The High-level Summit, International Institutional Reform and International Law

ELLEN HEY*

I INTRODUCTION

"Is it plausible to imagine a UN dealing effectively with these interlinked crises?"[1]; crises in which, as stressed by the High-level Panel on Threats, Challenges and Change (High-level Panel), "[p]overty, infectious disease, environmental degradation and war feed on one another in a deadly cycle."[2] A slight rephrasing of the question, I suggest, is helpful. Is it plausible to imagine international institutions, including the United Nations, meaningfully contributing to dealing with the interlinked crises in which "[p]overty infectious disease, environmental degradation and war feed upon each other"? Two considerations prompt this re-characterization of the topic. First, a point made by the High-level Panel regarding institutional reform in the area of economic policy highlights the reasons why our horizon should extend beyond the United Nations:

> The institutional problem we face is twofold: first, decision-making on international economic matters, particularly in the areas of finance and trade, has long left the United Nations and no amount of institutional reform will bring it back; and second, the Charter allowed the creation of specialized agencies independent of principle United Nations organs, reducing the role of the Economic and Social Council to one of coordination[3]

Second, the primary responsibility for dealing with these inter-linked crises rests with states. Moreover, their cooperation is crucial if the United Nations and other international institutions are to be in a position to address these issues, hence the terms "meaningfully contributing to".

Can I imagine international institutions, including the United Nations, meaningfully contributing to dealing with these interlinked crises? Probably, provided, among other things, the agenda for institutional reform focuses more closely on the legitimacy of international decision-making processes and on the relationship between substantive policy content and "good process". This article

---

* Professor and Head of the Department of Public International Law at the Faculty of Law of the Erasmus University Rotterdam.

1 Announcement for the conference *The UN at Sixty: Celebration or Wake?*, hosted by the *Journal of International Law & International Relations*, at the Faculty of Law of the University of Toronto, 6 October 2005.

2 *Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, UN GAOR, 59th Sess., Supp. No. 565, UN Doc. A/59 (2004) at para 22, online: United Nations ‹http://www.un.org/secureworld/ report.pdf› [High-level Panel Report].

3 *Ibid.* at para. 274.

develops the argument that to date the agenda for international institutional reform has devoted insufficient consideration to the link between the legitimacy of decisions taken and the decision-making processes utilized in international institutions. It makes the point that the relationship between participatory, transparent and accountable decision-making—good process—and decisions that are perceived of as legitimate has been neglected and that neglecting this relationship harbours the danger of undermining the legitimacy of the institutions involved.

The nature of the analysis is informed by legal scholarship that treats these two aspects of policy as intimately interrelated. Such scholarship emphasizes the importance of "good process" in developing substantive outcomes regarded as legitimate by those affected by these outcomes, including decisions that are intended to govern their behaviour.[4] The analysis conducted, moreover, draws on concepts that are familiar from national public and, in particular, administrative law, which even if not directly transplantable to the international legal system, facilitate the conceptualization of the exercise of public power constrained by the rule of law.[5]

This article first considers the decisions taken at the High-Level Summit in follow-up to the Millennium Goals (the Summit), as evidenced by the Summit Report,[6] and characterizes these decisions in terms of their possible effects on the manner in which international institutions, including the United Nations, might address the interlinked crises. It thereafter addresses the relationship between international institutional reform, international law and legitimacy.

---

4 Of particular relevance is the work of Jutta Brunnée and Stephen Toope on an interactional theory of international law, see, Jutta Brunnée & Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law", (2000) 39 Colum. J. Transnat'l L. 19. Other relevant scholarship is that of Phillip Allot, *Eunomia, A New Order for a New World* (Oxford, Oxford University Press, 1990) [Allot, "Eunomia"]; Philip Allot, "The Concept of International Law," (1999) 10 E.J.I.L. 31.- [Allot, "The Concept"] and Thomas Franck, *Fairness in International Law and Institutions* (Oxford, Clarendon Press, 1995).

5 Also see Benedict Kingsbury, Nico Kirsch & Richard Stewart, "The Emergence of Global Administrative Law", Global Administrative Law Series, International Law and Justice Working Papers, IILJ Working Paper 2004/1; and Ruth W. Grant & Robert O. Keohane, "Accountability and Abuses of Power", Global Administrative Law Series, International Law and Justice Working Papers, IILJ Working Paper 2004/7, both online: Institute for International Law and Justice ‹http://www.iilj.org/publications/wp_globadminlaw.htm›. See also Martin Loughlin, *The Idea of Public Law* (Oxford, Oxford University Press, 2003).

6 UN General Assembly, *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th Sess., UN Doc. A/RES/60/1 (2005), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/LTD/N05/511/30/PDF/N0551130.pdf?OpenElement›. (reference in this article is to the text of the resolution dated 24 October 2005)[Summit Report].

II INSTITUTIONAL REFORM AND THE SUMMIT

The High-level Panel Report, *In Larger Freedom*, which is the report prepared by the United Nations Secretary-General in preparation for the Summit meeting[7] and the Summit Report published pursuant to the meeting focus on a number of institutions and their need for reform, the most important of which are the United Nations Security Council, institutions operating in the area of social and economic policy including the Economic and Social Council (ECOSOC), United Nations human rights institutions, and the United Nations Secretariat. This article focuses on the first two institutions and refers to the latter two as relevant to the former. Reform of the General Assembly was addressed in the documents in terms of streamlining decision-making, better coordination, and enhancing its contacts with civil society.[8] While a weak version of these three elements was included in the Summit Report,[9] the Summit did adopt the Secretary-General's proposal that the General Assembly develop a comprehensive convention on terrorism.[10]

United Nations Security Council Reform

Even an inattentive follower of the United Nations Millennium process and the outcome of the Summit might at this stage ask why one should address United Nations Security Council reform, given that what was decided in this respect might be summarized as states resolving to remain concerned.[11] Moreover, why discuss the Security Council in an article that was supposed to focus on development, disease, and environmental degradation—the latter in particular—with other contributions addressing peace and security matters? Although it is true that nothing much was decided at the Summit meeting in terms of Security Council institutional reform, I submit that a further broadening of the mandate of the Security Council has taken place as a result of the run-up to and decisions taken at the Summit. Moreover, this development is likely to determine where decisions about development, disease and environmental degradation will be taken in future. Ultimately, it also will affect the allocation of competences between United Nations institutions.

