

EDITORIAL: UPDATING INTERNATIONAL ORGANIZATIONS

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“[T]he principles and purposes of the United Nations, as set out in the Charter, remain as valid and relevant today as they were in 1945, [...] the present moment is a precious opportunity to put them into practice. But while purposes should be firm and principles constant, practice and organization need to move with the times.”¹

Tempora mutantur, nos et mutamur in illis. Times change, and we with them. This old wisdom also holds true for international organizations: times change, and international organizations with them.

Most treaties that create international organizations are concluded for an indefinite period of time. It is obvious that, during their existence, the milieu in and for which the organization was created does not remain the same. Political, economic, technological, social, cultural, and other developments rapidly change our society. International organizations have to keep pace with these changes in order to remain capable of performing their functions and to avoid becoming irrelevant. In turn, international organizations are also created to assist in steering these changes and to shape conditions for future cooperation between members.

As times change, how do international organizations develop and change? First of all, international organizations are instruments of change by definition. Woodrow Wilson was right when he stated that “a living thing is born” when he presented the first draft of the League of Nations Covenant.² Constitutions of international organizations not only lay down rights and obligations of members, they also create organs having powers of their own. No matter whether these are

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¹ In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, UN Doc. A/59/2005, para. 153.

² Quoted by F.P. Walters, *A History of the League of Nations 1* (1950).

true decision-making powers or whether the organization is essentially a forum (a platform for discussion amongst members, for coordination of policies, and for exchange of views on items of common interest), international organizations are created to assist members to deal with issues that each member can no longer deal with in sovereign isolation. Their organs bridge the gap between the rules laid down in constitutions often long ago and present-day society.

The drafters of the Charter of the United Nations must have realized that “threats to the peace” in 1945 might well be different from those in 1965, 1985 or 2005. For good reasons, therefore, such threats have not been defined in the Charter. This would have given the Charter and the UN a rigidity that would have made it more difficult for the Security Council to give a broad interpretation to this notion, as it has done in recent years. For example, the Security Council stated that “the non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security”,³ and that “all acts of terrorism” have been qualified “as one of the most serious threats to peace and security”.⁴ This has allowed the UN to respond to new developments and threats.

Even though international organizations are instruments of change in this sense, there is a limit to how they can and should perform their functions in this way. At times, it is necessary to “update” their ground rules, their institutional framework, or both. Since 1945, constitutions of (quasi-) universal international organizations have been amended in response to decolonization and the resulting growth of membership. The only amendments to the UN Charter so far have related to these developments and have resulted in the enlargement of the Security Council (in 1965) and in the increase of membership with the Economic and Social Council (in 1965 and in 1973). Today, perhaps the most thorny issue on the agenda of UN reform is still related to the growth of UN membership over the years. Many UN members no longer consider the current size and composition of the Security Council as representative of UN membership as a whole.

However, this time there are more issues on the agenda of UN reform. These not only relate to institutional but also to substantive issues. For example, in the wake of 9/11 and the Iraq crisis, some questioned whether the existing UN collective security system was still adequate and up to date, or whether there

³ Statement by the President of the Security Council on behalf of the members of the Council, 31 Jan. 1992, UN Doc. S/23500 (1992), at 3.

⁴ Security Council Res. 1566 (2004).

was need for a “new collective security consensus”. On this issue, both the December 2004 High-level Panel Report and the March 2005 report by the Secretary-General of the UN essentially proposed to hold on to the rigour of the Charter system. These reports recommended not to amend Article 51 and not to change the powers of the Security Council. They essentially favoured maintaining the present collective security system. In situations where states consider the use of force, they either may do so in cases of self-defence or on the basis of (the “unique legitimation” of) a Security Council decision. *Tertium non datur*.

At the same time, while holding on to the Charter system, there is nevertheless some change. According to the High-level Panel Report, “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”. The High-level Panel concluded: “we do not favour the rewriting or reinterpretation of Article 51”.⁵ The Secretary-General also tries as hard as he can – indeed, he almost overstates the point – to make clear that “[i]mmminent threats are fully covered by Article 51”; “[l]awyers have long recognized that this covers an imminent attack as well as one that has already happened”.⁶ These two reports suggest that it has been agreed for a long time (“long established international law”, “lawyers have long recognized”) that Article 51 covers more than actual armed attacks. The authoritative commentary on the UN Charter edited by Simma indicates that there is no consensus on this point.⁷ In addition, the International Court of Justice has emphasized the Article 51 requirement of an armed attack,⁸ and has given a restrictive interpretation

⁵ A more secure world: our shared responsibility, Report by the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565, paras. 188, 192.

