

NOTES & COMMENTS

“Article 24 Crises” and Security Council Reform: A Japanese Perspective

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The Article 24 of the United Nations Charter prescribes the responsibility of the Security Council in maintaining the peace and security of the international community. Due to emerging threats against international peace, such as terrorism, proliferation of weapons of mass destruction and increasing recognition of the ‘human security’ concept, the Security Council now needs to diversify approaches to international security, such as prevention by establishing new international norms through quasi-legislation activities, in addition to a conventional approach of response to crisis such as peace keeping. Thus, the reform of the Security Council must be considered so that the Security Council could deal with such new threats more effectively as well as more legitimately.

Keywords

Security Council, United Nations Reform, Article 24 of the Charter, human security.

1. Introduction

On October 17, 2008, Japan was elected as a non-permanent member of the United Nations Security Council. Since its accession to the United Nations on December 18, 1956, Japan has served as a non-permanent member of the Security Council for a total of nine terms, and this election marked its tenth election.¹ Japan is the most frequently serving non-permanent member state of the Security Council. On this occasion, Japan

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¹ Japan has been successful in all elections except one in 1978, when Japan lost against Bangladesh.

expressed its determination to commit itself to making “proactive and constructive contributions to the work of the Council” to deal with complex challenges such as terrorism and the proliferation of weapons of mass destruction (WMD).² Furthermore, the Government of Japan explicitly expressed its expectation that its active engagement and contribution to the Council’s work during the two-year term beginning from January 2009 would meet the expectations of the international community and enable Japan to achieve permanent membership in the Security Council.³ Three years after the bitter disappointment of the failure of the Security Council reforms of 2005, expectations for the quest toward permanent membership have re-emerged.

At the same time, it is not appropriate to discuss Security Council reform only in the context of power politics within the United Nations. The quest for reform of the Security Council has derived not from power-hungry motivations of states aspiring for permanent seats. Rather, it is a consequence of real needs for increasing the Security Council’s capacity to adapt to the new security environment and thereby play a fundamental role in the maintenance of international peace and stability—as prescribed in Article 24 of the Charter of the United Nations—in the post-Cold War security environment, where “non-traditional security” issues have become increasingly critical.

Therefore, this paper will argue for the necessity of reform of the Security Council in view of the emerging functions that the Security Council will assume under changing perceptions of threats to international peace and security, and will then review the qualifications of Japan, as a new permanent member, in helping to enable the Security Council to play such new roles. This paper will first provide a rough sketch of the history of Security Council reform and Japan’s endeavors. Second, it will analyze the emerging new international security environment surrounding the Security Council and the so-called “Article 24 Crises,” as well as evolving (quasi-)legislative and judicial functions that the Security Council should adopt and bear in order to meet such new international security challenges. This paper will then re-evaluate the qualifications of Japan for becoming a permanent member of the Security Council and will describe the rationale upon which Japan should base its quest for expansion of permanent seats in the Security Council.

As unanimously adopted by the United Nations General Assembly on September 15, 2008, reform of the Security Council, or expansion of membership of the Security Council, was once again addressed as a priority issue in the reform for a more

² Press Release, Ministry of Foreign Affairs of Japan, *Statement by Mr. Hirofumi Nakasone, Minister for Foreign Affairs of Japan, on the election of Japan as Non-permanent member of the United Nations Security Council* (Oct. 18, 2008), available at http://www.mofa.go.jp/announce/announce/2008/10/1183983_1060.html. (last visited on Feb. 22, 2009)

³ *Id.*

effectively functional United Nations.⁴ Despite a gap of interests among member states regarding an increase in the membership of the Security Council, general agreement on reform was reached at the General Assembly. A decision was made to start intergovernmental negotiations on the questions of equitable representation and an increase in the membership of the Security Council, which had been repeatedly recognized as issues in various past resolutions.⁵ This section provides an overview of the background against which the need for Security Council reform has grown, as well as past proposals for reform and their consequences.¹

2. “Article 24 Crises” in the Changing Environment Surrounding the Security Council

As prescribed in Article 24(1) of the Charter of the United Nations, the United Nations members “confer on the Security Council primary responsibility for the maintenance of international peace and security,” and the members of the United Nations are bound to accept and carry out the decisions of the Security Council.⁶ Recently, the Security Council has come to face difficult situations that pose serious challenges to the capacity of the Security Council to function effectively as a primary organ for the maintenance of international peace and security. The challenges are two-fold: inadequate representativeness, which could negatively affect the legitimacy of decision-making in the Security Council, and the need for unconventional responsive measures against emerging international security crises. Together, these constitute the “Article 24 Crises.”

First, there is an imbalance of representation. Members of the United Nations now hold the perception that the Security Council does not appropriately reflect the principle of geographical representation. As noted above, recent changes in both the international community and the composition of the United Nations are creating a gap between regional representation and the composition of the membership of the Security Council. More equitable representation should be realized as it would increase the legitimacy of Security Council decisions. However, at the same time, reform must be carried out carefully to avoid creating any other discrepancy between democratic participation and operational efficiency.