The substantive mandate of the Security Council over the years, especially during the past decades, has significantly expanded to include, for example, the establishment of international criminal tribunals for the former Yugoslavia and

---

7 United Nations Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All—Report of the Secretary-General*, UN GAOR, 59th Sess., UN Doc. A/59/2005 (2005), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement›. [*In Larger Freedom*]

8 High-Level Panel Report, *supra* note 2 at paras. 240-243; *In Larger Freedom*, ibid. at 158-164.

9 Summit Report, *supra* note 6 at paras. 149-151.

10 *In Larger Freedom*, *supra* note 7 at para. 161; and Summit Report, *supra.* note 6 at para. 83.

11 Summit Report, *supra* note 6 at para. 153.

Rwanda, the administration of territory in Kosovo and East Timor, and terrorism.[12] Significantly, the High-level Panel Report calls on the Security Council to host a second special session on HIV/AIDS as a threat to international peace and security and "to explore the future effects of HIV/AIDS on States and societies".[13] While this suggestion was not taken up in *In Larger Freedom* or in the Summit Report, the earlier 2000 special session of the Security Council indicates that HIV/AIDS, at the time, was conceived of as a potential threat to collective security. Though the then adopted Security Council resolution in its operative part focuses on HIV/AIDS as a threat to the health of international peacekeeping personnel, including support staff, the Resolution in its preamble states that "the HIV/AIDS pandemic, if unchecked, may pose a risk to stability and security."[14]

The two resolutions adopted at the Security Council session held in conjunction with the Summit and hence at the level of Heads of State and Government, also illustrate the contemporary broad understanding of collective security. Resolution 1624 (2005) concerns terrorism, while Resolution 1625 (2005) in the annexed declaration addresses the Security Council's role in conflict prevention, particularly in Africa.

Resolution 1624, among other things, calls upon all states to "[p]rohibit by law the incitement to commit a terrorist act or acts".[15] Remarkably, it does so without indicating what *incitement* to commit a terrorist act or acts might mean and with a universally agreed definition of terrorism still in dispute.[16] Such an unspecified obligation, which is binding on states, raises questions regarding the appropriate manner of designing provisions of criminal law and in particular the principle of legality, *nullum crimen sine lege*, in criminal law. This manner of proceeding also raises questions concerning the role of democratically elected parliaments in co-determining the content of criminal law. Resolution 1624, as well as other Security Council resolutions on terrorism,[17] thus goes to the heart of national criminal law

---

12 Nico Krisch, "Introduction to Chapter VII" in Brunno Simma, ed., *The Charter of the United Nations*, 2nd ed. (Oxford: Oxford University Press, 2002).

13 High-Level Panel Report, *supra* note 2 at para 67.

14 UNSC Res. 1308, UN SCOR, UN Doc. S/RES/1308 (2000), at para. 11, Preamble.

15 UNSC Res. 1624, UN SCOR, UN Doc S/RES/1624 (2005), at para. 1(a).

16 Robert Kolb, "The Exercise of Criminal Jurisdiction over International Terrorists", in Andrea Bianchi, ed., *Enforcement of International Law Norms Against Terrorism*, (Oxford: Hart Publishing, 2004) 227-281 (Commenting on the many definitions available in international treaties and in national laws and the problems that arise as a result). Also see Antonio Cassese, "Terrorism as an International Crime" in *Enforcement of International Law Norms against Terrorism* 213 (making the point that a definition of terrorism does exist in international customary law); and Georges Abi-Saab, "The Proper Role of International Law in Combating Terrorism" in *Enforcement of International Law Norms Against Terrorism* xiii (pointing to the importance of adopting a comprehensive convention against terrorism that would include a definition of terrorism).

17 See *e.g.* UNSC Res. 1373, UN SCOR, 2001, UN Doc. S/RES/1373 (2001).

systems and raises fundamental concerns regarding its compatibility with international human rights law—concerns that equally arise with respect to the implementing legislation adopted by states.[18] The accompanying caution that states should comply with "international law, in particular international human rights law, refugee law, and humanitarian law",[19] while adopting counter-terrorism measures, does not alleviate the expressed concerns. The resolution, furthermore, exemplifies the broad powers exercised by the Security Council and its Counter-Terrorism Committee, which monitors implementation of relevant Security Council resolutions,[20] but, whose chairman has stated, is not mandated to monitor the compatibility of counter-terrorism with human rights law.[21] In this respect, it is worthy of note that the Secretary-General's proposal, to appoint a special rapporteur on the compatibility of counter-terrorism measures with international human rights law,[22] which was followed up by the Human Rights Commission in April 2005[23] and

---

18 See *e.g.* Kent Roach & Gary Trotter, "Miscarriages of Justice and the War Against Terrorism" (2005) 109 Penn State L. Rev. 967. The discussions and court cases regarding the United Kingdom's *Anti-Terrorism, Crime and Security Act*, 2001 c. 24 [ATCSA] are illustrative of the problems at hand. The British Government in response to a ruling of the House of Lords, critiquing in particular the discriminatory nature of the detention powers of the ATCSA and finding them contrary to Articles 5 (right to liberty and security) and 14 (prohibition of discrimination) of the European Convention on Human Rights, introduced the Prevention on Terrorism Bill earlier this year, which was adopted on 11 March 2005 (See Oonagh Sands, "British Prevention of Terrorist Act 2005" *ASIL Insight* (April 27, 2005), online: American Society of International Law ‹http://www.asil.org/insights/2005/04/insights050427.html›). Meanwhile discussion has already started on the compatibility of United Kingdom's Terrorism Bill submitted to Parliament on 12 October 2005 (see Amnesty International, *United Kingdom Amnesty's International briefing on the draft Terrorism Bill 2005* (1 October 2005), online: Amnesty Internationl ‹www.web.amnesty.org›. One of the points on which the law is critiqued by Amnesty International is the manner in which "encouragement of terrorism" is criminalized in the Bill. Amnesty argues that the provision fails to meet the criterion of being prescribed by law, i.e. the legality principle, see Amnesty International at 12. (See also Reuters, "Blair Unveils tough anti-terrorism laws" (12 October 2005), online: Reuters Today ‹today.reuters.co.uk›. In The Netherlands a similar debate is ongoing, particularly with respect to a government proposal to criminalize "incitement" to commit a terrorist act. Another point of criticism against the Bill relates to the ninety-day period during which suspects of terrorism could be held in detention without being charged—a period that Parliament brought back to twenty-eight days (See "Blair defeat over terror laws" *BBC* (9 November 2005) online: BBC ‹http://news.bbc.co.uk/1/hi/uk_politics/442086.stm›.

