

Article by former UN Legal Counsel Hans Corell in the Swedish daily Dagens Nyheter on 3 September 2011

Translation from the Swedish by the author

The UN Security Council Must Set a Good Example ¹

The former Legal Counsel of the United Nations: It is a tragedy that members of the UN Security Council sometimes violate the very Charter they are set to supervise. Many ask themselves why the UN Security Council is sanctioning the use of force in Libya, while at the same time the Council is unable to unite behind a forceful action against the Syrian regime. In the case of Syria, the political reality is probably that China and Russia would hardly agree to a UN resolution on military efforts. If the five permanent members of the Council – China, France, Russia, the United Kingdom and the United States of America – could demonstrate to the world that they will join hands in situations of the kind we are witnessing in Libya and Syria, this would have significant consequences for the prospects of preventing conflicts in the future, writes Hans Corell.

The events in North Africa and the Middle East actualise the question what responsibility the state community has to protect populations in countries where they are subjected to acts of cruelty by the ruling regime. Obviously, all efforts must be undertaken to prevent that such situations occur. But in some cases there may be no other way out than using military force in conformity with the Charter of the United Nations.

Many who follow the development surely ask themselves why the UN Security Council is sanctioning the use of force in Libya, while at the same time the Council is unable to unite behind a forceful action against Syria in spite of the fact that the Syrian regime obviously is committing terrible acts of cruelty against the civilian population.

In this situation it is important that one understands the legal prerequisites for the use of force on behalf of the state community and the underlying political realities. According to the UN Charter the use of force is permissible only in two situations: in self-defence and after authorisation by the Security Council.

With respect to Libya, there is an authorisation to use force in resolution 1973 of 17 March this year. According to the resolution UN Member States that have notified the Secretary-General and act in cooperation with him are authorised to take “all necessary measures” to protect civilians and civilian populated areas under threat of attack in Libya. The resolution expressly forbids a foreign occupation force of any form on any part of Libyan territory.

The situation in Libya has now developed in a manner that requires the Security Council to decide as soon as possible about further measures to protect the population. At the top of the agenda must be humanitarian issues such as access to water, food and medicine. However, experiences from UN operations elsewhere prove that it is also necessary to immediately provide the assistance that is required in order for the governing authority to maintain order and security while respecting fundamental rules on human rights.

¹ As is customary, the title was set by the paper.

In this context it is also necessary to answer the question who is authorised to represent Libya. An important element is here to convince a transitional government that persons who are wanted by the International Criminal Court should be transferred to this court.

In the case of Syria, the political reality is probably that China and Russia would hardly agree to a UN resolution authorising the use of military force to stop the atrocities that the Syrian regime is perpetrating. But the question is more complicated than that.

What it is all about is what has come to be referred to as “responsibility to protect”. Initially, this responsibility rests with each individual territorial state. But a second responsibility rests with the international community. The UN General Assembly and the Security Council have both endorsed the concept that there is a collective international responsibility to protect populations from genocide, other forms of mass killings (war crimes), ethnic cleansing and crimes against humanity that individual governments are unable or unwilling to prevent.

The question is then how far this responsibility goes. Here, in my view, the Security Council should seek guidance in the report that the High-level Panel on Threats, Challenges and Change presented on 1 December 2004 (A/59/565). According to the Panel, the Security Council – whatever other considerations it may take into account – should address at least the following five basic criteria when it considers whether to authorise or endorse the use of military force: seriousness of threat; proper purpose; use of force as last resort; proportional means; and balance of consequences.

The last criterion is of particular importance. In the somewhat intricate wording of the Panel: Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction? If the other criteria are met, it is indeed this last criterion that will be the determining factor.

In my opinion, this situation exists with respect to Syria. A position on the fifth criterion requires a thorough analysis of several factors: military, political, social and legal. But unfortunately, there is also an element here that is tied to how individual members of the Security Council sometimes act and their lacking ability to see eye to eye with each other in matters that ought to be self-evident.

Here, it is necessary to raise one’s eye and ask the question how best to avoid and prevent conflicts in the future. According to the UN Charter, the Security Council has the primary responsibility for the maintenance of international peace and security and is then authorised to act on behalf of the UN Members. However, this mandate also entails an obligation. Its members – and in particular the five permanent members: China, France, Russia, the United Kingdom and the United States of America – must set a good example and abide by the very Charter they themselves are set to supervise.

The fact that members of the Council sometimes violate the UN Charter when it suits their interests (as was the case in Iraq in 2003 and in Georgia in 2008) and the notorious unwillingness of China and Russia to act in spite of the fact that it is evident that measures can and should be taken by the Security Council is a tragedy. If the five permanent members could demonstrate to the world that they will join hands in situations of the kind we are

witnessing in Libya and Syria, this would have significant consequences for the prospects of preventing conflicts in the future.

In the discussion more and more people argue something which is self-evident: A precondition for international peace and security is that democracy and the rule of law are guaranteed. The conduct of the five permanent members of the Security Council will in fact determine whether this work will succeed. It is in the nature of things that these members sometimes can have different interests. But an obvious question to them is: why do people have to suffer because you have secondary interests here and there in the world? We live in the 21st-century and it is simply not acceptable that dictators and warlords are permitted to reign by methods that violate the most fundamental rules on human rights.

The objection is often made that these rules constitute an attempt by the West to force its values upon others. This is nothing but qualified nonsense. The Universal Declaration of Human Rights was elaborated by representatives from many countries, not least Moslem countries, and its roots are found in many cultures and religions.

If one examines the argument one will find that it is advanced precisely by persons who realise that they would not be allowed to remain in power if these rights were respected. A living proof of the accuracy of this reasoning is the popular uprisings that we are presently witnessing in North Africa and the Middle East.

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Hans Corell, born 1939, has in addition to his service as Legal Counsel of the Ministry of Justice, the Ministry for Foreign Affairs and the UN been a member of Sweden's delegation to the UN General Assembly (1985-1993) and has had several assignments related to the Council of Europe, the OECD and the CSCE (now OSCE). In 1998, he was the representative of the UN Secretary-General at the Rome Conference on the Establishment of an International Criminal Court (ICC). Since 2006 he is chairman of the Board of Trustees of the Raoul Wallenberg Institute. In his free time he sings in a choir and plays the pipes.

This article is available at <http://www.havc.se/res/SelectedMaterial/20110903libyasyrria.pdf>

See also "Security Council Reform: Rule of Law More Important Than Additional Members" Letter dated 10 December 2008 to the Governments of the Members of the United Nations at <http://www.havc.se/res/SelectedMaterial/20081210corelllettertounmembers.pdf>

² Added by the paper.