Second, the Security Council faces the reality of international politics involving conflict situations that are becoming increasingly complex both in terms of their

⁴ The Secretary-General, *Second performance report on the budget of the International Criminal Tribunal for Rwanda for the biennium 2006-2007, delivered to the General Assembly*, U.N. Doc. A/62/557 (Nov. 30, 2007).

⁵ Past documents referenced in U.N. Doc. A/62/577 (Dec. 11, 2007) are: Resolutions 48/26 (Dec. 3, 1993) and 53/30 (Dec. 1, 1998), and Decision 61/561 (Sept. 17, 2007).

⁶ U.N. CHARTER, art. 25.

characteristics and causes. To deal with such complex crises of international peace and security, the Security Council must take actions while sufficiently taking into account a much wider range of concerns and interests, including social and economic development, human rights, and humanitarian crises, which are traditionally outside of the Security Council's mandate. In addition, particularly in the area of "prevention," the handling of catastrophes caused by terrorism or the spread of WMDs is also a relatively new challenge for the Security Council, which has traditionally functioned as an instrument of crisis management. Under such circumstances, structural constraints of the Security Council that prevent it from functioning effectively have become tangible. There is a widening gap between the institutional design of how the Security Council works and the actual decisions and actions needed. Thus, this gap could be developing into an inability of the Security Council to formulate effective responses to crisis situations and deter or prevent further catastrophes.

A. Mounting Institutional Stresses in the Security Council

With the end of the Cold War, general agreement has been reached in the UN community on the need for Security Council reform in order to respond to changes in the international environment. As the Security Council has become more actively engaged in the maintenance and even the "making" of peace, there has also been a deterioration of the fiscal situation of the United Nations, and for these reasons, there have been serious discussions in various forums regarding an overhaul of the UN system. The reality of changes in the international community poses both quantitative and qualitative challenges to the legitimacy of the existing composition of the Security Council membership.

In terms of quantitative challenges, growing membership in the United Nations has not been properly reflected in the composition of the Security Council membership. Members and the composition of the Security Council should be subject to "due regard being specially paid... to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution."⁷ The number of members of the United Nations has grown from the original fifty-one members of 1945 to 192 in 2009. Despite such an expansion in membership, the composition of the Security Council has been revised only once in 1965, at which time there were 117 members of the United Nations, by increasing non-permanent membership from six to nine seats.⁸ In particular, despite increases in African and Asian membership in the

⁷ U.N. CHARTER, art. 23, para. 4.

⁸ G.A. Res. 1991 A (XVIII), U.N. Doc. A/1991 (Dec. 17, 1963). In this resolution, articles 23 and 27 were amended.

United Nations, these regions are extremely under-represented in the Security Council. It is, in a sense, natural that the United Nations seeks reform of the Security Council in the face of major changes in the composition of its own overall membership.

In 1945, the Security Council was composed of five permanent members and six non-permanent members. The initial regional allotment for the six non-permanent member seats comprised two seats for Latin America and one each for the Middle East, Western Europe, Eastern Europe and the Commonwealth. As the number of members from Asia and Africa increased, this regional allotment became less meaningful. When four more non-permanent seats were added in 1965 as United Nations membership exceeded 100 nations, the regional allotment was amended as follows: three seats for Africa; two each for Asia, Western Europe and Latin America; and one for Eastern Europe. This corrected, to some degree, the imbalance of geographical representation in non-permanent membership. However, due to the sharp increase in Asian and African members in the United Nations, even this could not reflect regional proportionality (see Figure 1 below).⁹

Figure 1: Current Regional Representation in the Security Council

Region	No. of states	Permanent seats	Non-permanent seats	Total
Africa	53 (27.7%)	0 (0%)	3	3 (20%)
Asia (excl. Turkey)	53 (27.7%)	1 (20%)	2	3 (20%)
Western Europe (incl. US and Turkey)	29 (15.2%)	3 (60%)	2	5 (33.3%)
Eastern Europe	22 (11.5%)	1 (20%)	1	2 (13.3%)
Latin America and the Caribbean	33 (17.3%)	0	2	2 (13.3%)
Other	1 (0.005%)	0	0	0 (0%)
Total	191	5	10	15

Source: United Nations website (compiled by the author)

⁹ Another criterion to point out in terms of representativeness is population size. India and Brazil, members of the "G4" along with Germany and Japan, claim their qualifications based primarily, but not exclusively, on this criterion. (It should also be noted that they are also major contributors of staff for UN peacekeeping operations.)

Note: Kiribati does not belong to any regional group.

The United States participates in the Western European and Others Group as an observer.

Turkey belongs to both the Asian Group and the Western European and Others Group but votes as a member of the Western European and Others Group.

