

**THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL
PEACE AND SECURITY
—THE CURRENT DEBATE IN THE LIGHT OF REFORM PROPOSALS—**

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**Hisashi Owada
Judge of the International Court of Justice**

Introduction

The title given to me for my speech this afternoon is “The United Nations and the Maintenance of International Peace and Security: the Current Debate in the Light of Reform Proposals”. I realize that this is a vast subject. If I tried to cover the whole expanse of this subject, it would require three hours instead of the thirty minutes allocated to me. In any case such a presentation would not be appropriate as an aperitif for the dinner. I have therefore decided to speak only on a few salient issues that are currently the focus of attention in academic as well as in UN circles on this subject.

First, I wish to address some aspects of the problem of the collective security system under the UN Charter against the background of new developments in international relations. In this context issues relating to the scope of the use of force under the Charter, issues relating to the doctrine of “responsibility to protect”, and issues relating to international terrorism will be touched upon.

Second, I shall refer to the changing scope of “security” in the new environment of growing interlinkage between peace, security and development. In this context, some discussion on the new concept of “human security” and its implications to the treatment of security in the United Nations will be attempted.

Third, if time permits, I hope to touch upon some structural aspects of the UN reform, as they relate to the issues of peace, security and development. The focus will be first on the Security Council both in terms of its composition and power, on the Economic and Social Council (ECOSOC) in the context of the concept of “human security”, and finally on the functions of the International Court of Justice (ICJ) from the viewpoint of consolidating the rule of law in contemporary international relations.

I. Issues relating to the Collective Security System

Article 1, paragraph 1, of the UN Charter identifies one of the primary purposes of the UN, as consisting in “maintain[ing] international peace and security, and to that end: tak[ing] effective collective measures for the prevention and removal of threats to the peace, and for the suppression of aggression or other breaches of the peace . . .”.

The collective security system to achieve this task is incorporated in Chapter VII of the Charter. As is well known, however, this collective security system was built on the premise that the “unity of purpose”, based on the recognition of common interests especially among the Five Powers that had been in alliance co-operation for the execution of the Second World War, would serve as the linchpin of this scheme for ensuring to set in motion the “unity in action”. However, the arrival of the Cold War soon after the establishment of the United Nations shattered this premise and put this collective security system into complete paralysis. The critical question is whether the removal of the Cold War structure that paralysed this system will now restore the viability of this premise and allow the system to work as originally planned.

With the demise of the Cold War, a number of new but diverse developments have emerged to affect the scene, such as the following:

i) The experience of the Gulf War in 1990 gave us the hope that this might indeed be the case. The declaration of the then US President George Bush that “a new international order” was emerging in the post-Cold War world seemed to point to that direction.

ii) The subsequent record of performance of the Security Council, however, seems to make us query whether this original scheme of the Charter for an effective collective security system was sufficiently realistic in its assumption that the “unity of purpose” based on the common interest would continue to exist, leading to the “unity in action”. The arrival of a new era of the post-Cold War world, where the single super-power dominates the scene, would appear to have created a new type of asymmetry and disharmony in the international system that could disrupt the proper functioning of the system.

iii) Developments in humanitarian crisis in different parts of the world have come to create a new type of threat, against the background of the emergence of “failed States”, as well as the normative development in the consolidation of human rights and in the criminalization of genocide and other human atrocities. This is a different type of threat to peace and security in the international community which had not been envisaged in 1945 under the collective security system provided for in Chapter VII.

iv) The rise of international terrorism by non-State actors, as so tragically demonstrated by the disaster of 9/11, has also created yet another new type of threat to the security of States, as well as that of the international community as a whole.

In the present situation fraught with a mix of these new developments, the challenge that international legal community faces now is to assess whether a new normative framework is required to reinforce the Charter régime on the use of force, which covers not only its collective security system under Chapter VII but its prescription on the individual use of force in self-defence.

