

The Mandate of the United Nations Security Council in a Changing World

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1 Introduction

The question of the mandate of the United Nations Security Council in a changing world is closely related to the ongoing work of reforming the UN. Such reform must be made in a manner that the Organisation can serve the purposes and apply the principles laid down in its Charter of 1945. This is a major challenge for creating a peaceful world. A key element, if not the most important component in this effort, is to reform the Security Council.

This item has been on the agenda of the General Assembly for many years. Over the past 20 years intense work has been devoted to the topic, culminating in a series of intergovernmental negotiations that started in 2009. An obvious element in these negotiations is the changing geopolitical situation since the establishment of the United Nations in 1945.

The question is, however, whether the ideas brought forward in the debate – often reduced to mathematical exercises comparing the UN membership in 1945 and today with the fifteen-member Security Council – risk missing the core issue in any reform of the Council, namely the manner in which the members of the Council honour the obligations that flow from the mandate entrusted to the Council by the members of the Organisation.

In the following these questions will be discussed under the titles: mandate and composition of the Security Council; the present geopolitical situation as compared to the situation in 1945; the performance of Council members; options for reforming the Council; and the manner in which the Charter requires the Council to fulfil its mandate. A concluding section contains a number of caveats and a warning that a reform that overlooks certain key elements in the mandate of the Security Council could cause irreparable damage to the UN system of collective security.

1 The views expressed in this article are the personal reflections of the author, based primarily on his experiences as the Legal Counsel of the United Nations from 1994–2004, and as the Legal Adviser from 2008–13 to the Panel of Eminent African Personalities, established by the African Union and chaired by former UN Secretary-General Kofi Annan, to assist the Kenya National Dialogue and Reconciliation after the post-election violence in 2007–2008.

2 Mandate and Composition of the Security Council

The mandate of the Security Council is laid down in article 24 of the Charter. In this provision, the members of the Organisation 'confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'. Most importantly in this context is that this authority is given to the Council 'in order to ensure prompt and effective action by the United Nations'.

The provision further prescribes that in discharging these duties the Security Council is bound to act in accordance with the purposes and principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI–XII of the UN Charter. Of particular interest is article 39 in Chapter VII:

The Security Council *shall* determine the existence of any threat to the peace, breach of the peace, or act of aggression and *shall* make recommendations, or *decide* what measures *shall* be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. (emphasis added)

As it appears from the imperatives in this provision the Council is under an obligation to make decisions for the purpose of maintaining or restoring international peace and security. Under article 25 the members of the UN are obliged to accept and carry out such decisions.

The composition of the Security Council is regulated in article 23. Originally, the Council consisted of eleven members, among them the five permanent members China, France, the then Union of Soviet Socialist Republics, now the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Through an amendment to article 23, which came into force on 31 August 1965, the membership of the Council was enlarged to fifteen members, among them the permanent five members.

With respect to the decision-making in the Council, except on procedural matters, article 27(3) prescribes that decisions shall be made by an affirmative vote of nine members, including the concurring votes of the permanent members. In other words, the permanent members have the right of veto.

Since the subject matter discussed in this article may lead to amendments to the UN Charter it is important to recall that in accordance with article 108 of the Charter amendments come into force for all UN members when they have been adopted by a vote of two thirds of the members of the General Assembly

and ratified by two thirds of the members of the Organisation, including all the permanent members of the Security Council.

3 The Present Geopolitical Situation as Compared to the Situation in 1945

With respect to the present geopolitical situation there have been tremendous changes since the UN was established. At that time the world population was around 2 billion. Today, we are slightly over 7 billion, and according to the latest prognosis of the United Nations Population Division we will be some 9.5 billion in 2050.²

In 1945, many peoples around the world were not granted self-determination; they lived in colonies. One of the major achievements of the United Nations is the decolonisation through the trusteeship system under the UN Charter. Today, 193 sovereign states are members of the Organisation. Among those, maybe some 120 could be defined as democracies at various stages.³

At that time, wars and armed conflicts were fought mainly between states, and the first efforts at UN peacekeeping were designed to address such situations. Today, conflicts are primarily non-international and UN peace operations are designed accordingly, including for peace enforcement and peacebuilding. The concept of responsibility to protect has been developed and endorsed both by the General Assembly and the Security Council.⁴

At the same time other threats against humanity have emerged. Rising CO₂ levels have led to climate change. Melting ices, a rising sea level and desertification will have very serious consequences in the future, in particular since some inhabited areas of the globe risk becoming inhabitable.

