceptions should be maintained in favour of the least developed countries. Again, the experiences that have been made with this approach since 1995, when the WTO entered into force, were not very satisfactory. As a consequence, in order to give expression to this new negotiating priority, the Doha Round started in 2001 was named the development Round.

89. HLP Report, para. 60.

90. Ibid., para. 62.

91. Ibid., para. 63.

efficiently. Corrupt and profligate governments are easy to misunderstand debt relief as a licence to return to bad habits.

### 3.2.2 *The Millennium Project and the Annan Report*

#### 3.2.2.1 The single goals

Here, the results of the Millennium Project Report (MPR) come into play. In fact, the results of MPR presented in January 2005 constitute an extraordinary contribution to development theory. As the experimentation of a vast array of development concepts over the last decade has given only meagre results, in addition to existing strong voices opposing a further transfer of resources in view of the lack of a perceptible outcome, the time has come for a thorough review of development politics. Such a re-examination of the whole issue appears to be particularly urgent as factors, such as overpopulation, the upcoming of new diseases, war, political oppression, gender bias and worsening terms of trade are causing the situation to deteriorate continuously.

Despite the absence of comprehensive development concepts, the MPR stands out for its scope, its richness of detail and its underlying intention to make a real difference. The goals, already set out in the Millennium Declaration of 2000,<sup>92</sup> are the following:

- 1) Between 1990 and 2015, halve the proportion of people whose income is less than \$1 a day and the proportion of people who suffer from hunger.
- 2) Achieve universal primary education by 2015.
- 3) Eliminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education by 2015.
- 4) Between 1990 and 2015, reduce the under-5 mortality rate by two-thirds.
- 5) Between 1990 and 2015, reduce the maternal mortality rate by three-fourths.
- 6) By 2015, halt and begin to reverse the spread of HIV/AIDS and halt and begin to reverse the incidence of malaria and other major diseases.
- 7) Ensure environmental sustainability by integrating the principles of sustainable development into country policies and programs and reversing the losses of environmental resources.
- 8) Develop a global partnership for development.<sup>93</sup>

These goals have been reaffirmed – and partly further developed – in November 2001 on the occasion of the launching of the Doha Round, at the March 2002 International Conference on Financing for Development in Monterrey and, the same year, at the World Summit on Sustainable Development in Johannesburg.

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92. A/Res/55/2.

93. See 34(7) *IMF Survey* (2005) p. 110.

Between 2000 and 2005 some progress in a few of these areas has been achieved, in others there was a standstill or even a further deterioration. In any case it is evident that much has still to be done and that efforts have to be boldened. The intent is to reach the MDG within the decade from 2005 to 2015. In this period a vast set of initiatives have to be undertaken both to meet actual urgent needs as to build up lasting infrastructures. The report advocates no easy solutions, but adopts instead a differentiated approach in which also traditional instruments such as ODA find an important place.

In 1970 the UNGA has fixed a target for developed country of providing 0.7 per cent of their national income as ODA. Overall, the percentage of ODA has, however, not risen but fallen; from 0.33 per cent in 1970 to 0.23 in 2002. Only five countries meet or surpass the 0.7 target: Denmark, Luxembourg, the Netherlands, Norway and Sweden.<sup>94</sup>

The MPR outlines that to meet the 0.7 per cent now would permit to halve poverty as income in developed countries is now at very high levels. This report recognizes also, however, that the quality of ODA has to be improved substantially and that this aid must be better targeted than is currently the case.<sup>95</sup> Crucial for the success will be the participation of the private sector, the coordination of the MDG strategies with the strategies of all International Organizations operating in the field of development policy, the devising of appropriate national strategies to achieve the Goals and a clear commitment to good governance. As it is known, this concept is still an elusive one.<sup>96</sup> It includes the promotion of human rights, the fight against corruption, the adoption of sound economic policies and the creation of transparent, participatory and accountable governments.<sup>97</sup>

The MPR is right when it emphasizes that the promotion of single, uncoordinated initiatives is not enough to meet effectively the development challenge. Instead, a grand design with the participation of all key stakeholders, domestic and foreign, is necessary to guarantee lasting results.

### 3.2.2.2 Achieving these goals

It is uncontested that this report merits praise for the thorough, detailed and comprehensive analysis of the situation. It is also clear that the development issue is a very complicated one that requires an integrated, multi-level strategy

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94. See MPR, p. 252.