The *High-Level Panel on Threats, Challenges and Change (HLP)*, established in 2003 at the request of the UN Secretary-General, has produced a report to address these new threats and challenges. The Report reviews the past performance of the United Nations over a wide range of its activities and makes a series of reform proposals. In accordance with the framework of discussion as presented by this *HLP* Report, a few salient issues out of this large area are now examined under the following rubrics:

(A) The Viability of the Collective Security System

The *HLP* Report argues that in the new situation of the post-Cold War era, three particularly difficult questions arise in relation to the viability of the Charter régime on the use of force.

(1) First is the case where a State claims *the right to strike preventively, in self-defence*, in response to *a threat which is not imminent*. To this, the *HLP* Report responds that there is no need to expand the scope of self-defence under Article 51. It argues that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. This should be sufficient, because there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment — and if necessary to visit again the military option.

Thus on the question of a possible option to resort to a preventive action in self-defence by individual States in such a situation, the Report declares that

“the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted” (*HLP* Report, para. 191).

The Report concludes that the “[*HLP*] do not favour the rewriting or reinterpretation of Article 51” (*HLP* Report, para. 192).

(2) Second is the case where a State appears to be posing an external threat, actual or potential, to other States or people outside its borders but where there is a division in the Security Council as to what to do about it. Here the *HLP* Report argues that

“the language of Chapter VII is inherently broad enough . . . to allow the Security Council to approve any coercive action at all . . . against a State when it deems this ‘necessary to maintain or restore international peace and security’.” (*HLP* Report, para. 193.)

It is worthy of note that the *HLP* Report, while recognizing that some States will always feel that they have the obligation to their own citizens, and the capacity, to do whatever they feel they need to do unburdened by the constraints of collective Security Council process, advances the following argument to reject this approach:

“however understandable that approach may have been in the cold war years, when the United Nations was manifestly not operating as an effective collective security system, *the world has now changed* and expectations about legal compliance are very much higher” (*HLP* Report, para. 196, emphasis added).

On this basis, it concludes that “the Security Council is fully empowered under Chapter VII of the Charter of the United Nations to address the full range of security threats with which States are concerned”, and that “the task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has” (*HLP* Report, para. 198).

The crucial point to be examined is therefore the question as to whether the premise on which this conclusion is based, i.e., the premise that “the world has changed” since the demise of the Cold War now holds valid and will allow us to believe that the Security Council is not only *empowered in law* but is also now *able and willing in fact* to address the full range of these security threats.

This position of the Panel could indeed be met with a much stronger scepticism, if in reality a contrary view could be substantiated that nothing significant has changed in this respect since the demise of the Cold War years, thus refuting the view implied in the Report that now “the United Nations is operating as an effective collective security

system”. As we are going to examine later, my own view is that in the present reality of international relations neither of the two claims are totally valid.

(3) Third is the case where the threat is primarily internal, i.e., to a State’s own people. With respect to this third case, the *HLP* Report is not as categorical about the viability of the present Charter régime on the use of force, either under Chapter VII or otherwise, as it is with respect to the two earlier contingencies. Thus the Report concedes that the UN Charter is not as clear as it could be when it comes to saving lives within countries in situations of mass atrocity.

The Report notes that a long-standing argument in the international community exists between those who insist on a “right to intervene” in man-made catastrophes and those who argue that the Security Council is prohibited from authorizing any coercive action against sovereign States for whatever happens within their borders. Presumably, it is with the intention of coping with this dilemma that an ostensibly new concept of “responsibility to protect” is now introduced into the Report in the place of the more traditional but controversial concept of the “right to intervene”. Thus after reviewing the recent history of successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo, and now Dafur, the Report comes out with the conclusion that “there is a growing recognition that the issue is not the ‘right to intervene’ of any State, but the ‘responsibility to protect’ of *every* State when it comes to people suffering from avoidable catastrophe” (*HLP* Report, para. 201, emphasis in the original) and that “there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so *that responsibility should be taken up by the wider international community* (*ibid.*, emphasis added).

I venture to submit, however, that the introduction of this new concept would make little difference to the existing situation from a legal perspective, as distinct from a political perspective, as long as what is contemplated by this italicised expression is nothing else than an action by the Security Council within the confines of its competence for taking necessary action under Chapter VII of the Charter. The situation could be wholly different,

on the other hand if that was not the case. We are thus led to an examination of this point in detail in the following section.