In those days the international legal system was not as developed as it is today. The progress in this field since then has been significant, notably in areas like human rights and international humanitarian law. Then, very little

2 See UN Department of Economic and Social Affairs, 'World Population 2012 Wall Chart' <<http://www.un.org/en/development/desa/population/publications/trends/wpp2012.shtml>> accessed 24 April 2014.

3 Standards certainly vary. Reference is made to the Intelligence Unit of *The Economist* <<http://www.eiu.com/>> accessed 24 April 2014; the US Department of State, 'Democracy' <<http://www.state.gov/j/drl/democ/>> accessed 24 April 2014; the web site of the Nobel Prize, 'Democracies in the World' <http://www.nobelprize.org/educational/peace/democracy_map/> accessed 24 April 2014.

4 See The World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 [138]-[139]; UNSC Presidential Statement 28 (2006) UN Doc S/PRST/2006/28.

could be done to fight the impunity that reigned in connection with conflicts. It is true that the Nuremberg and Tokyo tribunals were established after World War II. But these were unique attempts to bring perpetrators of international crimes to justice.

Now the situation is different. Over the last 20 years international or mixed criminal tribunals have been established to address the situations in the former Yugoslavia, Rwanda, Sierra Leone, and Cambodia. And there is now an international criminal justice regime established by the 1998 Rome Statute of the International Criminal Court, at present ratified by 122 states.⁵

Although the concept rule of law is not expressly mentioned in the UN Charter, gradually UN members have come to realize that this is one of the fundamental elements for creating a peaceful world. Several resolutions have been adopted focusing on the rule of law. Of particular interest in this context is the emphasis on the importance of the rule of law as one of the key elements of conflict prevention, peacekeeping, conflict resolution, and peacebuilding and that justice, including transitional justice, is a fundamental building block of sustainable peace in countries in conflict and post-conflict situations.⁶

Furthermore, the rule of law is an indispensable component in addressing some other mayor challenges that also threaten international peace and security: terrorism, poverty, disease, transnational crime, and corruption.

At the same time there has been tremendous development in the fields of science and technology. Suffice it to mention in this context communications, both through traditional means, and through the Internet.

All these factors exemplify elements that – together with the fall of the Berlin Wall in 1989 and the end of the Cold War – must be taken into consideration when the Security Council exercises its mandate under the UN Charter and when the need for reforming the Council is discussed.

4 The Performance of Council Members

In analyses of this question a point of departure is invariably that during the Cold War, the Council was unable to fulfil the mandate as laid down in and required by the UN Charter. It is true that peacekeeping missions were

5 See ICC, 'The State Parties to the Rome Statute' <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 4 may 2014.

6 See eg UNGA Res 67/1 (24 September 2012) UN Doc A/RES/67/1; UNGA Res 68/116 (16 December 2013) UN Doc A/RES/68/116.

established, and that they contributed to maintaining international peace and security in accordance with their mandates. However, the tensions between the major powers on the Council, in particular the Soviet Union and the United States, were a prohibitive factor in many situations.

A major shift occurred at the fall of the Berlin Wall in 1989 and the end of the Cold War. All of a sudden it was possible for the members of the Council to unite around important resolutions. The resolutions establishing the international tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively could be mentioned as examples.⁷

However, this unity was soon put to the test and major differences developed. The situation in Kosovo in 1998–1999 and the situation in Iraq in 2002–2003 are often mentioned as examples in analyses of this development.⁸

The dramatic and tragic development in Iraq prompted then UN Secretary-General Kofi Annan to deliver his by now famous address about the ‘fork in the road’ to the General Assembly on 23 September 2003. He focused on the threats that must be dealt with, and the need for the United Nations to confront these threats. At the same time he noted the disagreement on how to deal with them. Specifically, he noted that some states seem to argue that they have the right and obligation to use force pre-emptively, even on the territory of other states, and even while weapons systems that might be used to attack them are still being developed. He went on to say that ‘[t]his logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years’.

He then focused on the adequacy and effectiveness of the existing rules and instruments and continued:

Among those instruments, none is more important than the Security Council itself. In my recent report on the implementation of the Millennium Declaration, I drew attention to the urgent need for the Council to regain the confidence of States, and of world public opinion – both by demonstrating its ability to deal effectively with the most difficult issues, and by

7 UNSC Res 808 (22 February 1993) UN Doc S/RES/808, UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

8 See eg Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press 2001); David M Malone, *The International Struggle Over Iraq: Politics in the UN Security Council 1980–2005* (Oxford University Press 2006); Nicholas J Wheeler and Justin Morris, ‘The Security Council’s Crisis of Legitimacy and the Use of Force’ (2007) 44 *International Politics* 214.

becoming more broadly representative of the international community as a whole, as well as the geopolitical realities of today.