95. Ibid., p. 254.

96. See F.N. Botchway, 'Good Governance: The Old, the New, the Principle, and the Elements', 13 *Florida JIL* (2001) pp. 159-210; P. Hilpold, 'EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance', 7 *European Foreign Affairs Review* (2002) pp. 53-72; R. Dolzer, 'Good governance: Neues Leitbild der Staatlichkeit?', 64 *ZaöRV* (2004) pp. 535-546.

97. MPR, p. 110.

that this report seems to devise. On a whole, however, this report seems to place more emphasis on the responsibility of the developed countries than on that of the developing ones. The basic premise appears to be that the development problem cannot be overcome without a substantial transfer of resources from the industrialized countries to the Third World. It is improbable that such a commitment can be obtained from the group of the industrialized countries as a whole. The governance problem has been rightly recognized, but the relevant chapter stands somewhat isolated in the report. Nevertheless, ODA to a country in which there is no guarantee for good governance may make little or no sense. In the end, there is the impression that the development problem is still more complicated than this report manages to outline. On the other hand, this report constitutes an important contribution in this discussion. Any further inquiry into this issue will necessarily have to take recourse to this report and it is obvious that the integrated approach as well as the recognition that industrialized countries bear a primary (but not the only) responsibility for solving this problem are here to stay.

The results of the MPR find repercussion in the Annan Report in particular with regard to the plea to the industrialized countries to augment their ODA. At the same time, also the requirement to increase the quality, transparency and accountability of ODA is identified.

The Outcome Document follows more or less the same lines. It is impressive to see how much space is dedicated to development issues in this document. Both the obligation of the developed world to provide more assistance as that of the developing countries to pursue good governance are addressed but without doubt the far greater emphasis lies on the former obligation. These obligations are spelled out with somewhat less precision than in the Annan Report or in the MPR. In the end, we can say that we find in the Outcome Document a rich array of interesting ideas on how to fight the development problem. Practically no aspect examined in the development theory has remained ignored. Yet, this does not mean that a precise strategy can be identified. Of course, this is a task which requires intervention on various levels and as of yet not all effects of interaction between the various instruments and concepts mentioned are known. Perhaps the greatest contribution the Outcome Document could give in this field was to highlight the importance of the development issue and to evidence the various directions that can be followed in order to find a solution. Even though the cautious wording of the relevant paragraphs do not reflect adequately the urgent need for action at least it has been made clear that any reform endeavour concerning the UN will have to give central importance to the development issue.

A few words have to be said also on the trade versus aid issue. In the last years a broad consensus has emerged that the best antidote to poverty would be more trade and in this context the First World was invited to open their markets to products coming from the developing world. All these problems came to the fore at the G8 summit at Gleneagle in July 2005.

There debt relief was granted to the most indebted countries,<sup>98</sup> but no lasting and consistent answer to the development problem was found.<sup>99</sup>

Concerning trade, the Outcome Document is far less precise than the Annan Report. While the UNSG asked for a completion of the Doha negotiations no later than 2006, the fulfilment of its development promise and the granting of duty-free and quota-free market access for all exports from the least developed countries as a first step, the state representatives meeting at New York in September 2005 could agree only on a much vaguer commitment to 'work expeditiously towards implementing the development dimensions of the Doha work programme'.<sup>100</sup>

### 3.3 HIV/AIDS

In all reports and documents here to be considered relatively broad attention is devoted to the scourge of HIV/AIDS. This is singular for reform proposals concerning the UN or the development issue as such. It reflects the unique nature of this threat which could make a purely legalistic discussion meaningless. It also is alarming to see how an infectious disease, initially thought to be a very rare phenomenon, could assume epidemical proportions, cripple whole economies and wipe out within years a decades long development progress. According to the HLP Report, almost 30 million people in Africa now have HIV/AIDS.

'In the worst-affected States, middle-aged urban elites are heavily afflicted, eroding State capacity and decimating the economic activity of what should be a State's most productive group. The increasing number of infected women and girls is threatening food and agricultural production. If trends are not reversed, some of these States face collapse under the combined weight of poverty and HIV/AIDS.'<sup>101</sup>

The problem of HIV/AIDS is, therefore, not only one of enormous personal plight, but also a cause for rising poverty and for a reversal of a development process which has been promising in some cases. Eventually, there is even the risk of state collapse, an issue of greatest concern for international law as in failed states society is falling back to a pre-contractual, Hobbesian world in which all conquests of civilization disappear and there is a subject missing the International Community could address and hold responsible for

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98. Debts of 40 billion dollars owed by the 18 poorest nations to international organisations were cancelled.