(B) The Concept of “Responsibility to Protect”

The *HLP* Report states that:

“In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.” (*HLP* Report, para. 29.)

This approach of the *HLP* was presumably influenced by the Report of the *International Commission on Intervention and State Sovereignty* (ICISS) of 2001. This report, entitled *The Responsibility to Protect* notes that “the issues and preoccupations of the 21st century present new and often fundamentally different types of challenges from those that faced the world in 1945, when the United Nations was founded.” On this point it declares that “in key respects . . . the mandates and capacity of international institutions have not kept pace with international needs or modern expectations” and that “the issue of international intervention for human protection purposes is a clear and compelling example of concerted action urgently being needed to bring international norms and institutions in line with international needs and expectations.” (*ICISS* Report, paras. 1.10-1.11.)

I must point out that the legal implications of the whole picture as described in this statement could be radically different, depending upon whether what is envisaged in this statement is the responsibility to protect in the name of the international community by the Security Council, an organ empowered to act in that capacity by the UN Charter, or is something else that can go further to cover the responsibility to protect as claimed by individual members of this community.

In this respect, based on the analysis of the present state of the international system as revealed in the post-Rwanda/post-Kosovo world, the *ICISS* Report asks the following question:

“We have made abundantly clear our view that the Security Council should be *the first port of call* on any matter relating to military intervention for human protection purposes. But the question remains whether it should be the last. In view of the Council’s past inability or unwillingness to fulfil the role expected of it, if the Security Council expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within a reasonable time, *it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely discounted*. What are the options in this respect?” (*ICISS Report*, para. 6.28, emphasis added.)

Referring to a contingency where the Security Council failed to discharge its responsibility to protect in a conscience-shocking situation crying out for action, the Report declares that “it is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by.” (*ICISS Report*, para. 6.37.) It must be acknowledged that the issue, when raised in this way, cannot be brushed aside simply on the basis of a formalistic approach of legalism, but requires a soul-searching appraisal as a question of existential choice.

Nevertheless I cannot but wonder whether the case for such an irregular form of intervention is not being overstated in this proposition. A situation as represented in this hypothetical picture would seem to be quite unlikely to happen, provided that certain structural reforms in the working mechanism of the Security Council were put in place.

In fact, the alleged dichotomy between the “mandates and capacity of international institutions” and “international needs or modern expectations” in the *ICISS Report* (para. 1.11) appears to be one that is more apparent than real, provided that the situation is kept under the control of the Security Council endowed with the competence to deal with such a situation under Chapter VII of the Charter. On this scenario the Security Council can, under certain conditions, determine a situation of genocidal acts or other atrocities such as large-scale violations of international humanitarian law — a situation which to my mind would by definition involve significant elements of international public order — as constituting a threat to the peace or even a breach of the peace under Article 39 of the Charter, irrespective of whether it is taking place within the national border of a State or whether it is addressed to its own people. If the Security Council decides on enforcement

measures to be applied in such a situation under Chapter VII based on its determination to that effect, then the prohibition of intervention under Article 2, paragraph 7, will simply be irrelevant. This will be the case, as long as we stay within the framework of the power of the Security Council for taking action in dealing with the situation, either directly through its own enforcement action under Article 42, or else, indirectly through its authorization for an enforcement action, whether by a regional organization (Article 53) or by a group of States acting collectively (arguably Article 42).

If on the other hand the intention in introducing this new concept of “responsibility to protect” as *emerging guiding principles and evolving customary international law*, as the *ICISS* Report puts it, were to replace the old denomination of the “right to intervene” by the new denomination of “responsibility to protect” with a view to investing the same action to intervene on the part of a group of States in the form of a “coalition of the willing” or even by a regional organization with a cloak of legality or legitimacy, in the absence of an authorization of the Security Council, then the legal situation would be completely different. On such a scenario, I doubt whether the introduction of such a new concept would be really helpful, since the introduction of this new concept, in and of itself, would be tantamount to begging the question. It would be meaningless unless one could define precisely this concept of “responsibility to protect” in relation to the question of what was meant by “the international community”, the question of who could claim to represent it and on what basis, and most importantly the question of who could have the power to decide on these issues as well as on the issue of determining whether the situation amounted to the level where “the responsibility to protect” was to be exercised. As long as these questions were not clarified and left to the individual judgment of each actor, such an approach, well-meant as it might be, would be little more than an attempt to cloak something which in its essential character was neither legal nor legitimate in a new garb which would give the semblance of something else endowed with legality and legitimacy.