(...)

As for the composition of the Council, that has been on the agenda of this Assembly for over a decade. Virtually all Member States agree that the Council should be enlarged, but there is no agreement on the details.⁹

There is no doubt that there is great support among the members of the United Nations for an enlargement of the Council. And surely, this would add to the legitimacy of the Council, acting on behalf of the members of the Organisation. However, irrespective of the result of such an enlargement there will always be members who are disappointed. Therefore, at the heart of the matter is the manner in which the members of the Council discharge their functions. This is why more attention simply must be paid to this element.

In discussing this question, it is important to focus specifically on the limits on the power entrusted to the Council by the UN Charter. The general provision in article 24(2) that the Council shall act in accordance with the purposes and principles of the UN is not very precise. However, it goes without saying that the Council in its decision-making must observe rules defined as *ius cogens* and fundamental human rights and international humanitarian law rules.

In this context a problem related to the manner in which the Council adopted resolutions in the field of counterterrorism should be mentioned. Specifically, the system of the terrorist listings introduced by resolution 1267 (1999) could be called into question. Concerns were expressed that it may only be a question of time until a regional or national court in Europe arrives at the conclusion that listing people in the way the Council prescribes could amount to a violation of international human rights norms, unless the individual has a remedy that meets the standards prescribed in binding human rights norms. These concerns came true in 2008 through a ruling by the European Court of Justice.¹⁰

This author has consistently maintained that indefinite listing of persons in the manner that is now practiced requires that the persons listed have access to an independent and impartial court as a last resort.¹¹

9 United Nations, 'The Secretary-General Address to the General Assembly' (New York, 23 September 2003) <<http://www.un.org/webcast/ga/58/statements/sg2eng030923>> accessed 24 April 2014.

10 See Case C-402/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* Judgment by the European Court of Justice [2008] ECR I-6351 [GC], 3 September 2008, (the *Kadi* case).

11 Hans Corell, 'Reflections on the Security Council and Its Mandate to Maintain International Peace and Security' in Ola Engdahl and Pål Wrange (eds), *Law at War – The*

Another question that needs careful attention is the legislative power that the Security Council has assumed through the adoption of generally binding resolutions that do not address a specific situation related to the maintenance of international peace and security. By way of example could be mentioned the discussion in relation to resolution 1540 (2004), in which the Council, acting under Chapter VII of the Charter, decided *inter alia* that all states shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to that end maintain a number of specific measures.¹²

When this issue was discussed in the Security Council on 22 April 2004 before the adoption of this resolution some states expressed concerns. The following quote from a detailed statement of the representative of India could serve as an illustration:

Our recognition of the time imperative in seeking recourse through the Security Council does not, however, obscure our more basic concerns over the increasing tendency of the Council in recent years to assume new and wider powers of legislation on behalf of the international community, with its resolutions binding on all States. In the present instance, the Council seeks to both define the non-proliferation regime and monitor its implementation. But who will monitor the monitors? We are concerned that the exercise of legislative functions by the Council, combined with recourse to Chapter VII mandates, could disrupt the balance of power between the General Assembly and the Security Council, as enshrined in the Charter.¹³

The discussion has continued thereafter, extending also to other situations, notably resolutions adopted by the Security Council imposing sanctions on Iran.¹⁴ This is not the moment to go into detail regarding these aspects of the mandate of the Council. However, the issue requires attention by the members of the Council in their future work.

Law as it Was and the Law as it Should Be: Liber Amicorum Ove Bring (Martinus Nijhoff Publications 2008).

12 UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.

13 See UNSC, '4950th meeting, Thursday 22 April 2004, 9.50 am New York' UN Doc S/PV.4950.

14 See e.g. Daniel H Joyner, 'The Security Council as a Legal Hegemon' (2012) 43 *Georgetown Journal of International Law* 225.

Finally, a critical element with respect to the performance of the Council members is that they correctly understand their duties as members of the Council and in particular that these duties must be honoured when they define their national interests.

5 The Options for Reforming the Council

The question of reforming the Security Council has now been on the agenda of the General Assembly for some 20 years. Since 2009 there have been several rounds of intergovernmental negotiations based on a series of decisions by the General Assembly.¹⁵ The first of these decisions, 62/557, identified five key issues that should form the basis for the intergovernmental negotiations: categories of membership, the question of the veto, regional representation, size of an enlarged Council and working methods of the Security Council, and the relationship between the Council and the General Assembly.¹⁶

In 2009, the President of the General Assembly appointed Mr Zahir Tanin, Permanent Representative of the Islamic Republic of Afghanistan, to chair the intergovernmental negotiations on his behalf – an appointment that has been renewed through the years. On 25 July 2012 after the eighth round of intergovernmental negotiations Ambassador Tanin set out in a letter to the member states the state of negotiations to forge a way forward towards a solution which would garner the widest possible political support.¹⁷ The letter contained a number of recommendations, among them one that caused some controversy, namely that he be given a mandate to provide a concise working document for the continued negotiations.