19 UNSC Res. 1624 (2005), at para. 4.

20 UNSC Res. 1373 (2001), at paras. 6 and 7.

21 See website of the Counter Terrorism Committee, online: ‹http://www.un.org/Docs/sc/committees/1373/human_rights.html›.

22 *In Larger Freedom*, *supra* note 7 at para. 94.

23 Commission on Human Rights, Resolution 2005/80, (21 April 2005), at para. 14.

approved by ECOSOC in July 2005,[24] is not referred to in Security Council Resolution 1624. Nor was the Secretary-General's proposal taken up at the Summit meeting, even if the commitment to human rights law, refugee law, and international humanitarian law was reiterated in relationship to counter-terrorism measures.[25]

Resolution 1625 is also telling. In terms of conflict prevention, it refers to security, economic, social, and humanitarian sectors, as well as governance and human rights, when asserting the need to develop effective comprehensive strategies for conflict prevention.[26] This resolution resounds the comprehensive concept of collective security developed by the High-level Panel,[27] embraced by the Secretary-General,[28] reflected in the so-called Sachs Report,[29] and which also resounds in the Summit report.[30] The comprehensive collective security concept entails that threats to peace and security "include not just international war and conflict but [also] civil violence, organized crime, terrorism and weapons of mass destruction" as well as "poverty, deadly infectious disease and environmental degradation".[31] Such an understanding of peace and security, regardless of how pertinent it may be, amounts to a further broadening of the Security Council's mandate. It, thus, should come as no surprise if the Security Council in future were to concern itself with policies regarding poverty and the environment, for example.

The broad understanding of collective security raises yet another point of concern. The High-level Panel Report and the Sachs Report establish a causal link between poverty and security. For example, the High-level Panel, in developing the comprehensive collective security concept, provides that "[p]overty … is strongly associated with the outbreak of civil war".[32] The Sachs Report characterizes poverty as "[a] linchpin of global security" and provides that "[a]chieving the Millennium Development Goals should therefore be placed centrally in international efforts to end violent conflict, instability and terrorism".[33] While these assertions most probably are correct, linking poverty, which in turn is linked to environmental degradation, to global security provides a substantive basis for Security Council involvement in these issues and for an expansion of its mandate, as suggested above.

---

24 ECOSOC, Decision 2005/279, 25 July 2005.

25 Summit Report, *supra* note 6 at para. 85.

26 Annex to UNSC Res. 1625, UN SCOR, UN Doc. S. /RES/1625 (2005). , at para. 4.

27 High-Level Panel Report, *supra* note 2; see especially paras. 17-43.

28 *In Larger Freedom*, *supra* note 7. See especially at para. 77, and see generally paras. 76-86.

29 *Investment in Development, A Practical Plan to Achieve the Millennium Development Goals, An Overview*, UN Millennium Project, directed by Jeffrey D. Sachs, UNDP, 2005, online: UN Millenium Project ‹http://www.unmillenniumproject.org/reports/fullreport.htm› [Sachs Report].

30 See *e.g.* Summit Report, *supra* note 6 at .paras. 72 and 79.

31 *In Larger Freedom*, *supra* note 7 at para. 78.

32 High-Level Panel Report, *supra* note 2 at para 22.

33 Sachs Report, *supra* note 29 at 6.

The focus on poverty, however, implies that developing, instead of developed, states will be the main addressees of decisions taken in this respect. In terms of sustainable development, it is noteworthy that the link that Principle 8 of the Rio Declaration makes between environmental degradation and affluence, in terms of unsustainable patterns of production and consumption, is not reiterated in the Summit documents.[34] These considerations make it all the more worrisome that the Summit did not take-up the Secretary-General's proposal on Security Council reform, which would have made the Security Council more representative of the global community. Echoing an earlier statement the Secretary-General in *In Large Freedom* states that "no reform of the United Nations would be complete without reform of the Security Council", and "[t]he Security Council must be broadly representative of the realities of power in today's world".[35]

The point made in this section is not that the Security Council should not, as a matter of principle, be involved in policies regarding, poverty or the environment, for example, or that the links established between various policy areas are irrelevant.[36] The point is rather that first, given the membership and the decision-making procedure of the Council,[37] Its resolutions on these and other matters run the risk of increasingly being regarded as lacking legitimacy for lack of "good process". Second, if the Security Council exercises broad powers in specific areas of law, such as criminal law, it should be subject to the safeguards associated with that area of law and the rule of law in particular, even if these safeguards may have to be adapted the problems addressed.[38] Relevant in this context is also the fact that the Secretary-General's proposal to appoint a rapporteur on the compatibility of counter-terrorism measures with international human rights law[39] was not referred to in the Summit Report. This proposal and the steps subsequently taken by the Human Rights Commission and ECOSOC[40] are important since the appointed rapporteur, in reviewing national counter-terrorism laws, will be able to indirectly assess the compatibility of Security Council resolutions with human rights law.

---

34 1992 Rio Declaration on Environment and Development, 31 ILM (1992) at 874.

35 *In Larger Freedom*, *supra* note 7 at para 169.

36 See e.g. George Abi-Saab, *supra* note 16 (making the link between terrorism and "deep feeling of injustice and oppression, of loss of hope and prospects, resulting from misery, exploitation, denials of human rights, and great inequalities between and within peoples"), at xxi-xxii.

37 See articles 23 and 27 of the United Nations Charter.

38 See Thomas M. Franck, "Criminal Combatants, Or What? An Examination of the Role of Law in Responding to the Threat of Terror" (2004) 98 A.J.I.L. 686.

39 *In Larger Freedom*, *supra* note 7 at para. 94.