The real problem lies in my view not in the institution itself of the collective security system as we have it in the Charter, but rather in its modality of operation which has to be radically reviewed and changed. We have to be extra-cautious about putting in jeopardy

the very system of collective security which is the fruit of painstaking efforts over more than a century to create a viable structure of international governance based on the rule of law. We should avoid by all means falling into the mistake of a man in an old Chinese legend who committed the folly of “killing an ox in trying to improve the shape of his horns”.

(C) The Issue of International Terrorism

The tragic event of September 11, 2001, was a shattering experience to the whole of the international community. It posed a direct challenge to the public order of the international community as such, and not just a threat to the security of a particular nation — i.e., the United States.

Faced with this new challenge, two options are open to us the members of the international community for coping with this new type of threat. One is to follow the path that the United States pursued on the basis of Article 51 of the UN Charter, accompanied by the Security Council action essentially to endorse this approach of the United States.

The other is to look at this situation squarely from the viewpoint of a direct challenge to the public order of the international community and look for measures to be taken from the viewpoint of meeting the threat to the international peace and security.

It would appear that the course followed by the *HLP* in its Report is to endorse the former approach, which treated this situation primarily on the basis of the right of self-defence of the victim State under Article 51 of the Charter, combining this with the corresponding right of collective self-defence by a number of member States of the North Atlantic Treaty Organization under Article V of the North Atlantic Treaty. At least the impression is that the *HLP* Report accepted this latter approach pursued by the United States and her allies, without sufficiently focusing on the essential character of international terrorism, which the other approach tries to address.

While the legal availability under international law of the right of self-defence reflected in the former approach is not being put in question, it may legitimately be asked whether the latter approach, at least conceptually, would not be the better approach. The Security Council could have dealt with the situation squarely as a case of the direct breach of the peace as well as the threat to the security of the international community, which should have immediately set in motion the action to be taken by the Security Council. There is no doubt, at any rate, that this case should be regarded as *sui generis* from the

viewpoint of the application of Article 51, to the extent that the article, in its original inception, was primarily intended to address the situation of an armed attack by one State against another, as the International Court of Justice suggested in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (I.C.J. Reports 2004, p. 194, para. 139). This is not to say that the right of self-defence would not be available for such situation under general international law, as was demonstrated in the *Caroline* incident of 1842, nor that Article 51 should be intrinsically inapplicable to such situation under the Charter régime. Nevertheless, there would seem to be no room for doubt that the terrorist attack carried out by a non-State entity in this case posed a direct serious challenge to the public order of the international community as such, going beyond a mere infringement of the national interest of a particular State victim to this attack, thus fitting more appropriately to the framework of the Charter régime on collective security, which is a framework conceived primarily from the viewpoint of the public order of the international community.

It is true that the practical result may not be so radically different, inasmuch as the use of force against the terrorist group would have been legal and legitimate in any case under both approaches. However, it could be argued that the action taken against the sovereign Government of Afghanistan, as distinct from the terrorists, could have been justified more legitimately in the context of a more direct causal link that could be established on this basis than on the basis of the right of self-defence.

II. The Issue of “Human Security” in the Context of International Public Order

The end of the Cold War has come to witness another development which is going to pose a serious new challenge to the international community. The demise of a world divided by the rivalry between two camps in confrontation has ushered in a new era in which exogenous forces that used to work for keeping nations in unity have disappeared and in its stead indigenous forces that tend to work for disrupting the social fabric of society and disintegrating society itself have been unleashed. The result is that the solid basis for fostering the body politic of a nation in cohesion and for consolidating the system of governance in society has not been allowed to develop. Thus in many of the newly created “nation States”, the social solidarity to be built on the basis of growth in the shared sense of “belonging to one nation” either did not come to flower or did come to collapse, thus creating a situation of “failed States”.