The main trend in the debate, the latest held in the General Assembly on 7 and 8 November 2013, seems to be that states support an enlargement of the Council in both the permanent and non-permanent member categories.¹⁸

15 UNGA Decision 62/557 (15 September 2008); UNGA Decision 63/565 (14 September 2009); UNGA Decision 64/568 (13 September 2010); UNGA Decision 65/554 (12 September 2011); UNGA Decision 66/566 (13 September 2012); UNGA Decision 37/561 (29 August 2013).

16 The decision is available at <<http://www.un.org/ga/president/63/letters/screform61008.pdf>> accessed 24 April 2014.

17 Letter from Ambassador Tanin to Mr Nassir Abdulaziz Al-Nasser (25 July 2012) <<http://www.un.org/en/ga/president/66/Letters/PDF/Security%20Council%20Reform-PGA%20letter%2027%20July.pdf>> accessed 24 April 2014.

18 See UN Docs A/68/PV.46; A/68/PV.47; A/68/PV.48; A/68/PV.49. Additional comments on the item were made by India, Brazil, South Africa, and Benin in the General Assembly on 21 November 2013. See UN Doc A/68/PV.56.

However, there are extremely diverging views among states with respect to how a reform should be devised. The following quotes from the latest debate could serve as an illustration.

St Kitts and Nevis, speaking on behalf of the L.69 group (a diverse group of 42 developing countries from Africa, Latin America and the Caribbean, and Asia and the Pacific, united by a common cause):

It was in 1963, 50 years ago, that the most recent expansion enlarged the membership of the Security Council from 11 to 15 – a modest increase of four, in the non-permanent category only. Since then, the membership of the United Nations has increased from 113 to 193. Eighty Members have been added, but that has not altered by an inch the composition of the Organization's premier body mandated to maintain international peace and security.¹⁹

Italy, speaking on behalf of the Uniting for Consensus Group (Canada, Italy, Colombia and Pakistan):

We remain absolutely convinced that the creation of new permanent individual members would be a mistake (...) Nobody would benefit from a piecemeal approach or rushed solutions motivated mainly by the desire to increase the number of seats in the Security Council. We should not repeat the mistakes made in the past, when attempts to push through hurried and divisive solutions both failed, and made the entire reform exercise even more complicated.²⁰

Since any amendment to the UN Charter requires the approval of the five permanent members of the Security Council it is interesting to note also their positions in the latest debate. The following are quotes from their statements in the order in which they spoke.

Russian Federation: Let us not assume that a broader Security Council would be more able to find the appropriate solutions. It would more than likely complicate that process (...) Russia has championed making the Security Council a more representative body. However, such efforts should not affect the Council's ability to respond to emerging crises and challenges rapidly and effectively, all the more pressing today as we

19 See UN Doc A/68/PV.46, 12.

20 Ibid, 13.

witness a growing number of conflicts throughout the world. We are in favour of keeping the Council as it is, namely compact. Its optimal number should not exceed 20 members.²¹

United Kingdom: It is an opportunity for us to highlight our clear commitment to reforming the Security Council so that it is more representative of the modern world. We know that the vast majority of member states share that overarching aim (...) The United Kingdom supports broadening Council membership to include permanent seats for Brazil, Germany, India and Japan. We also support the expansion in the non-permanent category of members.²²

United States of America: Their contributions [referring to 79 different Member States having served as non-permanent members on the Council since 1993] demonstrate that we need a Security Council that better represents twenty-first century realities and is maximally capable of carrying out its mandate and effectively meeting global challenges of this century (...) The United States is open to modest expansion of the Council in both the permanent and non-permanent categories.²³

China: (...) the Security Council must adapt to the changing international situation through reform so that it can better fulfil its sacred responsibility given by the United Nations Charter (...) The priority in reforming the Security Council should be to increase the representation of the developing countries, in particular the countries of Africa, and provide more opportunities for medium-sized and small-sized countries, which constitute the majority of the United Nations membership, to enter the Security Council and participate in its decision-making.²⁴

France: The reform of the Council must take into account the emergence of new Powers that are willing and able to assume the responsibilities of a permanent presence on the Security Council and that are, in accordance with the Charter of the United Nations, able to make a significant contribution to the work of the Council. It is in that context that France supports an expansion in both categories of membership and supports in