40 See text at notes 23 and 24.

Moreover, the rapporteur, as other human rights rapporteurs, is able to scrutinize practice in both developed and developing states.[41]

Interesting and somewhat worrisome in the context of the lack of Security Council reform are two recent decisions of the Court of First Instance of the European Community, pertaining to the freezing of assets in view of the counter-terrorism measures adopted by the European Community on the basis of Security Council resolutions.[42] The Court held that while it is not entitled to review the legality of Security Council resolutions,[43] it is entitled to review such resolutions indirectly, based on its competence to review relevant Community instruments in the light of *jus cogens*, which, it asserts, also binds the Security Council.[44] It is worthy of note that the Court considers fundamental human rights, *in casu*, including the right to property, the right to a fair hearing and the right to an effective judicial remedy, to belong to the body of *jus cogens* that also binds the Security Council.[45] The Court ultimately held that the Community instruments, as well as the Security Council resolutions and the practice of the Sanctions Committee regarding the de-listing of natural and legal persons suspected of terrorism, are not contrary to *jus cogens*.[46] It would go beyond the scope of this article to dwell on the role of the Sanctions Committee; it suffices to say that it is a subsidiary body of the Security Council, made up of all Members of the Council that decides upon de-listing by consensus, unless the state that originally proposed the listing submits a request for de-listing. In the latter case, a non-objection procedure applies.[47] Moreover, individual cases are brought before the Committee by the state of citizenship or residence of the individual concerned,[48] which is problematic because international law does not grant individuals a right to diplomatic protection.

However, before we read too much into the decisions of the Court of First Instance, two points of caution are in order. First, the decisions of the Court of First Instance are subject to appeal to the Court of Justice of the European Community on

---

41 On the importance of international supervisory mechanisms see, Andrew Clapham, "Terrorism, National Measures and International Supervision" in Bianchi, ed., *Enforcement of International Law Norms against Terrorism*, *supra* note 16 at 283.

42 Case T-306/01(Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities) and Case T-315/01 (Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities), both 21 September 2005.

43 Case T-306/01 at paras. 270-276; Case T-315/01 at paras. 219-225.

44 Case T-306/01 at paras. 277-282; Case T-315/01 at paras. 226-231.

45 Case T-306/01 at para. 284 ff.; see also Case T-315/01 at para. 233 ff.

46 Case T-306/01 at para. 347; Case T-315/01 at para. 292.

47 Security Council Committee established pursuant to Resolution 1267 UN Doc. S/RES/1267 (1999), at para. 7, Guidelines of the Committee for its work, 7 November 2002 and amended 10 April 2003, online: United Nations ‹http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf›

48 Ibid.

points of law.[49] Second, I have serious doubts whether the approach adopted by the Court of First Instance, regarding in particular its findings on the content of *jus cogens*, will meet with the approval of the Court of Justice. However, I also add that this development, in which a regional court indirectly reviews Security Council resolutions and which may have destabilizing effects on the international legal system, might be inevitable if the United Nations does not itself adopt proper accountability procedures.[50] Approaches rightly adopted in a different context specifically that of the compatibility of European Community law with the European Convention on Human Rights (ECHR), by the European Court of Human Rights (ECrtHR) in *Mathews*[51] or in the more recent *Bosphorous* case,[52] might provide a source of inspiration for other courts, whether national or regional.

---

49 At the time of writing, Case T-315/01 had been appealed to the Court of Justice and was registered as Case C-402/05, online: ‹http://curia.eu.int/en/plan/index.htm›. Given that several cases were listed on the website, without further reference to names or documents, it is unclear whether case T-306/01 has been appealed. The deadline for lodging an appeal closed on 21 November 2005.

50 Such processes are at present limited to dialogue between the Security Council and its Counter-Terrorism Committee and human rights bodies, including the United Nations High Commissioner for Human Rights and the rapporteur on the compatibility of counter-terrorism measures with human rights law (see UNGA, *Protection of human rights and fundamental freedoms while countering terrorism*, GA Res 59/191, UN GAOR, 59th Sess., UN Doc. A/RES/59/191 (2005), and para 14(e) of Resolution 2005/80 adopted by the Human Rights Commission). Also see André Nollkaemper, "Internationalisering van Nationale Rechtspraak" ("Internationalization of the Decisions of National Courts") (2005) 131 *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* (*Communication of the Netherlands Society of International Law*) 1 at 62.

51 *Matthews v. United Kingdom*[1999] ECHR 12 In *Matthews* the ECrtHR held that the United Kingdom remained responsible for a violation of article 3 (the right to free elections) of Protocol 1 to the ECHR even if it had transferred certain competences to the European Community by way of "international instruments which were freely entered into by the United Kingdom" (at para. 33; see also paras. 34 and 35). *In casu* the relevant instruments were the Maastricht Treaty on European Union of 7 February 1992, in conjunction with Council Decision 76/787 and the Act concerning the Election of Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976. These instruments are all treaties, as opposed to Community instruments, under European law.

52 *Bosphorus Airlines v. Ireland*, Applicant no. 45036/98, 30 June 2005. In *Bosphorus*, instead of international instruments voluntarily entered into, a European Community instrument (*in casu* EC Regulation 990/93) was at stake and, in particular, whether the interpretation and application of that Regulation by Ireland was in violation of article 1 (the right to property) of Protocol 1 to the ECHR. EC Regulation 990/93 was one of the regulations adopted in the European Community to implement United Nations Security Council resolutions regarding sanctions against former Yugoslavia (*in casu* UNSC Resolution 820 (1993)). The ECrtHR distinguished the case from the previously discussed *Matthews* case (*supra* note 51), based on the finding that European Community instruments were at stake (para. 157). This prompted the Court to engage in an extensive consideration of

I suggest that it would be good process to establish an entity, independent of the Security Council, that could review the consistency of Security Council resolutions with human rights norms *ex ante* and a mechanism that could review the implementation of these resolutions by states. The work of the rapporteur on the compatibility of counter-terrorism measures with human rights law will focus mainly on the latter. The dialogue that the rapporteur is to engage in with the Counter-Terrorism Committee of the Security Council, however, may provide some scope for *ex ante* review.[53] The to-be-established Human Rights Council, in theory, could play a role in both respects. However, given the rather vague text in the Summit Report, its mandate and position remain unclear. Yet, the reference to "mainstreaming of human rights within the United Nations system"[54] provides scope for arguing that the Human Rights Council could and should play a role in this respect and, in particular, in considering whether Security Council resolutions meet human right standards. Such a development might also go a long way towards preventing national and European courts from coming to a variety of conclusions about the compatibility of Security Council resolutions and procedures with *jus cogens*.