Thus viewed, it becomes clear that the issue of development, which should comprise at its core the problem of nation-building, can no longer remain within the conventional realm of economic development to be measured by such criteria as the growth in income per capita of individuals, or the wealth of a nation in terms of the size of its GNP. The day has come when development hitherto defined in terms of the issue of freedom from want has to be looked at as an issue inseparably linked with the issue of security in terms of freedom from fear. It is through this linkage that the problem of “human security” has come to be regarded as part and parcel of the problem of security.

The concept of human security consists in the protection of the vital core of all human lives in ways that enhance human freedoms and human fulfilment. Human security can thus be said to comprise “protecting people from critical (severe) and pervasive (widespread) threats and situations . . . using processes that build on people’s strengths and aspirations . . . creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.” (Report of the *Commission on Human Security*, 2003, p. 4.)

The collapse of the Cold War order has unleashed forces, which have their origin very often in religious, racial, ethnic and other social tensions, as well as inequity and other grievances in society, political and social alienation and extreme poverty, giving rise to numerous civil wars and armed conflicts in many parts of the world. Moreover, what is important in this situation is that each of these challenges is in a complex relationship of interlinkage with each other. In order to overcome these direct threats to the life and security of people who suffer from such dire conditions, it is not enough to deal with each of these threats separately, treating some as “developmental issues” in the technical sense, while treating others as “security issues” in the conventional sense. In this situation the concept of “security” itself has to undergo a major transformation from the traditional concept relating to protection against external threats to a State to a much wider concept relating to the protection of human individuals against threats to their security as individuals. What is required under such circumstances is to build a social framework in which human individuals can empower themselves so that they can live free from want and free from fear. In order to achieve this, our responses should consist in addressing those diverse threats in a comprehensive manner as the issue of “human security”, capturing the interlinkages among them from a human perspective.

UN Secretary-General Kofi Annan himself specified this comprehensive nature of security, when he stressed that human security now joins the main agenda items of peace, security and development. He argued that:

“Human security in its broadest sense embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear, and the freedom of future generations to inherit a healthy natural environment — these are the interrelated building blocks of human — and therefore national — security.” (Press Release SG/SM/7382 dated 8 May 2000.)

This new approach is bound to have some substantive implications to the way in which the United Nations is to be organized from a structural point of view, as well as the way in which it is to function from an operational point of view. I shall come back to this theme when I touch upon the issue of structural reform of the United Nations.

III. Some Structural Aspects of UN Reform

All these points referred to above seem to lead us to the conclusion that some radical re-thinking is required about the present structure of the United Nations in order to reflect the present-day realities of the international community.

Here I shall refrain from recapitulating the political debates now going on within the United Nations. These debates sometimes tend to reflect individual national priorities and political aspirations based on largely parochial interests of different member States, rather than the genuine concern of the member States about the viability of the UN system from the viewpoint of public order in the international community. With this in mind, I wish to confine myself to engaging in a general discussion in principle on those issues which *should* be tackled in the UN reform for change from the viewpoint of meeting the threats and challenges that have been dealt with above.

(1) The Reform of the Security Council

The essence of the reform of the Security Council boils down to one issue — i.e., the issue of how we are going to succeed in transforming the Security Council into an organ that can truly function as *the effective centre* of the collective security system as conceived by the founding fathers of the United Nations.

As I stated earlier, it has been the conventional wisdom to regard the arrival of the Cold War as the cause that effectively paralysed this collective security system. While this is true, the question whether *a contrario* the demise of this anomaly has restored the framework that existed in the original design of the institution as conceived in 1945 — the framework built on the premise that the Great Power co-operation would be available to ensure the viability of the system for the maintenance of international public order on the basis of *pax consortis* — would seem to be much more problematical.