99. The G8 agreed, however, to double their development aid to 50 billion dollar, half of which would go to African countries.

100. Outcome Document, para. 32.

101. HLP Report, para. 7.

the events taking place.<sup>102</sup> In a recently published report by UNAIDS<sup>103</sup> the situation appears even bleaker: it is possible that by 2025 80 million people will be infected by HIV. Under this dramatic circumstances immediate action is required. In contrast to the more complex problems of poverty and development, here it is easier to determine priority measures. Absent a cure or an effective vaccine for those already infected, treatment by expensive combination therapies<sup>104</sup> is the only instrument at hand. As a consequence, the most needed resources in this field are financial ones even though it is to say that also political resources are of enormous importance as in the delicate field of sexually transmitted diseases the cultural obstacles to information and prevention are often of decisive importance. The HLP Report warns that the resources pledged for the fight against HIV/AIDS are insufficient; more than three times as much would be needed. These funds could be spent, first of all, for pharmaceutical treatment. It has to be recognized that great progress has been made in the attempt to make pharmaceuticals accessible also in developing countries. The nature of the problem involved has posed formidable obstacles: in the drug industry innovation costs are very high and therefore patent rights have to be very far-reaching in order to make innovation economically attractive.<sup>105</sup> On the other hand, this creates the moral and political problem that life-saving pharmaceuticals are denied to needy people. It could be argued that developing countries are in any case no relevant market for high-priced pharmaceuticals. As the population of these countries is not taken into consideration when cost/rentability calculations are undertaken the development of new drugs would not suffer if patent rights would be waived for developing countries, provided, of course, that care is taken that these drugs are not re-exported to industrialized countries. These considerations have flown, more or less, into the TRIPs Agreements. While this Agreement which entered in force in 1995 has brought about, in principle, an extension of patent protection also to developing countries, according to Article 31 of this Agreement compulsory licences are also permissible under certain restrictive conditions. The main problem lies in the fact that according to Article 31(f) of the Agreement compulsory licensing must be predominantly for the domestic market. Developing countries, however, often lack the production capacity for sophisticated medicines and compulsory licensing is not allowed for foreign markets. This problem was addressed first

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102. On AIDS as a security problem see also B. Condon, 'The Twin Security Challenges of AIDS and Terrorism: Implications for Flows of Trade, Capital, People, and Knowledge', in R.P. Buckley, ed., *The WTO and the Doha Round* (The Hague, Kluwer Law International 2003) pp. 251-284.

103. See UNAIDS, *AIDS in Africa: Three Scenarios to 2025* (4 March 2005), available at <[www.unaids.org/unaids\\_resources/images/AIDSScenarios/AIDS-scenarios-2025\\_report\\_en.pdf](http://www.unaids.org/unaids_resources/images/AIDSScenarios/AIDS-scenarios-2025_report_en.pdf)>.

104. The so-called Highly Active Anti-Retroviral Therapy (HAART).

105. See H. Grabowski, 'Patents, Innovation and Access to New Pharmaceuticals', *5 Journal of International Economic Law* (2002) pp. 849-860.

in a Doha Ministerial Declaration of 14 November 2001 where ministers agreed to extend exemption on pharmaceutical patent protection for least-developed countries until 2016. A definite solution for the problem outlined above was found in the Decision of 30 August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPs Agreement and public health.<sup>106</sup> This Agreement finally allowed the parallel import of pharmaceuticals made in other countries under compulsory licences. Extensive guarantees were added to make sure that no abuse – especially in the form of a re-export to industrialized countries – could take place. Cheap medical imports are, however, not sufficient. Firstly, it has to be taken care that these medicines are administered correctly and effectively. To this end the HLP has rightly invited international donors to undertake, in partnership with national authorities and local civil society organizations, a major new global initiative to rebuild local and national public health systems throughout the developing world.<sup>107</sup> What is still missing is a clear statement on the responsibility of the developing countries themselves for stopping the spread of infectious diseases. Without full cooperation of these countries the fight against this threat cannot be won.<sup>108</sup> Experience has shown that the contribution of the governments is decisive for the creation of a ‘culture of prevention’<sup>109</sup> while *laissez-faire* or ignorance for political, ideological, religious or whatever reasons proves to be deadly. Rightly, the MPR places the AIDS problem within the greater objective of fostering sexual and reproductive health – with all the societal changes that are needed to achieve this goal, in particular with regard to the fight against discrimination of women.<sup>110</sup> As a ‘quick win’ states are urged to finance the Global Fund to Fight AIDS in a more consistent way.