Institutional Reform and Social and Economic Policy

As the quotation at the beginning of this article illustrates,[55] the High-level Panel made the point that UN reform can only partially, if not marginally, address reform in the area of international economic policy. In particular, it means that reform of the WTO, International Monetary Fund (IMF) and the World Bank cannot be addressed in this process. It is of course well understood that that the United Nations reform process, as such, and the United Nations Secretary-General cannot address reform of these institutions in a comprehensive manner. In the case of the Secretary-General, specifically, addressing such reform would clearly extend beyond his mandate. The Summit, however, as a meeting of the United Nations General Assembly attended by Heads of State and Government, is competent to

relevant EC law and practice in the area of human rights, to eventually come to the conclusion that "[i]f such equivalent protection [equivalent to the ECHR] is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the Convention [ECHR] when it does no more than implement legal obligations flowing from its membership of the organization. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient." (para. 156). The ECrtHR, while in general terms approving of the manner in which human rights are protected in the European Community, thus reserves its position to consider whether in an individual case such protection was manifestly deficient. In *Bosphorus* the ECrtHR rejects the claim.

53 See First Report of the Special Rapporteur, UN Doc. A/60/370 (2005).

54 Summit Report, *supra* note 6 at para. 159.

55 See text at *supra* note 3.

address such issues. While the General Assembly, as such, cannot amend the terms of reference or mandates of United Nations specialized agencies—let alone of the WTO, which is not a United Nations specialized agency—it frequently requests United Nations specialized agencies, other United Nations bodies, or member states of such agencies or bodies to undertake certain tasks.[56] Moreover, as the reference to the need for reform of the Bretton Woods institutions illustrates, the Summit did not remain totally silent on this point.[57]

In *In Larger Freedom*, the Secretary-General acknowledges the point made by the High-level Panel regarding the limited possibilities for the United Nations in addressing institutional reform in the area of economic policy.[58] The proposals included in *In Larger Freedom* and the decisions contained in the Summit Report accordingly are limited to strengthening the coordinating role of ECOSOC. The measures envisaged call for more dialogue and partnerships with the financial institutions, the private sector, and civil society and high-level meetings with the aim of better coordinating the work of the United Nations in the area of social and economic policies. They also acknowledge that the working methods of ECOSOC should be adapted to achieve these aims.[59] The bottom line is that ECOSOC was envisaged as a coordinating body in 1945 and remains just that. It remains to be seen whether the fact that some ECOSOC members will be members of the Organizational Committee of the Peacebuilding Commission will enhance ECOSOC's position.[60] Relevant considerations in this respect are that the Peacebuilding Commission is no longer envisaged as a joint venture of the Security Council and ECOSOC, as proposed in *In Larger Freedom*[61] and that it will report to the General Assembly, instead of to the Security Council and ECOSOC in sequence, depending on the phase of the conflict.[62]

Significantly, *In Larger Freedom* acknowledges that, in the medium and longer term, "much more radical reforms" will be required to streamline activities of the many institutions working on development, environment, and humanitarian

---

56 Exemplary are the annual resolutions of the General Assembly regarding oceans and the law of the sea, for example GA Res 58/240, UN GAOR, 58th Sess., Un Doc. A/RES/58/240 (2004), in which a number of United Nations specialized agencies and their member states as well as other United Nations bodies are requested to consider and act on issues regarding ocean policy and law. See Ellen Hey, "Reviewing Implementation of the LOS Convention and Emerging International *Public* Law", in Alex Oude Elferink, ed., *Stability and Change in the Law of the Sea: Selected Issues* (Leiden: Martinus Nijhoff, 2005)73.

57 See text at *infra* note 76.

58 *In Larger Freedom*, *supra* note 7 at para. 172.

59 *In Larger Freedom*, *supra* note 7 at paras. 175-180, and Annex at para. 8(d); see also Summit Report, *supra* note 6 at paras. 155-156.

60 Summit Report, *supra* note 6 at paras. 97-105.

61 *In Larger Freedom*, *supra* note 7 at paras. 114-117.

62 Compare *In Larger Freedom*, *supra* note 7 at para. 116, and Summit Report, *supra* note 6 at para. 99.

action. The Secretary-General, in fact, points to the need to regroup agencies, funds, and programs "into tightly managed entities" and asserts that this "might involve eliminating or merging those funds, programmes and agencies which have complementary or overlapping mandates and expertise".[63] However, in the meantime, emphasis is to be placed on improving coordination of United Nations activities at the country level.[64] The Summit Report reflects these considerations in terms of a business-as-usual attitude without the urge for radical reform.[65]

The paragraphs on environmental policy in the various reports are telling. With respect to global environmental governance, *In Larger Freedom* points out that "the number and complexity of international agreements and agencies", with "more than 400 regional and universal multilateral environmental treaties in force" would have the following implication:

> It is now high time to consider a more integrated structure for environmental standard setting, scientific discussion and monitoring treaty compliance. This should be built on existing institutions, such as the United Nations Environment Programme, as well as the treaty based bodies and specialized agencies. Meanwhile, environmental activities at the country level should benefit from improved synergies, on both normative and operational aspects, making use of their comparative advantages, so that we have an integrated approach to sustainable development, in which both halves of that term are given their due weight.[66]

Note that the quoted passage follows the sense of the paragraphs on social and economic reform: significant restructuring is required, albeit with a focus on better coordination at the country level in the meantime. Yet, it is also worthy of note that this paragraph reflects concerns that were already expressed in Agenda 21, and in particular Chapter 38, on international institutional arrangements.[67]

The Summit Report is exemplary of the "business-as-usual" attitude of United Nations member states when it comes to environmental policy. It expresses agreement "*to explore* the possibility of a more coherent institutional framework" to address "enhanced coordination, improved policy advice and guidance, strengthened scientific knowledge, assessment and cooperation, better treaty compliance, *while respecting the legal autonomy of the treaties*, and better integration of environmental activities in the broader sustainable development framework at the operational

---

63 *In Larger Freedom*, *supra* note 7 at para. 197.

64 *In Larger Freedom*, *supra* note 7 at para. 198.

65 Summit Report, *supra* note 6 at paras 168 and 169.

66 *In Larger Freedom*, *supra* note 7 at para. 212, *In Larger Freedom*.

67 See especially Agenda 21: Programme of Action for Sustainable Development, United Nations Publication, online: United Nations ‹http://www.un.org/esa/sustdev/documents/agenda21/index.htm›, at para 38.7.

level".[68] This is a far cry from developing an integrated structure for global environmental governance and from a response to the findings of the High-level Panel that "[e]xisting global economic and social governance structures are woefully inadequate to address the challenges ahead"[69] and that "[m]ost attempts to create governance structures to tackle the problems of global environmental degradation have not effectively addressed climate change, deforestation and desertification" with multilateral environmental treaties being undermined by inadequate implementation and enforcement by the states parties.[70]

What can one make of the above in terms of decision-making and legitimacy in international social and economic policy? I suggest that the agenda is set for business-as-usual with one important difference: the comprehensive collective security concept discussed above.[71] It will in the future provide a basis for the Security Council expanding its mandate in the area of social and economic policy, including human rights policy, unless the Human Rights Council is vested with an appropriate mandate. If the Security Council expands its mandate as suggested, the already weak position of ECOSOC and the institutions operating under ECOSOC might weaken even further. This would entail a further shift in the institutional balance within the United Nations, with the Security Council attaining increased importance and the importance of ECOSOC declining further.