One possible approach to reform for meeting this situation hanging in a state of uncertainty would be to take a more critical view of the present state of international relations and to try to aim at a radical reform on the working hypothesis of the Security Council, by building into the system devices and innovations that could constrain member States from paralysing the system by arbitrary actions. The issue of abolishing or restricting the use of the veto would come at the top of the list of such an approach. Attempts to expand the scope of the right of self-defence under Article 51 or to allow the room for action under the doctrine of “responsibility to protect”, with a view to promoting the cause of enforcing international public order, would fall under this same approach as well.

Another approach would be to take a more realistic view of the intrinsic nature of the present-day international system and to try to work for the realization of *pax consortis* within the reality of the present Charter framework. The *HLP* Report apparently subscribes to this latter approach, when it declares that “the Security Council is fully empowered under Chapter VII of the Charter . . . to address the full range of security threats with which States are concerned” and that therefore “the task is not to find alternatives to the Security Council as a source of authority but to make the Council *work better* than it has” (*HLP* Report, para. 198, emphasis added).

Whichever approach one takes, however, it is clear that the issue of building legitimacy and effectiveness of the Security Council as the “executive organ” for implementing international public order in the name of the international community is a crucial point of reference for reform. When one examines closely the record of performance/non-performance of the Security Council at the crucial moments of the post-Cold War history where major issues of peace and security were involved, including cases of human security crises such as the Kosovo crisis of 1995 and the Rwanda crisis of 1994, one finds that there was almost always tragic dilatoriness and/or lamentable inaction. Accountability for this state of affairs has been placed squarely at the door-step of the

Security Council as such, including non-permanent members as well as permanent members with veto power. Whatever the cause for this state of affairs may have been, world consensus is emerging that this is simply not acceptable, since it is tantamount to negating the very basis of the cause of collective security which the Security Council is meant to serve.

In the face of this stark reality, it is my personal but firmly held view that the reform of the Security Council has to ensure that the Council in its entirety, including its permanent and non-permanent members, must primarily and above all be represented by those members who can demonstrate the capacity and the commitment *effectively* to work for implementing the public order of the international community, which it is the primary responsibility of the Security Council to identify and act upon in a concrete situation. The reform in the composition of the Security Council, which unfortunately is being talked about apparently mainly in the context of a political power game, should be nothing else than the application of this basis philosophy.

(2) The Reform in the Economic and Social Areas

The reform of the ECOSOC was carried out once in 1965 in order to reflect the major increase in the UN membership, especially of newly independent States of Asia and Africa. However, that reform focused exclusively on the enlargement of its membership, and as a consequence even resulted in some loss in effectiveness of this organ.

Given the new developments in the post-Cold War situation, where the issues of peace, security and development have come to be so inseparably interlinked and where the issues relating to human security are so inevitably part and parcel of the activities of the Security Council as well as those of the ECOSOC, much more basic reform in the structure of the United Nations in this area would seem to be as important as the reform in the functioning of the Security Council. This should involve the reform in two dimensions.

First, it is essential to realize on the one hand that in light of these new developments, the powers and functions of the Security Council, at any rate in an operational sense in practice, should extend to those socio-economic issues which traditionally have not been regarded as falling within the jurisdiction of the Security Council. These issues include the issue of refugees and internationally displaced persons, the issue of health such as AIDS/HIV, malaria and polio, the issue of human rights violations and many other issues directly threatening the very basis of “human security”,

all of which fall within the category of the issues relating to the public order of the international community.

Second, this however should not mean on the other hand that the power and functions of the Security Council in this area can be exclusive or even primary, in relation to other organs of the United Nations, and in particular the ECOSOC. On the contrary, a major overhaul of the ECOSOC itself should be undertaken as the primary organ in this field, on the basis of a fundamental rethinking of its roles and functions.

Some concrete recommendations are put forward in the *HLP* Report touching on this aspect of the problem. They include the establishment of a *Committee on the Social and Economic Aspects of Security Threats*, and the creation of a *Peacebuilding Commission* under the Security Council, which nevertheless should include representation from the ECOSOC as its integral part.