21 Ibid, 18.

22 Ibid, 20.

23 Ibid, 22.

24 Ibid, 26.

particular the candidacy of Germany, Brazil, India and Japan as permanent members of the Security Council, and an increased presence of African countries, including among the permanent members.²⁵

The timing of the reform has also become an issue. Many delegations express firm wishes that the reform could be combined with the 70th anniversary of the United Nations in 2015. However, some delegations categorically warn against a fixed timetable stressing that the substance of the reform is more important than the timing. The following quote from the statement of *Mexico* could serve as an illustration to the latter position:

Cyclical celebrations do not bring magical solutions that are not backed up by broad, solid agreements. As long as the lack of flexibility and political will on the part of some is aimed at privileging a few, no reform is possible. We should concentrate our efforts on the substance and not on the calendar.²⁶

With some exceptions the debate tends to focus completely on the various options for an enlargement of the Council. A common element in the many interventions in the debate is that the Security Council needs to be more 'representative, accountable, and democratic'.

The question of the composition of the Council is of course political, and it is true that the present composition of the Council reflects the geopolitical situation after World War II. It is therefore understandable that the Council membership has become an issue. However, as the present author has emphasized in a letter to the members of the United Nations of 10 December 2008, the composition of the Council cannot be completely delinked from the legal aspects of the Charter and the mandates entrusted to the different UN organs.²⁷

With respect to an extended membership, the highest figure proposed that the present author has been able to identify is 31 members.²⁸ However, the Council is designed to be an executive organ, and the question is whether the Council can function if its membership is increased in this manner. If too

25 Ibid, 28.

26 UN Doc A/68/PV. 46, 15.

27 Hans Corell, 'Security Council Reform: Rule of Law More Important than Additional Members' (Letter to The Government of the Members of the United Nations, 10 December 2008) <<http://www.havc.se/res/SelectedMaterial/20081210corelllettertounmembers.pdf>> accessed 24 April 2014.

28 Philippines, in a message to Ambassador Tanin in May 2010, confirmed in the General Assembly on 7 November 2013. See UN Doc A/68/PV/47, 25.

many members are added, there is a clear risk that the Council becomes inoperable. This might very well happen already if its present membership of fifteen is increased and in particular if additional veto wielding members are admitted.

Furthermore, with few exceptions, there is not much attention paid in the debate to the effect of an increased membership if it is not combined with a firm commitment on the part of those elected to respect international law and in particular the UN Charter, which the Council is set to supervise. The overriding purpose of a Security Council reform must be to see to it that the members of the Council actually honour the trust that the members of the Organisation have conferred on it under article 24 of the Charter.

On 22 October 2013 the President of the General Assembly appointed six Permanent Representatives to serve as an Advisory Group to himself, namely the Permanent Representatives of Belgium, Brazil, Liechtenstein, Papua New Guinea, San Marino and Sierra Leone.²⁹ Its purpose is to produce a basis for the start of the intergovernmental negotiations including available options. In early December 2013 the group provided the President with a non-paper capturing what states had suggested so far. By letter of 10 December 2013 the President communicated this paper to the member states through Ambassador Tanin to assist in the organisation of the intergovernmental negotiations, while ensuring that General Assembly decision 62/557 remained the continued basis for the negotiation process.³⁰

Obviously, the geopolitical changes that have occurred since the establishment of the United Nations require a reform of the Security Council, including its composition. However, the question is what is most important: a well-functioning Council or changes in the composition of the Council. The apparent answer to this question is that the Council simply must function in a manner that it can fulfil its mandate under the UN Charter. In particular, the members of the Council must respect the principles of the rule of law and, above all, they must bow to the UN Charter. At the same time the Council must be maintained as an executive organ in order to fulfil the requirement in article 24 'to ensure prompt and effective action'.

29 Letter from John W Ashe (22 October 2013) <<http://www.un.org/en/ga/president/68/pdf/letters/10222013-Security%20Council%20Reform%20Informals.pdf>> accessed 24 April 2014.

30 Letter from John W Ashe to Mr Zahir Tanin, Permanent Representative of Afghanistan to the United Nations (10 December 2013) <http://www.un.org/en/ga/president/68/pdf/letters/12102013Security_Council_Reform_Informals-10_December_2013.pdf> accessed 24 April 2014.

This brings to the forefront the argument advanced in the debate just referred to, namely that the Council must be more representative, accountable, and democratic. It is, however, important to make a clear distinction here between 'representative' and 'democratic'. The first question is where the focus should be. The composition of the Council reflects the situation in 1945. It is obvious that the composition must be revisited in view of the geopolitical development since then. The Council must therefore be more representative.