The Outcome Document fully acknowledges the enormous dimensions of this problem and the urgent need for action. Where it falls back, however, is – as with development aid – in the field of precise obligations and commitments.

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106. See C. Herrmann, ‘Viagra für den Welthandel oder historischer Wendepunkt für den internationalen Patentschutz?’, 14 *EuZW* (2003) pp. 673 et seq.; G. Contaldi, ‘Tutela delle invenzioni e accesso ai farmaci essenziali nell’accordo TRIPs’, 87 *Rivista di diritto internazionale* (2004) pp. 955-990; H.P. Hestermeyer, ‘Flexible Entscheidungsfindung in der WTO’, 53 *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil* (2004) pp. 194-200; D. Matthews, ‘WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?’, 7 *Journal of International Economic Law* (2004) pp. 73-107.

107. HLP Report, para. 68.

108. See ‘Symptomatic Relief – A New Deal on Medicines for the Poor is Welcome, So Far as It Goes’, *The Economist*, 6 September 2003, p. 13.

109. The most prominent example is Uganda, once a country with one of the highest infection rates, where the government was able to launch a very effective information campaign and to decisively reduce the rate of new infections.

110. See MPR, pp. 82 et seq.

### 3.4 Environmental degradation

The HLP Report stresses the importance to develop a comprehensive approach to tackle poverty, infectious diseases and environmental degradation.<sup>111</sup> It also deplores the fact that environmental concerns are rarely factored into security, development or humanitarian strategies.<sup>112</sup> This document also provides some interesting considerations on this relationship. It remains, however, far away from delivering a full theory on this issue and it has yet to be proven that such a holistic perspective is superior to an approach that addresses these threats singularly. Probably it could be useful to see this proposal as complimentary and not as a substitute to the way these problems were confronted traditionally. Politically it is comprehensible that such a strategy was chosen: it underscores the necessity to attribute the responsibility for such measures to international institutions. The UN would be predestined to assume the role as a coordinating entity. In reality, intensive efforts have yet to be undertaken to identify possible gains that could be obtained from giving priority to such a new approach. Only a few hints are given as to which measures should be adopted directly in the field of environmental protection. Reference is made to the Kyoto Protocol, which has encouraged the development of renewable energy sources and which is an important instrument in the attempt to curb global warming. There is, however, the problem of insufficient adherence to this Protocol with the United States refusing to ratify it and many developing countries considering the whole agenda to be a problem concerning primarily the First World.<sup>113</sup> Furthermore, a strategy for the time after 2012 is still lacking.<sup>114</sup> In this area the Annan Report does not go beyond the HLP Report. On the contrary, it seems to be more cautious as it confronts this issue more directly and not as an element of a complex system of interrelated problems.

On the whole, it can be said that in this field the contributions of the HLP Report and of the Annan Report do not go beyond calling generally in mind the problem as such. New problem solving strategies cannot be found. As stated, with regard to the problem solving method, it is not clear whether the 'comprehensive approach' adopted in the HLP Group Report will really allow to set a decisive step forward.

The Outcome Document dedicates relatively large space to environmental issues and calls for greater adherence to the existing instruments in this field and for further standard-setting.<sup>115</sup> The obligations it contains are, however, not very precise and little remains of the bold, integrated approach set out in the HLP Report and in the Annan Report.

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111. HLP Report, para. 55.

112. *Ibid.*, para. 54.

113. *Ibid.*, para. 72.

114. *Ibid.*

115. Outcome Document, paras. 48 et seq.

#### 4. RULE OF LAW, DEMOCRACY, HUMAN RIGHTS

##### 4.1 The specific role of the UN in this field

The Annan Report is at its best when issues of a stricter political or legal nature have to be confronted and when they concern the traditional field of operation of the UN. Here, Annan was able to refer to a rich panoply of initiatives he has started personally in the previous years and he could rely at the same time on a solid framework elaborated by the HLP. With regard to the necessity to strengthen the rule of law in international relations he emphasizes, for example, the role of the International Criminal Court and that of the International Court of Justice. Both institutions have done formidable work but they also need more support. When he endorses the 'emerging norm that there is a collective responsibility to protect' identified by the HLP Report,<sup>116</sup> he favours a more pro-active role of the UN system thereby, however, also preparing the ground for measures of humanitarian intervention.