Equally or perhaps even more important are the qualitative challenges. There is an undeniable reality that the current composition of the permanent membership of the Security Council is merely a reflection of the power politics of 1945 and not of present day.¹⁰ As the activities of the United Nations increase, the UN budget has also grown. In 1988, the amount of expenditures in the UN regular budget was \$874 million (U.S.).¹¹ In 2006, expenditures reached approximately \$4.19 billion. Peacekeeping expenditures have skyrocketed since the 1990s from \$620 million (U.S.) in 1990 to \$4.88 billion (U.S.) in 2005.¹² As the financial burdens of the member states rise, states that are becoming increasingly major financial contributors have felt that their positions are not being properly reflected in important decision-making processes within the UN system, particularly within the Security Council. Japan and Germany, the second and third largest financial contributors to the United Nations, respectively, have both pointed out this representation gap.

The financial contributions of Japan through the 2006 to 2008 fiscal years were set at 19.46% (\$332.2 million (U.S.)) in 2006, 16.62% (\$332.6 million (U.S.)) in 2007 and 16.624% (\$304.1 million (U.S.)) in 2008. In 2008, despite revisions of the proportions of the financial contributions of each country, Japan's proportion of 16.624% still exceeded the contributions of the U.K. (6.64%), France (6.30%), China (2.66%) and Russia (1.20%) and was almost equal to the total of these four amounts combined.¹³ As for contributions to the special budget for peacekeeping activities, Japan is the second largest contributor after the United States. Even though permanent members of the Security Council have to pay a "surcharge" on top of their regular proportions, no permanent member other than the United States makes a higher financial contribution than Japan.¹⁴ As described by the Secretary General, "the financial and military contributions to the United Nations of some of the five permanent members are modest compared to their special status,

¹⁰ Editorial, *A U.N. for the 21st Century*, N.Y. TIMES, Dec. 7, 2004, at A26.

¹¹ Press Release, General Assembly, Fifth Committee Approves Assessment Scale for Regular, Peacekeeping Budgets, Texts on Common System, Pension Fund, as it Concludes Session, U.N. Doc. GA/AB/3787 (Dec. 22, 2006).

¹² *Peacekeeping Expenditures in Current vs. Real Terms, 1947-2005*, GLOBAL POLICY FORUM, available at <http://www.globalpolicy.org/finance/tables/pko/currentreal.htm> (last visited on Jan. 22, 2009).

¹³ Ministry of Foreign Affairs of Japan, *2007-09-nen kokuren tsuujou yosan buntanritsu/buntankin*, available at http://www.mofa.go.jp/mofaj/gaiko/jp_un/yosan.html (last visited on Feb. 2009).

¹⁴ Fact Sheet, *United Nations Peacekeeping*, U.N. Doc. DPI/2429/Rev.2 (Feb. 2008).

and often the Council's non-permanent members have been unable to make the necessary contribution to the work of the Organization."¹⁵

Therefore, the Security Council should be reformed to become more "democratic and accountable"¹⁶ in order to "increase the involvement in decision-making of those who contribute most to the United Nations financially, militarily and diplomatically – specifically in terms of contribution to United Nations assessed budgets [and] participation in mandated peace operations."¹⁷ If the principle of "taxation without representation is tyranny," which is one of the fundamental principles of democracy, were applied to the international community, Japan's quest for a permanent seat in the Security Council would be quite a legitimate claim. However, fulfilling the requirements of the qualitative and quantitative considerations for the composition of the Security Council is not an easy task. Such considerations may not be satisfied simultaneously and may even conflict with one other.¹⁸

B. Re-conceptualization of "Security" in the Post-Cold War Environment

Since the end of the Cold War, the nature of crises constituting "threats to international peace and security" has been changing and taking on more complex forms. First, even though the number of inter-state armed conflicts (or "state-based conflicts") has decreased, intra-state conflicts or armed conflicts between government and non-state groups or between non-state groups are increasing. According to *Human Security Report 2005*, in 2003, thirty conflicts occurred between non-state groups and twenty-nine conflicts involved states.¹⁹ Moreover, less than 5% of all armed conflicts took place between states. Second, threats of international terrorism are trending upward, although the number of casualties fluctuates by year. "Significant" terrorist attacks involving loss of life, serious injury or major property damage (more than \$10,000 (U.S.)) increased from seventeen cases in 1987 to more than 170 in 2003.²⁰ In 2004, the number of significant terrorist attacks increased to 651 and the number of casualties reached nearly 9,000, which was double that of 2003.²¹ Third, while the threat of major nuclear war between the United States and Russia has sharply decreased, risks of proliferation of

¹⁵ The Secretary General, *Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, A more secure world: Our shared responsibility*, 246, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*].

¹⁶ *Id.* 249 (d).

¹⁷ *Id.* 249 (a).

¹⁸ Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT'L L. 632, 633-634 (2005).

¹⁹ HUMAN SECURITY CENTER, *HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY* 70 (2005).

²⁰ *Id.* at 43.