The argument that the Council must be more democratic is, however, a misconception. It misses a very important legal point, namely that a characteristic of an executive body is not that it is 'democratic' in the sense that everybody or as many as possible have a say. On the contrary, decisive characteristics of an executive body in any organisation is that it is representative while at the same time very limited in size and that in the exercise of its authority it has to faithfully apply a set of rules. Therefore, any comparison between the size of the General Assembly and the number of Council members, suggesting that the Council should be enlarged simply because the membership of the United Nations has increased substantially over the years misses the very important point that the Council simply must be a functioning executive organ.

Consequently, more attention must be given to the manner in which the members of the Council perform their duties. This applies in particular to the permanent five members. It is true that the Council over the years has made great contributions to the Organisation's work to maintain international peace and security. However, unfortunately, there are also great deficiencies in the performance of the permanent members. And sometimes we have seen clear violations of the UN Charter, like the attacks on Iraq in 2003 and Georgia in 2008. If this problem is not properly addressed, any reform of the Council risks becoming meaningless, if not counter-productive.

Against this background, the question must be asked if there is a need to change the composition of the Council at the moment. Would it not be better to focus on a more radical reform of the Council's composition than is presently contemplated and at a time when we have seen the undoubtedly dramatic geopolitical shifts that will occur within the next decade or two? It is also important that democracy and the rule of law are established in more countries so that the proud declaration in General Assembly resolution A/RES/67/1 of 24 September 2012 on the rule of law becomes a reality.³¹ Such a situation would make it possible to make a more far-reaching reform within the present size of the Council resulting in a composition that reflects the membership of the Organisation in a more reasonable and just mode than is presently the case.

31 See (n 6).

6 The Manner in Which the Charter Requires the Council to Fulfil Its Mandate

While the Council could be said to be the most powerful organ of the United Nations, the inability of the Council to take action in certain situations when it could and should do so is maybe the weakest link in the fulfilment of the purposes and principles of the United Nations. The latest example is Syria, a sad reminder of the Council's failure to act in unity to protect a population that is the victim of grave international crimes. I am not for a moment suggesting that the Council should have resorted to the use of force when the events unfolded. But an immediate, determined and unified reaction on the part of the Council would have made a tremendous difference, and maybe the present situation could have been avoided.

This shortcoming is addressed in the aforementioned letter to the UN members of 10 December 2008:

This inability of the Security Council to act in certain situations when it should do so is deplorable. It is all the more sad since the Council is actually in a formidable position to make a difference in the world if its members, and notably the permanent members, joined hands and agreed to adhere strictly to international law and in particular the UN Charter. In addition, the permanent members of the Council could make a commitment to use their veto only in situations where their own most serious and direct national interests are affected. They could also agree to take action when in the eyes of a well-informed general public this would be the obvious thing to do. Such steps would send a resounding signal around the globe, in particular to oppressive regimes and presumptive warlords, i.e. those who cause the conflicts that the Council will be faced with unless they are prevented.³²

It was against this background that this author proposed and has kept reiterating since then that in the negotiations on the composition of the Security Council all UN members engage in a discussion with the five permanent members of the Council whether such commitments on their part might be the way ahead rather than increasing the membership of the Council at present. An alternative solution could be such a step in combination with a very modest increase in the Council's membership.

³² See (n 27).

Consequently, irrespective of the outcome of the negotiations on the composition of the Council, the permanent five members should make a solemn declaration of the kind that would be binding under international law along the lines set out in the Annex to the 10 December 2008 letter containing the following four elements:³³

- To scrupulously adhere to the obligations that they have undertaken under international law and, in particular, those laid down in the Charter of the United Nations;
- To make use of their veto power in the Security Council only if their most serious and direct national interests are affected and to explain, in case they do use this power, the reasons for doing so;
- To refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state unless in self-defence in accordance with article 51 of the Charter of the United Nations or in accordance with a clear and unambiguous mandate by the Security Council under Chapter VII; and
- To take forceful action to intervene in situations when international peace and security are threatened by governments that seriously violate human rights or fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity or when otherwise the responsibility to protect is engaged.

It should be emphasized that the intention behind this proposal is to inspire a serious discussion of the issue and that the text of the draft declaration should be regarded as food for thought, rather than an attempt to propose the exact wording of such a declaration.