But, what, subject to the above, does "business as usual" mean? In order to explore the answer to this query, I submit, with all due respect, that the United Nations Secretary-General missed a point when he refers to the need for "much more radical reforms" being required to streamline the activities of institutions active in the social and economic field and for an "integrated structure for" global environmental governance.[72] A system for streamlining activities in the social and economic field and an integrated structure for global environmental governance has been under construction for a while. It involves standard-setting and monitoring compliance with those standards. However, it only involves standards for a part of the world, that is the South, and, to a lesser degree, economy-in-transition states. The World Bank, in particular, streamlines activities and provides such a structure. With regard to global environmental governance, it does so through, in particular, the renegotiated Global Environment Facility (GEF), which is the implementing agency for most of the financial mechanisms established by Multilateral Environmental Agreements (MEAs) and through its own initiatives like the Prototype Carbon Fund (PCF) and the original GEF.[73] The World Bank and the IMF, as is well-documented, also play an important role in addressing other social

---

68 Summit Report, *supra* note 6 at para. 169, last bullet [emphasis added].

69 High-Level Panel Report, *supra* note 2 at para. 56.

70 High-Level Panel Report, *supra* note 2 at para. 54.

71 See especially text following *supra* note 26.

72 See text at *supra* note 66.

73 See Ellen Hey, "Sustainable Development, Normative Development and the Legitimacy of Decisions-Making" (2003) 34 Neth. Y. I.l L. 3 [Hey, "Sustainable Development"].

and economic concerns, including human rights, especially though Structural Adjustment Programs.[74] The World Bank, for example, has a host of internal regulations for projects that it engages in and that are targeted at various issues from environmental impact assessment to indigenous peoples.[75] The point, once again, is not that the World Bank or the IMF should not adopt such regulations and apply them to projects that they engage in. It is rather that the decision-making processes and procedures through which such instruments are developed are not characterized by "good process", given that participation of developing and economy-in-transition states in decision-making is relatively limited, when compared to developed states. The following paragraph in the Summit report is telling:

> We reaffirm the commitment to broaden and strengthen the participation of developing countries and countries with economies in transition in international economic decision-making and norm-setting, and to that end stress the importance of continuing efforts to reform the international financial architecture, noting that enhancing the voice and participation of developing countries and countries with economies in transition in the Bretton Woods institutions remains a continuous concern.[76]

Such concerns are not new. While Agenda 21 voiced similar concerns only with respect to the GEF in its original form,[77] the 1990 Report of the South Commission made the point with respect to the international institutions in general and the Bretton Woods institutions in particular.[78] In addition, the Johannesburg Declaration on Sustainable Development also makes the point that "[t]o achieve our goals of sustainable development, we need more effective, democratic and accountable international and multilateral institutions." [79]

With the emergence of the comprehensive collective security concept, the absence of Security Council reform, little by way of reform of the institutions that

---

74 See Mac Darrow, *Between Light and Shadow, The World Bank, The International Monetary Fund and International Human Rights Law* (Oxford: Hart Publishing, 2003).

75 See *e.g.* World Bank Operational Policy/Bank Procedures (OP/BP) 4.01 on environmental assessment policy and OP/BP 4.10 on indigenous peoples.

76 Summit Report, *supra* note 6 at para. 35.

77 Agenda 21, *supra* note 57 at para. 33.14, (A)(iii). The GEF was established as a pilot project of the World Bank in 1991 and was administered solely by the World Bank. Agenda 21 required that the GEF be restructured so as to be more transparent and more open to participation by developing states, but also giving due weight to the funding efforts of donor states (par. 33.14(A)(iii)). The GEF was established in its present form in 1994. For further information see Hey, "Sustainable Development", *supra* note 73 at 32-35.

78 The South Commission, *The Challenge to the South, The Report of the South Commission* (Oxford, Oxford University Press 1990). See especially 263-265.

79 UN Doc.A/Conf.199/20 at para.31, reproduced in (2002) 2 International Environmental Agreements: Politics, Law and Economics 43.

operate in the area of social and economic policy, and the uncertainty in the mandate of the Human Rights Council, questions arise regarding the legitimacy of the decisions taken, the decision-making processes employed and, ultimately, the institutions involved. These questions are especially relevant in the light of the above analysis, which illustrates that institutions in which developed states dominate decision-making—the Security Council, the World Bank, and IMF—occupy crucial positions in international decision-making, both where security as well as social and economic policy are at stake. Add to that the fact that the decisions taken by these institutions affect developing states more significantly than developed states and we are at the core of the North-South debate. I suggest that in this respect, the Summit meeting was a missed opportunity to address inequities in international decision-making. That brings me to the question of how such inequities might be conceptualized in terms of international law, which could introduce some measure of legitimacy into the decision-making processes and procedures by introducing notions related to the rule of law.

III INTERNATIONAL INSTITUTIONAL REFORM, INTERNATIONAL LAW AND LEGITIMACY

In addition to democracy,[80] the concept of the rule of law[81] is central to the conceptualization of legitimacy in terms of law in contemporary national society. While this concept is not directly transplantable from the national to the international level of governance, the concept of the rule of law does offer relevant anchoring points for conceptualizing how legitimacy might be enhanced at the international level of decision-making. Moreover, the importance of the rule of law is also addressed in the various documents related to the Summit.

The Rule of Law and the Summit Documents

The Summit Report refers to the need to strengthen the rule of law at national and international levels. The report, in focusing on the steps to be taken at the national level, emphasizes the role of the United Nations in promoting the rule of law and democracy at that level.[82] Noteworthy is the establishment of a rule of law assistance unit within the United Nations Secretariat.[83] While in *In Larger Freedom*,

---

80 Translation of the notion of democracy to the international level of decision-making is particularly difficult, if not impossible, because there is no *demos*, at least at present and probably a long way into the future. Consequently, legitimacy has to be grounded on other concepts, as suggested, the concept of the rule of law can be helpful in this respect. Also see and Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 A.J.I.L. 596; see especially at 615-616; see also Grant & Keohane, *supra* note 5 see especially at 11-14.