What is needed to achieve the purpose of strengthening the capacity of the United Nations in this field is a *holistic approach*, which should mobilize into the process of policy formulation and implementation all the stakeholders as well as all the shareholders. This however is easier said than done, because one essential characteristic of the international system as we have it today lies in the compartmentalization of competence on the basis of national sovereignty. This is true even when we are tackling problems belonging to the realm of global public goods, such as peace and development. The conventional wisdom to deal with this situation has been to rely on an appeal for more effective *co-ordination* among different competences and divergent interests of different players on the basis of voluntary co-operation. However, I am afraid that in this instance this will not be sufficient.

In this respect, the suggestion made in the *HLP* Report to transform the ECOSOC into a *development co-operation forum*, with a reinforced system of regular meetings between the ECOSOC and the Bretton Woods institutions for encouraging collective action may go some way in the right direction. It is my submission, however, that this is not going to be enough. A much more integrated approach to the issues at hand on the part of all the major stakeholders and shareholders has to be devised, built on the clear identification of a strategy in this field, which in turn should be implemented in an effective way on the basis of the principle of clearly defined *division of labour* for pursuing the agreed framework of strategy, rather than on the vague notion of co-ordination through the coalition of the willing.

(3) The Functions of the ICJ

The importance of the rule of law in the international community as the basic foundation of international public order is self-explanatory. Needless to say, the rule of law is not the monopoly of the International Court of Justice, as one can see easily from the fact that there are so many other international courts, tribunals and other quasi-judicial organs, such as ICC, ICTY, ITLOS, ICSID and WTO Dispute Settlement Mechanism, that are functioning so competently in their respective specialized fields.

Granting that, it seems nevertheless remarkable to find that there is no reference to the role and the functions of the ICJ in the whole of the reform proposals contained in the *HLP* Report (except for the single reference to the name “International Court of Justice” in paragraph 11).

There might be some who find comfort in this fact by taking a cynical view that the *HLP* has found no need for reform or for re-thinking about this Court. I for one believe, without being parochial, that in the context of the emphasis that the *HLP* Report has placed on the centrality of the United Nations in the present international system as the guarantor of the public order of this community, the functions as well as the functioning of the ICJ should have received a more careful attention for review and study from the viewpoint of promoting the rule of law in the international community.

Such review and study in themselves would be worth a full discussion in a seminar of this kind. Here, mainly due to the time constraint, I shall refrain from going into a substantive discussion of different issues involved on this score, except to mention a few of the salient ones to be considered.

(a) The issue of the access to the Court

It has been pointed out for so many years that it is becoming anachronistic to restrict the access to the ICJ only to States. The situation seems to have become even more serious in recent years, not only by the growing practice of participation by international organizations in some multilateral conventions as full-fledged parties and by their recognized capacity to act in their own right (*Handlungsfähigkeit*) going beyond their capacity to rights (*Rechtsfähigkeit*) in the international arena; there are even such new developments as the European Union participating in a multilateral convention régime in the name of the totality of the EU to the exclusion of each member State of the Union. It is my personal view that a rethinking on this question is in order.

(b) The issue of jurisdiction of the Court

The traditional framework in which the jurisdiction of the Court to hear a contentious case between States was created almost a century ago. No major review based on a serious analysis of the accumulated practice has since been tried. The traditional approach to this issue has been focused on the Optional Clause, but a new innovative system of allowing “contracting-out” somewhat following the system of the ICC Statute, rather than the system of “contracting-in” as it is the case with the Optional Clause in the present Court, might be an issue worth a close study. Also, a comparative study of merits and demerits of establishing jurisdiction of the Court either by a compulsory mechanism or by special agreement could be useful, when examined not only in the context of judicial effectiveness but also in the context of the issue of compliance on the basis of accumulated past practice. In any case, a policy-oriented analysis that could point to some innovations and improvements in the system of jurisdiction could be extremely fruitful, in light of new changes in the international system.

(c) The issue of the advisory functions of the Court

In my personal view, there are two observations to be made on the role of the Court in its advisory functions.