⁶ In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, UN Doc. A/59/2005, para. 124.

⁷ A. Randelzhofer, Article 51, in B. Simma (ed.), *The Charter of the United Nations* (2nd ed. 2002), at 803. According to Randelzhofer, “Art. 51 has to be interpreted narrowly as containing a prohibition of anticipatory self-defence. Self-defence is thus permissible only after the armed attack has already been launched” (id., footnotes omitted).

⁸ *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1985, paras. 187-201; *Case concerning oil platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports 2003, paras. 43-78.

to this requirement.⁹ Nevertheless, it is likely that the interpretation of Article 51 has changed with time, and that the two mentioned reports have captured the essence of today's broadly shared views on the interpretation of Article 51. Therefore, irrespective of maintaining the Charter system, there have been some change: more general support for the interpretation that self-defence also covers the use of armed force against imminent threats.

There is also some limited change with regard to the position of the Security Council. While the above mentioned reports do not propose any changes to the powers of the Security Council, they do favour changes in the application of these powers in order to make the Council more effective. For example, according to the High-level Panel, "as a whole the institution of the veto has an anachronistic character that is unsuitable for the institution in an increasingly democratic age and we would urge that its use be limited to matters where vital interests are genuinely at stake".¹⁰ Moreover, the Secretary-General recommends in his report that the Security Council adopt a resolution setting out a number of principles and express its intention to be guided by them when deciding whether to authorize or mandate the use of force.¹¹ It is now up to the governments to act upon these proposals. The next issue of this journal will pay attention to the issue of UN reform.

Reform discussions also take place in a number of other organizations. A major example is the World Trade Organization. In 2003, WTO Director-General Supachai Panitchpakdi created a high-level panel, officially called the Consultative Board. It is composed of eight eminent persons and chaired by former WTO Director-General Peter Sutherland. Shortly after the publication of the UN's High-level Panel Report in January 2005, the Board presented its report, which is usually referred to as the Sutherland Report. This issue of the *International Organizations Law Review* contains a separate 'Forum' Section in which several experts put forward their views on this report. It is interesting to note that both the High-level Panel Report and the Sutherland Report strongly support the status quo, the existing organizations and their ground rules for

⁹ In the *Oil platforms* judgment, *op. cit.* note 7. The Court has not yet pronounced itself on the question whether imminent threats may be covered by Art. 51 (see its judgment in the *Nicaragua Case*, para. 194).

¹⁰ A more secure world: our shared responsibility, Report by the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565, para. 256.

¹¹ In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, UN Doc. A/59/2005, para. 126.

international cooperation, both in trade and in the area of the maintenance of international peace and security. Both reports do not favour a complete reform of the UN or the WTO, but provide limited suggestions for updating these organizations.

As noted in one of the contributions to the Forum in this issue,¹² it is somewhat fashionable today for international organizations to have their own high-level panels. In the past, such panels also have been created; an example is the Leutwiler Group created in 1983 by the then Director-General of GATT, Arthur Dunkel. However, at present, the creation of reform panels almost has become a matter of course. Reform panels are a sort of public international consultant used to analyze the organization and make recommendations to improve it. In addition to the UN and the WTO, many other organizations currently are involved in processes of self-analysis or soul-searching.

A few issues concerning the creation of reform panels merit attention. First of all, the UN and WTO panels show the far-reaching power of the Secretary-General or Director-General of the organization. In these cases, it was their own decision to create these panels to look into the future direction of these organization, something highly relevant for the members of the organization. The power to make such a decision normally will not be among the express powers of the SG or DG, but can be included in their implied powers for good reasons.

Secondly, no matter how influential the reports produced by these panels are, it is for the members to implement or reject the recommendations for change. In that context, it might be relevant to whom a panel addresses its recommendations: to the membership as a whole, without any specific further timetable or agenda for subsequent decision-making, or to the Secretary-General as in the case of the UN. If it is framed as in the case of the UN, the advantage is that there is an additional chain in between the recommendations from outsiders and their ultimate implementation. This also means that the SG will know how members feel about these recommendations before he will issue his own suggestions for change. In addition, where the SG takes over recommendations from the panel, they carry the authority both of relative outsiders and of the SG. Where the SG does not take over recommendations, members of course are still free to agree to them and implement them. Where the SG submits recommendations that are not based on panel recommendations, it seems easier

¹² See the contribution by Von Bogdandy and Wagner.

for members not to implement than in the case where the SG follows the panel recommendations.