81 See David M. Beaty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004); Martin Loughlin, *supra* note 5.

82 Summit Report, *supra* note 6 at paras. 134-137.

83 Summit Report, *supra* note 6 at para. 134(e).

its role is linked to peacebuilding and the (re)introduction of the rule of law in conflict or post-conflict societies,[84] its role is left unspecified in the Summit Report and is referred to in terms of technical assistance and capacity-building only.[85] It is still unclear if the unit could play a role in ensuring that counter-terrorist measures are implemented in accordance with the rule of law. Moreover, if it is to play a role in this respect, as opposed to the rapporteur on the compatibility of counter-terrorism measures with human rights law,[86] its focus would most likely be exclusively on developing states. It is important to note, however, that the rapporteur may provide advisory services and technical assistance to states at their request only, even if the rapporteur is entitled "to make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism."[87]

As mentioned above, the Summit Report also addresses the rule of law at the level of international governance. A conceptualization of what the introduction of the rule of law at the international level might entail, however, is lacking. First, at various places in the document the importance of the rule of law at all levels for "sustained economic growth, sustainable development and the eradication of poverty and hunger"[88] as well as "peaceful coexistence and cooperation among States"[89] is asserted. Notably, the section entitled "Systemic Issues and Global Economic Decision-making" contains the above quoted paragraph about the need to reform the Bretton Woods institutions[90] as well as a commitment to "equitable, rule-based, predictable and non-discriminatory trading and financial systems"[91] and the assertion that "[g]ood governance at the international level is fundamental for achieving sustainable development".[92] Essentially, these assertions amount to a summary of what was already agreed in the Monterrey Consensus, adopted in March 2002.[93] Perhaps more importantly, a reference to the significance of the International Criminal Court in implementing the rule of law at the international level, as contained in *In Larger Freedom*,[94] is not to be found in the Summit Report.

---

84 *In Larger Freedom*, *supra* note 7 at para. 137.

85 Summit Report, *supra* note 6 at para. 134(e).

86 See text at *supra* note 41.

87 Human Rights Commission, Resolution 2005/80 at para. 14(a).

88 Summit Report, *supra* note 6 at para. 11; see also paras. 21, 24(b).

89 Summit Report, *supra* note 6 at para. 134(a)

90 See text at *supra* note 76.

91 Summit Report, *supra* note 6 at para, 36.

92 Summit Report, *supra* note 6 at para. 39.

93 Monterrey Consensus of the International Conference on Financing for Development, Mexico, 2002, UN Doc. A/CONF.198/11, see in particular section F of the Consensus and UN Doc. A/59/822, 1 June 2005, The Monterrey Consensus: status and implementation and tasks ahead, Report of the Secretary-General.

94 *In Larger Freedom*, *supra* note 7 at para 138.

Beyond broadened and strengthened participation of developing and economy-in-transition states in decision-making in the Bretton Woods institutions and equity and transparency in decision-making, there is not much to be found in the Summit Report in terms of what the rule of law might entail at the international level of decision-making. Admittedly, the concrete reference to the Bretton Woods institutions and to participation in decision-making and norm-setting are a step beyond what has to date been included in similar international policy instruments.[95] However, the absence of a call for more accountable international institutions is conspicuous by its absence in the Summit report— a requirement that was included in, for example, the Johannesburg Declaration.[96]

Most importantly, the Summit document shows no trace of the proposals for Security Council reform, as proposed by both the High-level Panel and by the Secretary-General in *In Larger Freedom*. As the High-level Panel asserted, Security Council reform is necessary to enhance the effectiveness of that body, but also to enhance its legitimacy and credibility. While the former refers to the need for more substantively coherent decision-making by the Security Council, the latter refers to the need to broaden its composition.[97] The Secretary-General in *In Larger Freedom* adopted a similar position, both in terms of substance[98] and institutional reform.[99]

The gradual broadening of the concept of collective security and Security Council practice, without concomitant Security Council reform, and the central role played by the Bretton Woods institutions in international social and economic policy, give rise to the question about how the role of international law may be understood. This query is discussed in the following section of this article.

Globalization, International Institutions and International Law

Globalization, whether understood narrowly as economic globalization or more broadly as a process by which social relationships, including those of individuals and groups, extend across the globe, has resulted in decision-making at the international level becoming more important as means of addressing ensuing relationships of interdependence.[100] Moreover, enhanced interdependence has resulted in the perception that the decision-making processes and the ensuing decisions are of concern to the international community, as such. Armed conflict, terrorism, human rights violations, environmental degradation, and poverty are pertinent examples. International institutions play an important role in decision-making in these policy

---

95 See text at *supra* notes 77 to 79.

96 See text at *supra* note 79.

97 High-Level Panel Report, *supra* note 2; see respectively paras. 204-209 and 244-260.

98 *In Larger Freedom*, *supra* note 7 at para. 126.

99 *In Larger Freedom*, *supra* note 7 at paras. 167-170.

100 Ellen Hey, *Teaching International Law, State-Consent as Consent to a Process of Normative Development and Ensuing Problems*, inaugural lecture, (The Hague: Kluwer Law International, 2003), 2 [Hey, *Teaching International Law*].

areas. The United Nations Security Council, the various treaty based human rights bodies, conferences of the parties (COPs) to MEAs, and the World Bank provide relevant examples. While many, if not most, of the decisions taken by these institutions are not legally binding in terms of the traditional doctrine of international law, such decisions, as resolutions of the Security Council, which are legally binding when it acts under Chapter VII of the United Nations Charter, may exert considerable influence on states as well as on individuals and groups. Relevant examples are the draft decisions on the content of the flexible mechanisms under the Kyoto Protocol adopted within the framework of the climate change regime,[101] decisions of the Human Rights Committee on the legality of reservations to the International Covenant on Civil and Political Rights[102] and the aforementioned Operational Policies/Bank Procedures of the World Bank.[103]

In terms of traditional doctrine, the legally non-binding character of such decisions can be explained by the fact that states did not formally consent to the decisions at stake. As opposed to the situation regarding the Security Council acting under Chapter VII of the United Nations Charter, states also did not formally consent to the institution in question adopting legally binding decisions. However, what all these institutions, including the Security Council, have in common is that questions regarding the legitimacy of the decision-making process and the resulting decisions have arisen. I submit that, in terms of law, this is because state-consent, the fact that states in all these cases consented to the treaty establishing the

---

101 COP 7 adopted decisions amongst other things, on the implementation of articles 6, 12 and 17 of the Kyoto Protocol, in view of the entry into force of the Protocol. It is envisaged that these decisions will be adopted in November 2005, at the first meeting of the COP/MOP of the Kyoto Protocol, which entered into force on 16 February 2005. For the text of the decisions, see UN Doc. FCCC/CP/2001/13 Add. 1 to 3. For information on the flexible mechanisms of the Kyoto Protocol see David Freestone, "The UN Framework Convention on Climate Change, the Kyoto Protocol and the Kyoto Mechanisms" in David Freestone & Charlotte Streck, eds., *Legal Aspects of Implementing the Kyoto Mechanisms: Making Kyoto Work* (Oxford: Oxford University Press, 2005) 3.