However, interestingly this idea could now be further developed in the light of the proposal by France introduced by President François Hollande in the debate in the General Assembly on 24 September 2013. The following is a quote from his statement:

My message is simple. In any domain, whether international security, nuclear proliferation, development or climate change, the worst threat is inaction, the worst decision is to take no decision, and the worst danger is to not see any. And the United Nations bears the responsibility to act. Each time the Organization appears powerless, peace is the first victim. That is why I am proposing that the permanent members of the Security

33 The Annex is attached for ease of reference.

Council define a code of conduct such that in cases of mass crimes, they may collectively decide to renounce the right of veto.³⁴

This proposal was further developed by Foreign Minister Laurent Fabius in an article in the *New York Times* on 4 October 2013. Summarizing the proposal he said:

Our suggestion is that the five permanent members of the Security Council – China, France, Russia, Britain and the United States – themselves could voluntarily regulate their right to exercise their veto. The Charter would not be amended and the change would be implemented through a mutual commitment from the permanent members. In concrete terms, if the Security Council were required to make a decision with regard to a mass crime, the permanent members would agree to suspend their right to veto. The criteria for implementation would be simple: at the request of at least 50 member states, the United Nations secretary general would be called upon to determine the nature of the crime. Once he had delivered his opinion, the code of conduct would immediately apply. To be realistically applicable, this code would exclude cases where the vital national interests of a permanent member of the Council were at stake.³⁵

As it appears, the French proposal, which was supported by many delegations in the General Assembly debate in November 2013, is founded on the same theory as the declaration proposed in the 2008 letter – a voluntary yet binding undertaking by the permanent five members. Hopefully this idea could be further developed and lead to a positive and constructive result that literally would make a world of difference.

Needless to say, if the negotiations result in a future amendment to the UN Charter, the elements discussed here could be laid down in the Charter itself.

In this context it is also important to focus on the connection between international peace and security and the possibility of bringing perpetrators of genocide, war crimes and crimes against humanity to justice. Here, the Security Council has an important role to play.

The fact that the Security Council established the international war crimes tribunals for the former Yugoslavia and Rwanda and initiated the establishment of the Special Court for Sierra Leone testifies to this. And now we also

34 See UN Doc A/68/PV.5, 34.

35 See Laurent Fabius, 'A Call for Self-restraint at the UN' (*The New York Times*, 4 October 2013) <http://www.nytimes.com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html?smid=tw-share&_r=1&&pagewanted=print> accessed 24 April 2014.

have the International Criminal Court, established by the 1998 Rome Statute. Under article 13(b) of the Statute the Council is authorized to refer to the Prosecutor of the ICC situations in which one or more crimes under the Statute appears to have been committed. This option has been used by the Council in two situations: the Sudan and Libya. However, if the Council avails itself of this procedure it is important that the Council also acts in consequence and vigorously supports the ICC. This applies in particular if the evidence in the situation at hand leads the Prosecutor to officials at the highest national level and specifically if arrest warrants are issued.³⁶

This authority vested in the Security Council by the Rome Statute is actually one of the key elements among the resources available to the Council in the execution of its mandate. The primary goal in the work to maintain international peace and security must of course be to prevent conflicts. And the best way to prevent conflicts is to make certain that dictators and warlords are not allowed to act with impunity.

The present situation in Syria demonstrates with terrifying clarity that the permanent members simply must engage in a principled discussion on how to cooperate in the future. In particular, the permanent members need to draw a line to signal that, if in a conflict this line is passed, the Council simply must intervene, if necessary by force. Not to send this signal would be to just sit back and wait for the next 'Syria' anywhere in the world where democracy and the rule of law are absent. In this context it is pertinent to refer again to the proposal by France just mentioned.

It is also crucial that the members of the Council abandon their tendency to apply different standards depending on the political situation analysed in a very narrow national perspective. In an international society under the rule of law the only way forward is that international law is applied to all actors objectively and according to the same standards. Of particular concern in this context is that the US in applying the UN Charter uses a completely different yardstick in the Middle East as compared to elsewhere in the world. This behaviour is actually poisoning the atmosphere in the entire UN system.

7 Conclusions

The question is then what conclusions can be drawn from this reasoning.

³⁶ Hans Corell, 'International Prosecution of Heads of State for Genocide, War Crimes and Crimes against Humanity' (2009) 43 *The John Marshall Law Review* xxv.

A point of departure must be that the changing geopolitical situation requires that the Security Council be reformed. However, at present the main focus should not be on extending the membership of the Council but on a long overdue reform that could be executed almost immediately and at that without amendments to the UN Charter.

The focus of this reform should be on the manner in which the members of the Security Council exercise their mandate and in particular the responsibility that rests with the permanent five members of the Council. The guiding principle for this reform should be the need for the rule of law at the national and international levels and the demands on the Council that such a regime entails.