Finally, it is obvious that panel composition is crucial. The composition of the WTO Consultative Board is criticized in one of the contributions to our Forum in this issue, because it did not include scholars, intellectuals and politicians who had voiced criticism at the WTO.¹³ It is crucial that panel members are the best authorities in the field, are fully familiar with the organization concerned and are sufficiently open-minded to suggest changes to update the organization where necessary. Panels are not embedded in the institutional structure of the organization; they have no powers in the way organs of that organization do. Whenever their recommendations are followed, it is on the basis of their perceived usefulness combined with the wisdom and authority of panel members.

Ideally, reform panels act in the common interest of membership as a whole. From this perspective, they should assist members (and sometimes also the SG of the organization) to reconsider the *raison d'être* of the organization, its functions and work, and to make better informed decisions when updating is necessary or when old rules and principles still hold good. In the past, panel members have usually operated in their individual capacity and did not represent governments. However, over the past decade, the European Union experimented with different groups in different compositions. In 1995, the so-called Reflection Group, established by the European Council, prepared the ground for the Amsterdam Intergovernmental Conference (IGC) to modify the EU and EC Treaties. The Group was chaired by Carlos Westendorp, who was appointed by the Spanish Government, and was further composed of other representatives of the Member States' Foreign Ministers, two members of European Parliament and one European Commissioner. It is interesting to note that, in practice, some Foreign Ministers chose to be represented by non-governmental experts, such as international law professors, while others chose members of government, former ministers and ambassadors. In the final report of the Reflection Group, possible solutions were presented to the institutional problems the EU was facing. For the preparation of the Nice IGC in 2001 and the connected enlargement of the European Union, the model was even replaced by completely independent advisory groups upon request by the European Commission. Under the chairmanship of Guiliano Amato and coordinated by the European University Institute, a Reflection Group of fourteen academics from

¹³ *Ibid.*

western and eastern Europe produced a report on the long-term implications of enlargement. A similar approach was chosen with the establishment of the Group consisting of Jean-Luc Dehaene, former Prime Minister of Belgium, Mr. Richard von Weizsäcker, former President of the Federal Republic of Germany and Lord Simon of Highbury, former chairman of British Petroleum and former Minister, to give their views in complete independence on the institutional implications of enlargement.

At least in the EU, there seems to be a certain consensus that major institutional reform no longer can be left to the governments of Member States. Thus, the preparation of the IGC to conclude the European Constitution was in the hands of representatives of the national parliaments as well as from the European Parliament and the European Commission alongside the representatives of the governments (the ‘Convention’). At the same time, the process was meant to be as open as possible, allowing non-governmental experts to share their ideas. With the adoption of the Constitution, the Convention has even become a mandatory element of the future EU revision procedure.

Indeed, the establishment of expert panels seems to be somewhat contagious these days. In December 2004, the Ministerial Council of the Organization for Security and Cooperation in Europe (OSCE) asked the incoming Slovenian Chairman-in-Office to appoint seven people to a “Panel of Eminent Persons” on institutional reform. The panel members were appointed in February 2005. Although they do not represent any government, they include several former foreign ministers, a former OSCE Chairman-in-Office and a former OSCE Secretary General. The task of the group is to “review the effectiveness of the Organization, its bodies and structures and provide an assessment in view of the challenges ahead.” The representatives of the OSCE-participating States will discuss the panel report by June 2005. Here also, apart from recognizing some shortcomings in the functioning of the OSCE, the reason to update the organization is found in a chronological momentum: the thirtieth anniversary of the Helsinki Final Act, the fifteenth anniversary of the Charter of Paris for a New Europe and the tenth anniversary of the OSCE.

Irrespective of these examples, the idea to create a high-level panel has also been opposed in other international organizations. For example, Germany has suggested the creation of a reform panel for NATO, but there was much opposition to this. At the time of writing of this editorial, it does not seem likely that NATO will have its own version of a high-level panel. Reasons for members not to support the idea – no matter how fashionable – may be that they do not favour blueprints for reform or even suggestions for change, as they would like to stay fully in control of “their” organization and do not want

to be confronted with influential external pressure to implement changes they simply do not want.

Times change, and international organizations with them. Over the years many international organizations (including the UN, the WTO and the EU) have ceased to function as purely intergovernmental organizations. The impact of their decisions and policies reaches beyond interstate relations. This development makes it understandable why international organizations increasingly value the opinion of non-governmental experts regarding questions of institutional reform.