²¹ See generally *A Chronology of Significant International Terrorism for 2004*, NATIONAL COUNTERTERRORISM CENTER, available at <http://wits.nctc.gov/reports/2004nctcchronology.pdf> (last visited on Sept. 21, 2008).

WMD, especially to and from non-state actors, are sharply rising. The cases of North Korea's nuclear development and Iran's quest for enrichment capability, as well as the involvement of Pakistani scientist A.Q. Khan in constructing a global nuclear black market, pose serious challenges to the international community.

Furthermore, these phenomena are often inter-related with one another through very complex dynamics. Conflicts today rarely take the form of intensive exchanges of fire between states. Rather, they tend to be "asymmetrical" low-intensity civil wars that are accompanied by the suppression of human rights and/or humanitarian crises. Causes are also complex, involving struggles over identity issues (religion, tribal affiliation, language and other values that unite communities), control over and access to economic resources, and legitimacy to govern the state. These conflicts are deeply rooted in the absence of legitimate and appropriate governance and in poverty involving the absence of sources of income on the ground, and it is very difficult for such conflicts to be resolved completely. Such difficulties are indicated by the fact that approximately 44% of conflicts under cease-fire recur within five years.²² The "War on Terrorism" fought in Afghanistan and Iraq, as well as other similar military operations against militias and armed minority groups in various places around the world, may add more complexity to conflicts in some cases by triggering antipathy toward international interventions and stimulating terrorist activities.

Another aspect of the new security environment in the post-Cold War world is the emphasis placed on both military and non-military collective security issues. The Secretary-General's High-level Panel on Threats, Challenges and Change issued a report, which recognized human security as a primary concern for the United Nations to address and proposed a profound re-conceptualization of security.²³ Threats to be dealt with under the new security "extend to poverty, infectious disease and environmental degradation; war and violence within States; the spread and possible use of nuclear, radiological, chemical and biological weapons; terrorism; and transnational organized crime."²⁴ Put simply, the report proposed that the United Nations, an organ designed to deal with security among states, shift its priority toward human security.²⁵

Faced with non-traditional security issues such as humanitarian crises in civil wars, terrorism and the proliferation of WMD, the United Nations and the Security Council need a new strategy for taking actions to cope with these new realities. In the process of

²² PAUL COLLIER et al, *BREAKING THE CONFLICT TRAP: CIVIL WAR AND DEVELOPMENT POLICY* 83 (The World Bank) (2003).

²³ A More Secure World, *supra* note 15, at 1.

²⁴ *Id.*

²⁵ Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: the Grand Themes of UN Reform*, 99 AM. J. INT'L L. 619 (2005).

building new strategies and actions of the United Nations, some new concepts have emerged. Concepts of “peacebuilding,” “human security” and the “responsibility to protect” are, if not universally accepted, attracting wide attention and support.²⁶ In particular, the concept of “peacebuilding,” proposed in *An Agenda for Peace* in 1992, is a very important notion that has been shaping the foundation of a new strategy for involvement of the United Nations in resolving armed conflicts. “Peacebuilding” has widened the scope of UN activities for conflict resolution from traditional peacekeeping to include security sector reform (SSR), “disarmament, demobilization and reintegration (DDR)” activities, civilian policing, socio-economic development, humanitarian assistance including support for refugees, and support for establishing “good governance” and the rule of law in states and local communities.

C. New Functions for the New Security Concept

The High-level Panel’s report proposed to build a “new security consensus” and a “new comprehensive collective security system” to cope with new types of threats such as “poverty, infectious disease and environmental degradation; war and violence within States; the spread and possible use of [WMD]; terrorism; and transnational organized crime.”²⁷ Such a re-conceptualization of “security” triggered controversy among member states over whether the usage of the term was indeed suitable to express situations desperately requiring international cooperation and solidarity. However, it was uncontroversial that the United Nations and Security Council should play leading roles in tackling such situations. This shared perception had been consolidated through various international initiatives, most notably through the work of the Commission on Human Security.²⁸

Such a redefinition of the concept of security prompted institutional reform of the United Nations. The High-level Panel recommended establishing a Peacebuilding Commission, which was incorporated into Secretary-General Kofi Annan’s report with some modifications in organizational structure and membership.²⁹ This idea was also

²⁶ For detailed discussion, see INTERNATIONAL DEVELOPMENT RESEARCH CENTRE, *THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY* 2.14 (2001) (“[T]here is a necessary re-characterization involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties”).

²⁷ *A More Secure World*, *supra* note 15, 28, at 16.

²⁸ The Commission on Human Security was established in January 2001 through the initiative of the Government of Japan. The commission was co-chaired by Dr. Sadako Ogata, former United Nations High Commissioner for Refugees, and Professor Amartya Sen of Trinity College of the University of Cambridge. The Commission’s report was submitted to Secretary-General Kofi Annan on May 1, 2003.