##### 4.2 The Human Rights Council

With regard to human rights protection and institutional reform he proposes the replacement of the Commission on Human Rights with a smaller standing Human Rights Council composed of experts which should be elected by the UNGA by a two-thirds majority of members present and voting. Of all the reform proposals developed by Kofi Annan this is the one that enjoyed the widest approval<sup>117</sup> and in the Ping document which was intended to become the Outcome Document of the high-level plenary meeting of the UNGA of September 2005 contained the decision to establish a standing Human Rights Council as a subsidiary organ of the UNGA to be based in Geneva.<sup>118</sup> The effective Outcome Document, however, deferred this question to the President of the UNGA who has 'to conduct open, transparent and inclusive negotiations to be completed as soon as possible during the 60th session, with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures for the Council'.<sup>119</sup>

It seems very likely that a broader consensus can be found on this issue in the State Community. It is, however, too early to state whether such a change in

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116. See the HLP Report, para. 203; Annan Report, para. 135.

117. Kofi Annan wrote as follows: 'In particular, States have sought membership of the Commission [on Human Rights] not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.' See the Annan Report, para. 182.

118. A/59/HLPM/CRP.1/Rev.1, para. 130.

119. Outcome Document, para. 160.

the organisational structure would really constitute a substantial improvement. As has been rightly pointed out in the AIV Report there is no guarantee that the proposed Council will eliminate the main objections to the present Commission on Human Rights.<sup>120</sup> For example, it is not clear in which way serious violators of human rights could be excluded from this political body.<sup>121</sup> Furthermore, it remains unclear what would be the destiny of the special procedures of the present Commission on Human Rights and of the existing Sub-Commission<sup>122</sup> which has given groundbreaking contributions to the development of international human rights standards and their control. It would be a bad deal to substitute an institution which has achieved in the past at least in part satisfactory results for an institution whose characteristics are still to a large degree undefined. Of course, the mandate given to the President of the GA offers an opportunity to devise new and more effective rules for the creation and the implementation of human rights provisions. On the other hand, it is very likely that those forces which have opposed such a development in the past will undertake every effort to render these new instruments as vague as possible. As a consequence, it can be argued that no step should be undertaken that imperils past achievements in this field that are worthwhile to be preserved. The great challenge will be to engender a profound discussion on the necessary measure to be taken and at the same time not to lose the momentum which is now in the wake of the general discussion on an UN reform so propitious also for reforms in the field of human rights. The UNSG also proposed that the new Human Rights Council should periodically evaluate the fulfillment by all UN member states of all their human rights obligations, using a peer review system.<sup>123</sup>

It was, however, doubted whether the Council as a political organ would be able to carry out such reviews independently.<sup>124</sup> These doubts are to a certain extent justified. Whether such an endeavour will succeed depends, however, much on the concrete instruments at hand. Within the European Council and in the context of the Framework Convention for the Protection of National Minorities (FCNM) it has been shown, for example, that a political organ, such as the Committee of Ministers, can very well exercise such a control in an objective way if there is an independent body such as the Advisory Committee which is responsible for the technical work. This system also represents the best evidence that a reporting system can be very helpful and that the stigma associated with

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120. See AIV Report, p. 333, para. IV(3).

121. Kofi Annan proposed that prospective members should have a 'solid record of commitment' to human rights. As they should be elected, however, by the UNGA political deals are still possible or even probable (even though a two-third majority would be required).

122. See the AIV Report, p. 335.

123. See the explanatory note by the UNSG entitled *United Nations Human Rights Council* of April 2005, <[www.globalpolicy.org/reform/hrc/04explanatory.htm](http://www.globalpolicy.org/reform/hrc/04explanatory.htm)> (visited on 1 October 2005).