102 See General Comment 24, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, adopted by the Human Rights Committee at its fifty-second session, 1994, online: Office of the High Commissioner for Human Rights ‹http://www.unhchr.ch› . Also see comments Human Rights Committee on the reservation made by the United States to art 6 (death penalty). Furthermore, see Human Rights Committee, Communication No. 845/1999: Trinidad and Tobago, UN Doc CCPR/C/67/D/845/1999, 31 December 1999. In this Communication the Human Rights Committee proceeded to determine that a reservation made by Trinidad and Tobago to the Optional Protocol to the effect that the Human Rights Committee would not be entitled to receive and consider communications relating to any prisoner under sentence of death was contrary to the object and purpose of the Optional Protocol and thus did not preclude the Committee from considering the communication in question.

103 See *supra* note 75.

institution in question, no longer serves to legitimize the decisions taken by these institutions.

I will retrace a few steps. In traditional international legal doctrine, state-consent serves the dual purpose of bringing into existence a binding rule of law and of legitimizing that rule. Traditional doctrine thus first assumes that a state is bound by a rule or set of rules in the form of a treaty, if that state formally consents to the rule or set of rules in question in accordance with an agreed procedure.[104] Second, traditional doctrine also assumes that a decision so adopted is legitimate. Traditional doctrine, thus, adopts a normative, instead of a legal-sociological, approach to the legitimacy of a rule or set of rules adopted.[105] Moreover, in traditional doctrine, the two functions of state-consent coincide. This approach can be explained in terms of the original conception of the international law as a purely inter-state legal system, in which international institutions play a minor role. However, with the increasingly important role played by international institutions in international decision-making, a different perception of legitimacy is required—one that is grounded in legal-sociological approaches and which can be found in national public or administrative law.

As mentioned above, formal state-consent, with the exception of the Security Council acting under Chapter VII of the UN Charter, is absent in most of the decisions taken by the institutions referred to above. Furthermore, also in those cases where the Security Council acts under Chapter VII of the UN Charter, all states bound by the Security Council resolution do not consent to it. I suggest, that in all these cases it is appropriate to regard the consent of states to the treaty establishing the international institution in question as consent to a process of normative development, the outcome of which is unknown at the time when consent is given. However, from this perspective, state consent to the treaty establishing the institution, no longer serves to legitimize the decisions taken by the institution at some future point in time. The legitimacy of the decision in question, I suggest, instead depends on the nature of the decision-making processes and procedures used to adopt the decision. It is at this stage that "good process" comes into play and that an alternative approach to legitimacy needs to be developed.[106]

Developing an alternative approach to legitimacy, however, involves stepping outside the confines of traditional international legal doctrine. It involves acknowledging that we are using a legal system that is similar to national contract law to address common interest or public law type problems.[107] As in national public and administrative law, in particular, consent to a rule or set of rules is not a proper source of legitimacy. Instead, legitimacy is grounded in other factors such as the

---

104 That is, in accordance with the relevant rules in the Vienna Convention on the Law of Treaties.

105 Bodansky, *supra* note 80 at 600-603.

106 Also see Hey, *Teaching International Law*, *supra* note 100.

107 Also see Ellen Hey, "International *Public* Law" (2004) 6 International Law FORUM du Droit International 149.

attribution and delegation of decision-making powers, reasoned decisions, proportionality in decision-making, the right of interested parties to have their interests accounted for, respecting basic rights, and access to review procedures.[108] The decision-making processes and procedures employed by international institutions, thus, should be the focus of attention if these institutions and the ensuing decisions are to be regarded as legitimate.

Such a conceptualization of the rule of law at the international level of decision-making is absent from the Summit Report, while *In Large Freedom* contains elements of such an approach. Relevant examples are the human rights rapporteur for determining the compatibility of counter-terrorism measures with human rights law and the proposals on Security Council reform. Such an approach, however, also requires that due consideration be given to the central role played by the World Bank and the IMF in developing integrated approaches to social and economic policies as applicable to developing states, in particular.

IV FINAL REMARKS

The conceptualization of legitimacy and international law as presented in this article is twofold. First, it is based on the idea that law is about process and relationships before it is about rules and that relevant actors in interaction constitute and reconstitute these relationships and thus themselves and their interests.[109] In this view, the law at any given time also reconstitutes relevant actors. The resulting conceptualization is one of a continuous interactive process in which individuals and groups, law and society reconstitute themselves and each other. Second, it is based on the idea that the public domain is a domain in which all power exercised is public power and thus subject to the requirement of accountability.[110] This conceptualization is familiar to lawyers based on their knowledge of international administrative law. However, it has not resounded in the international public realm, as the Summit report illustrates. This is not to say that elements of

---

[108] See Kingsbury et al., *supra* note 5 and Grant & Keohane, *supra* note 5.

[109] Also see Brunée & Toope, *supra* note 4 at 51-52; Allot, "The Concept", *supra* note 4 at 36.

[110] Also see Allot, "Eunomia", *supra* note 4 at 336-337; Allot, "The Concept", *supra* note 4 at 36.

such a conceptualization of international law are totally absent. Relevant examples are the reporting and complaints procedures available under human rights treaties, the International Criminal Court, the World Bank Inspection Panel,[111] the compliance procedures included in most MEAs,[112] and the renegotiated GEF with more equal participation of developing and developed states in decision-making.[113] However, such examples are few and far between and importantly, many of them do not apply universally.

---

111 See Hey, "Sustainable Development", *supra* note 73 at 41-43.

112 Hey, "Sustainable Development", *supra* note 73 at 38-41.

113 Hey, "Sustainable Development", *supra* note 73 at 32-35.