²⁹ Since it is not part of the mandate of this paper, analysis of the differences between the two reports will not be discussed here. However, one major difference is the relationship between the Peacebuilding Commission and existing organs of the United Nations. The High-level Panel proposed that the Peacebuilding Commission, as a

endorsed by the World Summit in September 2005.³⁰ The Peacebuilding Commission submits annual reports to the General Assembly and is expected to provide advice to the Security Council in periods when peacekeeping missions are operating on the ground and to the Economic and Social Council during the phases of transitional recovery to development.³¹

In comparison with reform of the Security Council, the establishment of the Peacebuilding Commission was a rather small institutional change. However, the implications are more profound than they appear and could also be significantly linked with the functions of the Security Council and hence reform of the Security Council. The Security Council was originally designed to “respond” to emergency crises in cases of threats to international peace and security. At most, its scope remained the prevention of the recurrence of armed conflict, as traditional peacekeeping forces were mandated to do. Thus, it lacked the perspectives of medium- to long-term policy planning for establishing political, social and economic foundations for sustained peace or for “preventing” the occurrence or resurgence of crises. If the advice of the Peacebuilding Commission is to be reflected in discussions on security situations and mandates of UN missions decided by the Security Council, this indicates a clear expansion of the Security Council’s scope of work from conventional security to the much broader concepts of state and human security.

D. Increasing Emphasis on the “Legalization” of Security Measures in the Security Council

The report also indicated new ways of coping with security issues by emphasizing the “challenge of prevention”³² as well as the use of force. If the prevention of catastrophes is to be emphasized as indicated in the High-level Panel’s report, reform of the United Nations system and of the Security Council in particular, along with law implementation and enforcement, will become vital.

During the Cold War, repeated failure to build consensus among permanent members of the Security Council prevented the Council from fulfilling its responsibility for the maintenance of international peace and security under the UN Charter. Rather, the Security Council has served as an arena for ideological confrontation between the

subsidiary body of the Security Council, would be accountable to the Security Council. In Annan’s report, the Peacebuilding Commission would initially report to the Security Council and then to the Economic and Social Council as peacebuilding activities progressed. Annan’s report takes into consideration G77 concerns on the further concentration of power in the Security Council and the decreasing significance of the General Assembly and other UN organs.

³⁰ 2005 World Summit Outcome, U.N. GAOR 60th Sess., 97, U.N. Doc. A/60/L.1 (Sept. 20, 2005).

³¹ S.C. Res. 1645, U.N. Doc. S/RES/1645 (Dec. 20, 2005); G.A. Res. 60/180, U.N. Doc. A/RES/60/180 (Dec. 30, 2005).

³² This phrase is used in the title of Part II of *A More Secure World*, *supra* note 15.

West and the East. In January 1992, world leaders gathered for the Security Council Summit meeting to discuss “the responsibility of the Security Council in the Maintenance of Peace and Security.”³³ Many interventions at the meeting stressed the strengthening of the rule of law.³⁴

The Security Council itself has also come to emphasize the importance of the rule of law in its own discourse and work.³⁵ It established a thematic agenda item titled “Justice and the Rule of Law” in September 2003.³⁶ It proposed holding discussions on ways to strengthen the rule of law in post-conflict situations. The importance of the rule of law as a principle to be emphasized in the Council’s own work can be seen in the Council’s resolutions. In the nine years from the beginning of 1998 until the end of 2006, the phrase “rule of law” appeared in no fewer than sixty-nine council resolutions.³⁷

Another important phenomenon related to the new expected role of the United Nations (or the Security Council) in prevention is the increased use of legislative or judicial functions, or similar functions, by the Security Council as part of a proactive approach toward the maintenance of international peace and security.³⁸ As legislation, Security Council resolutions can be distinguished from conventional resolutions based on the “general and abstract character of the obligation imposed.”³⁹ Therefore, they are not triggered by specific cases, situations or conflicts. Rather, they are intended to target general phenomena that may constitute threats to international peace and security. They are also designed to maintain their effects over the long term, whereas resolutions targeting specific situations may lapse unless the Security Council adopts their extension. Typically, resolutions on the prevention of terrorism or the prevention of the spread of WMDs would fall under this category.

The first such was Resolution 1373, which was adopted after the 9/11 terrorist attacks of 2001 and binds member states of the United Nations to combat terrorism. The most phenomenal case is Resolution 1540, which urges member states to take actions to prevent the proliferation of WMD and in particular to prevent the involvement of non-

³³ U.N. SCOR, 46th Sess., 3056th mtg., U.N. Doc. S/PV.3046 (Jan. 31, 1992).

³⁴ See e.g., *Id.* at 89 (UNSG Boutros-Boutros Ghali), 18 (President Mitterrand, France), 36 (King Hassan II, Morocco), 47 (President Yeltsin, Russia), 50 (President G. Bush, USA), 97 (President Rao, India), 107 (Prime Minister Miyazawa, Japan), etc.

³⁵ U.N. SCOR, 58th Sess., 4833d mtg., ¶1, U.N. Doc. S/PRST/2003/15 (Sept. 24, 2003).