124. See the AIV Report, p. 334.

public notice of misdemeanours may be as least as conducive to betterment as judicial condemnations.<sup>125</sup>

It was also criticized that it would be a wasting of energies to discuss the situation in countries where there are few human rights problems.<sup>126</sup> Here, a different position is taken. There is the example of the CCPR where we have also a monitoring mechanism with a very extensive reach that seems to operate fairly well. Of course, this mechanism could still be improved, it does not enjoy sufficient publicity, reports are often presented late in time and in any case an obligation to report to the Human Rights Council would have a far greater reach. At the same time, these problems are predominantly issues of resources. Furthermore, it is often not possible to sort out the countries where there are few human rights problems. A good record of the past is not a sufficient guarantee also for the future. A reporting mechanism has to fulfil also a preventive and an early warning function. The reporting mechanism introduced with the FCNM has borne evidence that a detailed country analysis can bring unexpected results to the surface – even in countries with a traditionally high reputation in human rights affairs.

Even though there are limits to a comparison of a regional human rights protection instrument (applicable, what is more, only to a very restricted array of rights) with a proposed general one it should not be overseen, however, that monitoring procedures based on reporting obligations can be far better than their general reputation if they are structured properly and if adequate resources are made available.

In sum, Annan's initiative to create a Human Rights Council is, therefore, to be welcomed if this idea is further developed, if it is made sure that it builds on past successes and if sufficient resources are made available.

### 4.3 The promotion of democracy

Finally, Annan highlights in his report also the role the UN has played for the promotion of democracy. Making this role more visible would help to make it also more effective and to gain the necessary support by the State Community also in financial terms.

All in all, the promotion of the rule of law, of human rights and of the principle of democracy are of pivotal importance for the further development of the

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125. On the particularities of compliance in international law see the seminal contribution by L. Henkin, *How Nations Behave: Law and Foreign Policy* (New York, Columbia University Press 1979) and A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA, Harvard University Press 1995). See also H. Neuhold, 'The Foreign-Policy "Cost-Benefit-Analysis" Revisited', 42 *GYIL* (1999) pp. 84-124; J. Brunnée and S.J. Toope, 'Persuasion and Enforcement: Explaining Compliance with International Law', 13 *FYIL* (2002) pp. 273-295; L. Fisler Damrosch, 'Enforcing International Law through Non-forcible Measures', 269 *Recueil des Cours* (1997).

126. *Ibid.*

UN system. This has been clearly evidenced in the Annan Report but, on the other hand, it would perhaps have been possible to highlight better the strong interrelation of this issue with all the other reform proposals. Such an approach would also have given greater legitimacy to the reform proposal as a whole.

With regard to the issue of democracy is interesting to note the strong shift in emphasis if we compare the Annan Report and the Outcome Document. The relevant paragraphs in the Annan Report reflect pride on the contribution given by the UN to the promotion of democracy and also the resolution to further enhance the engagement in this area.<sup>127</sup> In the Outcome Document, however, the governments set a clear limit to such a development with the following affirmation: 'We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right for self-determination.'<sup>128</sup>

Such a declaration exemplifies that the 'emerging right to democratic governance', which was identified several years ago, has not yet fully materialized.<sup>129</sup> There is the suspicion that the emphasis on factual or possible elements that stand in the way of the formation of a broader common agreement on the content of democracy is – to a certain extent – also expression of scepticism towards this concept as such.

## 5. CONCLUSIONS

This is surely a unique period for the UN. While we are witnessing, on the one hand, massive challenges to this system, consisting in widespread violations of UN law, on the other hand, several reports and documents have been presented that stand out for their scope, their ponderation and their thoroughness. The Outcome Document of the 2005 World Summit only formally and provisionally sets an end to this discussion as it does not constitute a sufficient answer to the urgent needs for reform.

Therefore, if the reform discussion is to be continued, the HLP Report, the Annan Report and the MPR will probably remain important reference points. A groundbreaking UN reform implementing the main elements of these documents is not very likely in the near future but, on the other hand, the approaches

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127. Annan Report, paras. 148 et seq.

128. Outcome Document, para. 135.

129. See, in this regard, the pivotal contribution by T. Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) pp. 46-91. See also H.J. Steiner, 'Political participation as a Human Right', 1 *Harvard Human Rights Yearbook* (1988) pp. 77-134; G.H. Fox, 'The Right to Political Participation in International Law', 17 *Yale JIL* (1992) pp. 539-609 and G.H. Fox, 'Self-determination in the Post-cold War Era: A New Internal Focus?', 16 *Michigan JIL* (1995) pp. 733-781.

and strategies advocated in these documents cannot be easily ignored. A detailed discussion will have to set in whereby the single positions are further refined or finally discarded. Whatever will be the outcome of this discussion it is important that it has been started and that a comprehensive approach has been chosen, the only one able to gather the momentum necessary for a such a far-reaching reform.