At the same time the discussions on the composition of the Security Council should continue with a focus on an even more radical reform than is presently contemplated and within the limits of its present size. In these discussions there is need for statesmanship – in particular circumspection and foresight – when states define their national interests. The message from the InterAction Council of Former Heads of State and Government from 2010 comes to mind:

The five permanent members must realize that they are the bearers of a great responsibility and that they represent all nations and not just their national interests.³⁷

If the Council in its present composition demonstrates that it is able to perform its duties in a more unified, objective and effective manner, there is no need for an immediate change of the Council's composition. In the long-term perspective, it would rather be preferable that any changes in the Council's composition are decided when the tendencies in the present geopolitical shift appear more clearly and when there are additional democracies among the members of the United Nations. Needless to say, the working methods of the Council can be addressed at any time as appropriate since they can be improved without amendments to the Charter.

To the UN membership at large this approach should be acceptable since this would avoid the risk of creating a too large and maybe inoperable Council or a Council that would simply continue on a 'business as usual' basis.

This approach should be acceptable also to the permanent five members since it would put them in a position to actually deliver. And, again, the question is whether the situation in Syria could have been avoided if the permanent

37 Inter Action Council, 'Final Communiqué, 28th Annual Plenary Meeting, 18–20 April 2010, Hiroshima, Japan' <<http://www.interactioncouncil.org/final-communicu-27>> accessed 24 April 2014.

members a few years ago had adopted a strategy along the lines suggested here. If international peace and security is to be ensured for the future, the main responsibility rests with the permanent members of the Security Council. If they fail, there is a clear risk that the UN will lose authority and that the Organisation will be at risk.

The argument is sometimes advanced that if the UN fails it would be necessary to create a new world organisation. This is an extremely dangerous reasoning. We should respect the UN Charter and its legacy and always remember that it was produced by a generation that had experienced two world wars.

And surely the permanent members realize that if they undermine the authority of the Security Council and thereby the UN as a whole, in any new structure they will never ever be given the legal authority that they are accorded under the UN Charter – to permanently sit on a body that is authorized to make decisions, including on the use of force, that all members of the Organisation are under a legal obligation to follow.

In view of the positions that many states have taken in the ongoing negotiations it can be assumed that they may react negatively to the ideas advanced here. This applies in particular to states that aspire to a more permanent presence in the Security Council, and states in regions that do not have a permanent representation in the Council. By way of example, the fact that Africa does not have such representation is an anomaly.

It is, however, of greatest importance that states proceed with caution here. All this must be viewed in a longtime perspective, bearing the interests of coming generations in mind. The lodestar must be to safeguard the system of collective security in the UN Charter. There is at present a clear risk that political expediency and an almost frantic focus on extending the membership may result in an inoperable Council. If this happens, the damage to the system of collective security will be irreparable.

Annex to a Letter of 10 December 2008 from Former Legal Counsel of the United Nations Hans Corell to the Governments of the Members of the United Nations

*Draft Declaration by the Permanent Members of the Security Council*³⁸

We, the permanent members of the Security Council,
Mindful of the responsibility of the Security Council under the Charter of the United Nations for the maintenance of international peace and security;
Realizing that the ever present threats to international peace and security are now exacerbated by the effects of climate change in combination with a rapidly growing world population;
Aware of the fact that failure on the part of the Security Council to act in situations where action is obviously required may cause unnecessary human suffering and may tempt others to intervene, including by the use of force, without the required authorization of the Council;
Realizing that such actions by others will undermine the respect for the Charter of the United Nations and may in themselves pose a direct threat to international peace and security;
Conscious of the fact that a failure by the members of Security Council to set the example by scrupulously adhering to international law and the Charter of the United Nations will have devastating effects on the efforts to establish the rule of law at the national and international level,

Have agreed to make the following solemn undertaking:

We pledge

- To scrupulously adhere to the obligations under international law that we have undertaken and in particular those laid down in the Charter of the United Nations;
- To make use of our veto power in the Security Council only if our most serious and direct national interests are affected and to explain, in case we do use this power, the reasons for doing so;
- To refrain in our international relations from the threat or use of force against the territorial integrity or political independence of any state unless in self-defence in accordance with Article 51 of the Charter of the United Nations or in accordance with a clear and unambiguous mandate by the Security Council under Chapter VII;
- To take forceful action to intervene in situations when international peace and security are threatened by governments that seriously violate human rights or fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity or when otherwise the responsibility to protect is engaged. [end]

³⁸ I would like to emphasize that the intention behind this proposal is to inspire a serious discussion of the issue and that the text should be regarded as food for thought rather than an attempt to propose the exact wording of such a declaration.