³⁶ U.N. SCOR, 58th Sess., 4833d mtg., U.N. Doc. S/PV.4833 (Sept. 24, 2003); U.N. SCOR, 58th Sess., 4835th mtg., U.N. Doc. S/PV.4835 (Sept. 30, 2003); U.N. SCOR, 59th Sess., 5052d mtg., U.N. Doc. S/PV.5052 (Oct. 6, 2004).

³⁷ JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 465-467 app. 3, Table A (2007).

³⁸ For detailed discussion on the legislative and judicial functions of the Security Council, see e.g., JOCHEN ABR. FROWEIN & NICO KRISCH, INTRODUCTION TO CHAPTER VII OF THE CHARTER OF THE UNITED NATIONS 708-709, (2002); Stephan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT’L L. 175-193 (2005).

³⁹ Talmon, *supra* note 38, at 176.

state actors in proliferation activities.⁴⁰ These resolutions impose on member states legislative and administrative obligations and ensure their implementation by establishing oversight committees, such as the Counter-Terrorism Committee for Resolution 1373 and the so-called 1540 Committee for Resolution 1540.

While Resolution 1373 did not attract any major objections from member states, Resolution 1540 met some objections regarding “basic concerns over the increasing tendency of the Council . . . to assume new and wider power of legislation on behalf of the international community”⁴¹ before it was adopted unanimously. However, states expressing concerns did not deny the Security Council’s legislative function *per se* and recognized Resolution 1373 as a legitimate resolution. Rather, this suggests the need for the careful execution of legislative functions to reflect the general will of the member states. As the Brazilian representative pointed out in the course of discussion on Resolution 1540 at the Security Council, the resolution was designed to close a gap in international law that did not address in sufficient detail with the potential threats of linkages between non-state actors and the proliferation of WMD. Moreover, the resolution was necessary because of the need to treat this gap with a sense of urgency given the gravity of the issue.⁴²

Another type of legalization of the Security Council’s work can be seen in several “judicial” actions. Examples include the adoption of Resolutions 1422 and 1487 on the establishment of the International Criminal Court as well as in the establishment of judicial bodies such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in Resolutions 827 and 995, respectively.

The legalistic approach should be effective as a general preventive measure to deal with threats before such threats can actually cause damage to international peace and security. In the meantime, this approach will require very careful treatment of concerns over the procedural and political legitimacy of the Security Council’s actions.⁴³ Since resolutions of the Security Council bind all member states of the United Nations, the Security Council needs to secure sufficient, if not satisfactory, transparency and accountability through effective consultations with other member states. Such resolutions also need to serve the universal interests of the international community as a

⁴⁰ S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

⁴¹ U.N. SCOR, 59th Sess., 4950th mtg., 23 (India), U.N. Doc. S/PV.4950 (Apr. 22, 2004). Other countries also made similar points.

⁴² U.N. SCOR, 59th Sess., 4950th mtg., 3 (Brazil), U.N. Doc. S/PV.4950 (Apr. 22, 2004).

⁴³ For more discussions on concerns over the legislative function of the Security Council, see Talmon, *supra* note 38; see also Masahiko Asada, *Kokurenanpori no shihoteki/rippotekikinou to sono seitosei*, 570 KOKUSAIMONDAI 5-31 (2008).

whole. In any case, under increasing recognition of the prevention of terrorism and the spread of WMD as important agenda under Chapter VII of the UN Charter, legalization has become an effective measure for the Security Council to fulfill its mandate under Article 24 of the UN Charter.

3. New Conceptions of Qualifications for Permanent Membership in the Security Council

The emergence of new security concepts and expectations and realities for new functions of the Security Council allows us to take a different approach toward arguing about the appropriateness and legitimacy of new membership in the Security Council and, in particular, Japan's quest for permanent membership. In addition to conventional discourse over the appropriateness of Japan's candidacy, emerging international security challenges and the evolving process of UN adaptation to this changing environment will require a reassessment of Japan's qualifications.

First, Japan has been taking a leading role in transforming the roles of the United Nations and the Security Council to adapt to the new realities of international security. In order to help enable the UN system to work for assuring "human security" all over the world, Japan has made significant contributions to the process of elaborating and operationalizing the concept of human security in the context of the UN's work and responsibility. Furthermore, Japan has taken the initiative in the establishment of the Trust Fund for Human Security. The Trust Fund was established in 1999 with financial contributions from Japan to provide funding to UN organizations carrying out projects to advance the operational impact of the human security concept.⁴⁴ Japan also took the initiative in the process of establishing the Peacebuilding Commission (PBC) and served as chair of the commission in 2007. Managing the process of establishing a new organ and making it functional and effective requires political maneuvering to bring together and bind the diverse political interests of various states, administrative/organizational skills to establish appropriate and efficient procedures for the work of the organ, and in-depth knowledge and vision on the issues concerned. Japan, as chair, strengthened the effective working relationships between the Commission and other organs. With the cooperation of the Security Council, monthly consultations between the chair of the Commission and the president of the Council were institutionalized through Japan's initiative. Japan has also promoted discussions on peacebuilding strategies.⁴⁵ Japan's

⁴⁴ Ministry of Foreign Affairs of Japan, *The Trust Fund for Human Security 5 (2007)*, available at http://www.mofa.go.jp/policy/human_secu/t_fund21.pdf (last visited on Feb. 3, 2009).