First is that in terms of the number of cases referred to the Court, the present Court seems to be utilized less for advisory functions than its predecessor the PCIJ used to be in the days of the League of Nations. In the League days, it was quite common for the Court to offer, at the request of the Council of the League, its opinion on some legal aspect of a specific issue in relation to a situation pending before the Council for its political deliberation. It might be useful to examine the viability of a more frequent recourse to such a device. Such a use of the advisory function of the Court could also contribute to the depoliticization of a dispute or a situation that came before a political organ of the United Nations. At least, it could solve the dilemma that could arise from time-to-time, in which a situation brought before an organ of the United Nations became a subject of a “legal assessment” by that organ in a non-legal environment, and then later came before the ICJ for its legal analysis either in the form of contentious or advisory proceedings.

Second is the reverse side of the same problem. I am referring to the danger that the Court might be dragged into the arena of politics if the request for an advisory opinion on a concrete issue in dispute between States were made in such a way that the Court had to give its legal opinion on a situation in which the legal aspect of the dispute involved would

constitute only a small element in the context of the efforts for solving the dispute as a whole. While there would be nothing intrinsically improper even in such a situation for the Court to pronounce its legal opinion on some particular legal segment of the problem at issue, the crucial question is whether by so acting the Court would be offering a constructive service to the parties to the dispute or to the international community as a whole from the viewpoint of promoting the basic cause to which the Court is expected to contribute, i.e., the peaceful settlement of the dispute in question. Both these positive and the negative sides of advisory functions of the Court together with the issue of modalities for exercising such advisory function could be more deeply explored.

(d) The issue relating to the constitutional structure of the organization

Finally, it may happen sometimes, especially in the context of its advisory functions, that the Court is involved in the examination of an issue of a constitutional character in relation to an international organization. It is inevitable and proper for the Court to do so, to the extent that the Court is in a position to give its own interpretation even on the constitutional instrument of an international organization, e.g., the Charter in the case of the United Nations, as part of its functions for the interpretation of an international agreement, which the constitutional instrument undoubtedly is. However, in a concrete situation there is a very thin line to cross between this function in principle and the function in reality which gets the Court into the realm of judicial review on the constitutionality of an action taken by an organ of the organization in question — a function not given to the Court, at any rate expressly, under the Statute.

The Court has quite judiciously avoided getting involved in this intractable territory of constitutional review by making it clear that it is not endowed with such power. However, it is difficult to avoid in practice that a pronouncement of the Court on the interpretation of the Charter inevitably has some legal effects upon this aspect of the issue involved. This could happen, in particular, when the Court is asked to validate an action taken by the decision of the majority of a political organ of the United Nations but contested by minority members of that organ on the ground of its unconstitutionality or the *ultra vires* character of the action.

The issue is clearly a delicate one to tackle. I am raising it here, nevertheless, because I believe that there should be some serious discussion on this topic as part of the structural issues of the Organization. The theory of *compétence d'attribution* applicable as

the legal basis for determining the limit of the competence of an international organization or its organs in general, while valid in theory, will be likely to be of little help. The net result of applying this doctrine, when there is no constitutional framework in which the system of judicial review is incorporated in the system granting this power to the Court, is likely to put the case at the sway of the view of the majority in the forum in question. In such a situation, there could be very little room for raising the issue of *ultra vires* of the organ in question in the context of the whole structure of the organization. It has been argued on that basis that the Court in getting into this territory could place itself in a legal quagmire. Judge Schwebel put this point in the form of the following *quaere* in one of his opinions:

“[I]s a holding by the Court that the [Security] Council has acted *ultra vires* a holding which of itself is *ultra vires*?” (Dissenting opinion of President Schwebel in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *I.C.J. Reports 1998*, p. 81; also in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *I.C.J. Reports 1998*, p. 172.)

I readily acknowledge that politically it is hardly to be expected that the ICJ will be given the formal power of judicial review over an action of the political organ of the United Nations. Nonetheless I feel that here is an issue worthy of serious consideration, which would contribute not only to the consolidation of the rule of law in relation to the activities of international organizations, including the United Nations, but also will contribute to the advancement of the theory and practice of international organizations.