If we refer to the HLP Report and the Annan Report two main parts can be distinguished which differ markedly in their scope and quality: firstly, the part regarding the proposed reforms to the system of collective security and secondly, the right to self-defence on the one hand and the other proposals regarding security in a wider sense (including the fight against poverty, infectious disease and environmental degradation) on the other. The former has caught most of the attention in the media and in academic reviews.<sup>130</sup>

As has been shown, however, the relevant proposals do not always seem convincing. Probably outside the immediate intention of the authors these proposals would sensibly lower the threshold for the recourse to force in the presence of a threat to international security. This would constitute a clear departure from the philosophy standing at the basis of the creation of the UN. Possible immediate improvements in the security situation in a specific situation should be weighted against the long-term threats for international stability when instruments of armed coercion are easily available. It can be said, therefore, that on this issue intense discussion is still necessary.

It is probably no coincidence that the Ping document is far more prudent when it comes to devising the top priorities in the reform agenda. The strongest independent positions it takes concern the decision to establish a standing Human Rights Council<sup>131</sup> and a commitment to management reform.<sup>132</sup> In the other fields it espouses either the positions of the Annan Report or it contains an invitation for further discussion.<sup>133</sup> The Outcome Document finally adopted by the 2005 World Summit in September 2005 proceeds further on this direction. Therein the governments adhere largely a traditional international law position and the Annan Reports moves further to the back. The main achievements contained in this document regard the establishment of a Peacebuilding Commission and the positive stance taken towards the creation of a Human Rights Council, although the final decision on this question is deferred to the UNGA.

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130. See, for example, C. Stelzenmüller, 'Und sie bewegt sich doch', *Die Zeit*, 2 december 2004, p. 8; 'Angekratzte UNO will sich neu definieren', *Die Presse*, 3 december 2004, p. 4; R. Thakur, 'Wieder vereinte Nationen?', 60 *Internationale Politik* (2005) pp. 102-107; 'Reforming the UN', *The Economist*, 1 december 2004; C. Stelzenmüller, 'Klüger geht's nicht', 60 *Internationale Politik* (2005) p. 108.

131. Ping document, paras. 130 et seq.

132. *Ibid.*, paras. 134 et seq.

133. Significantly, in the field of the prohibition of the use of force: 'We recognize the need to continue discussing principles for the use of force, as identified by the Secretary-General' (*ibid.*, para. 76).

The main strengths of the HLP Report and the Annan Report have to be found in the many proposals for reform touching upon security in a wider sense. Under this perspective these reports lay the foundations for a reform not only of UN law, but of main aspects of international law in general. The MPR constitutes a further important document that strengthens the argumentative basis for the need of change. The evidence shown of the many interconnections existing between these issues may not always be fully convincing, but in any case it offers important new insights on which further studies can be undertaken.<sup>134</sup> Probably most important of all, these reports can be understood as a well drafted collection of arguments sustaining the necessity to attribute to the UN a pivotal role for the solution of the most central problems of international law. Seen from this perspective these reports also support the position of those who claim a constitutional role for UN law in the international order. In this sense these documents constitute a direct response to the affirmations to be heard in the recent past according to which the UN has to play only a minor role in international politics or would even be heading towards becoming superfluous.<sup>135</sup> They show that – quite on the contrary – the great challenges of our time in international law and politics cannot be solved without, but only within, the UN system.

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134. As the AIV report notes, for this new strategy to be successful, 'UN bodies, and especially the Security Council, will have to conform to demanding new concepts of what their work entails and the speed with which they must act'. See AIV Report, p. 320.

135. See, for example, R. Kagan, 'Of Paradise and Power. America and Europe in the New World Order' (New York, Knopf 2003). For a thorough analysis of this discussion see E. Bohne, 'Die Europäische Sicherheitsstrategie und die Nationale Sicherheitsstrategie der USA im Vergleich', S. Brink and A. Wolff, eds., *Gemeinwohl und Verantwortung, Liber Amicorum Hans Herbert von Arnim* (Berlin, Duncker & Humblot 2004) pp. 43-71.