⁴⁵ See Yukio Takasu, *Note for Effective Joint Endeavours for Peacebuilding (June 23, 2008)*, available at http://www.un.int/japan/jp/topics/080623_Note%20on%20Peacebuilding.pdf (last visited on Jan. 11, 2009).

contributions to the process of establishing the Peacebuilding Commission have demonstrated its leadership capabilities.

The increasing importance of the Security Council's legislative and judicial functions also provides a new venue for discussing the question of qualifications. One of Japan's priorities in its UN activities is "to settle disputes by diplomacy and not the use of force."⁴⁶ Needless to say, this does not mean that the military element of the collective security mechanisms of the United Nations would not remain as a core mechanism, and military contributions as well as financial, political and other means will remain important. However, non-military means such as legislative and judicial functions for securing international peace and security could diminish the relative importance of military potential as one of the criteria for permanent membership in the Security Council. Given the prospect that the "Council would be needed more and more to do that kind of legislative work,"⁴⁷ contributions to this element will become important.

Now that the composition of the Security Council has become highly incongruent with the reality of increases in UN membership and an international security environment that requires various measures and responses, it is natural that such realities have prompted the need for Security Council reform, not only for proper regional representation but also for preventing Security Council resolutions from being undermined by questions over their legitimacy based on ineffective responses to new security realities. As the prevention of catastrophes becomes an important task for the United Nations and the Security Council as indicated in the High-level Panel's report, implementation and enforcement of laws will become vital areas of international contribution. This will create division among UN members based not on power but on adherence to law in both internal and external affairs.⁴⁸ What is now becoming more critical than in the past is a criterion based on the extent to which a state can contribute to both the rule of law and legal implementation and enforcement.

Secondly, Japan has been playing a role in filling the gaps in inadequate participatory (or representative) mechanisms that, ideally, should reflect stakeholders' interests in formulating effective responses. Subsidiary bodies and informal groups could help the United Nations (though not the Security Council) in escaping from Article 24 crises by providing options for member states to avoid the structural deficiencies of the Security Council that block the functioning of effective conflict resolutions and also by reflecting the candid voices of stakeholders in informal settings,

⁴⁶ Press Briefing, United Nations, Press Conference by Japan (Jan. 9, 2009), available at http://www.un.org/News/briefings/docs//2009/090109_Takasu.doc.htm. (last visited on Feb. 9, 2009).

⁴⁷ Press Briefing, United Nations, Press Conference by Security Council President (Apr. 2, 2004), available at <http://un.org/News/briefings/docs/2004/pleugercp.DOC.htm> (last visited on Mar. 21, 2009).

⁴⁸ Slaughter, *supra* note 25, at 631.

thereby filling participatory gaps.⁴⁹ Currently, these gaps are being filled by various subsidiary bodies and working groups of the Security Council,⁵⁰ as well as by informal groups, such as the “Group of Friends” chosen by the Secretary-General or the president of the Security Council, that support such leadership, as well as “contact groups,” which are ad hoc coalitions of self-selected, like-minded countries for lending leverage to the Secretary-General. Although the composition of membership, objectives for formation, and the effects of such groups on the Security Council vary, effective output from the Security Council has become more reliant on consultations taking place in or with such informal groups.⁵¹ Japan has participated in many of these gatherings and has even served as chair or vice-chair in various subsidiary bodies or working groups of the Security Council.⁵²

Although informal groups can contribute to the improvement of governance of the Security Council by improving deficiencies in the operational-participatory gap, the complementary functions that such informal groups play cannot replace certain elements of the indispensable values that the Security Council bears.

However, prevailing informal groups also pose serious concerns regarding their accountability, exclusiveness (which is the same criticism being levied against the Security Council) and transparency. Moreover, they may sometimes operate in competition with the Security Council. Although, in the short run, they may alleviate tensions and risks of dysfunction in the Security Council generated by the delay in adaptation to systemic problems through amendment of the UN Charter, the “institutionalization” of informal groups as a supplementary measure to overcome the Security Council’s Article 24 crises would not be desirable as a long-term solution. Such informal consultation groups cannot replace the legitimizing function of the Security Council.

4. Conclusion

As analyzed above, it is now appropriate to take into account the new security environment and the new functions that the United Nations Security Council has come to bear when appropriate reform of the Security Council is discussed. Under such

⁴⁹ Jochen Prantl, *Informal Groups of States and the UN Security Council*, 59 INT’L ORG. 559, 563-566 (2005).

⁵⁰ See e.g., *Letter from Riyad Mansour, Ambassador, Permanent Observer of Palestine, to the President of the Security Council*, S/2009/9 (Jan. 6, 2009).

⁵¹ Prantl, *supra* note 49, at 560.

⁵² Note by the President of the Security Council, S/2009/2 (Jan. 6, 2009); Note by the President of the Security Council, S/2006/66 (Jan. 31, 2006); Note by the President of the Security Council, S/2005/3 (Jan. 5, 2005); Note by the President of the Security Council, S/2005/4 (Jan. 5, 2005).

circumstances, it is more appropriate to address reform of the Security Council not only in terms of equitable representativeness and democratization but also in the context of substantial contributions to the realization of more effective implementation of the Security Council mandate for facing new international security challenges. To some extent, Security Council reform should fulfill the requirements of “democratization” and “representation” in the United Nations. Indeed, Article 2(1) of the UN Charter prescribes “the sovereign equality of all its members.”⁵³ In the meantime, however, “effectiveness” and special “responsibility” should be the criteria to be pursued in reform of the Security Council.⁵⁴ As indicated by customary conduct in current elections for non-permanent seats, “democracy” (if the term is indeed appropriate) overrides “effectiveness” and “responsibility.”

The primary objective of Japan’s promotion of UN reform are to reinforce the legitimacy of the Security Council and to make UN actions more effective and responsive to the emerging concerns of international society. Japan’s permanent membership in the Security Council would strengthen the legitimacy of the Security Council’s decisions in terms of representativeness in several different ways: first, Japanese membership will improve equitable regional representation; second, bringing a power defeated in the Second World War into the Security Council would make the United Nation a truly “united” organization of the global community; and third, Japan’s permanent membership would demonstrate that even a non-nuclear weapons state can take a legitimate and valuable part in decision-making for the maintenance of international peace and security. As the function of the Security Council diversifies into legislation and law enforcement under Chapter VII, the rationale for domination by the military powers (i.e., the nuclear weapons states) of the Security Council becomes more and more irrelevant. Instead, countries making non-military contributions to the maintenance of the international order—through financial contributions and engagement in peace-building and conflict resolutions based on non-military means—are gaining more ground for permanent membership in the Security Council.

Certainly, an expansion of membership of the Security Council would increase representativeness and thereby ease such disparities between contributions and representation. Whatever the outcome of Security Council reform should be, the inequality among member states institutionalized in the Security Council will continue unless the right of veto is completely abandoned. Nevertheless, an enlarged and more

⁵³ This principle is embodied in the composition and voting procedures of the General Assembly.

⁵⁴ Regarding effectiveness, the High-level Panel’s report stated that “the challenge for any reform is to increase both the effectiveness and the credibility of the Security Council.” It also stated that the “Security Council was designed to enable the world body to act decisively to prevent and remove threats. It was created to be not just a representative but a responsible body.” *A More Secure World*, *supra* note 15, ¶¶248, 244.

equitably representative Security Council could diminish the negative impacts of the veto system. Japan may contribute to the “democratization” of the Security Council by presenting more restrained ways of using the right of veto. Such measures could include declaring a moratorium of some kind on the use of veto power and/or exercising the right of veto only in conjunction with at least one other permanent member.⁵⁵ If a permanent member should wield their right of veto against a vast majority, its isolation from the “dominant” global public opinion would be highlighted to a greater extent. In other words, permanent members would become more restrained from abusing or misusing their right of veto.

Although it would be better for the international community, as well as for Japan, to include Japan in formal decision-making processes on actions for the maintenance of international peace and security, Japan should be flexible in its measures for achieving the goals of reform, which are to make the United Nations more accountable, democratic and effective.

For Japan, a desirable scenario would be one in which the General Assembly decides to choose candidates for new permanent membership in the Security Council through a democratic election. If Japan should fail to gain two-thirds of the total vote, it would simply mean that the world had decided that Japan was not qualified to become a permanent member of the Security Council. However, if more than two-thirds of the General Assembly should be in favor of Japan’s permanent membership, this would consolidate the legitimacy of Japan’s qualifications. Needless to say, so long as the quest for a consensus resolution is not abandoned, this scenario is not likely to be realized.

In the meantime, as the High-level Panel and in particular the Secretary-General have repeatedly insisted, Security Council reform should not bring about a stalemate of all aspects of UN reform. Nevertheless, “Security Council reform cannot, or at least should not, be simply another piece of a larger puzzle.”⁵⁶ In this new international environment—in which new types of threats are posing serious challenges to the effectiveness of the UN mechanism and visions for global justice and the maintenance of international peace and security are undergoing transformation—a new model for the Security Council will be necessary to better deal with global security concerns. We do not have the luxury of failing to adapt the Security Council, the universal organ for our global common interests, to the new global security challenges that we now face.

⁵⁵ Shinichi Kitaoka & Masakazu Yamazaki, *Shin-kokuren taishi to kataru 'nihon no jiritsu'*, CHUOKORON, 66, 2004.

⁵⁶ Slaughter, *supra* note 25, at 630-631.