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Stockholm, 10 December 2008

To the Governments of the Members
of the United Nations

Security Council Reform: Rule of Law More Important Than Additional Members

I am writing this letter in my capacity as former Under-Secretary-General for Legal Affairs and the Legal Counsel of United Nations (March 1994 to March 2004). It concerns a matter of great importance for the maintenance of international peace and security in the future, namely the way in which the members of the Security Council respect international law and fulfil the mandate entrusted to the Council by all Members of the United Nations.

I am fully aware that the contents of the letter, dated on the day of the 60th anniversary of the Universal Declaration of Human Rights, might cause strong reactions, in particular among the five permanent members of the Council, among the States that aspire to a more permanent presence in the Council, and among those who have been engaged in the preparations for next year's negotiations concerning the composition of the Council. However, the matter raised is very serious and it is imperative that it is brought to the forefront so that all Members of the United Nations and the general public are fully aware of what these negotiations might entail.

The line of reasoning in the letter is that international peace and security will be under serious threat in the future unless the rule of law is established both at the national and international level. The way in which the members of the Security Council, and in particular the permanent members of the Council, conduct themselves will be the determining factor in what must be a global effort to establish the rule of law. The permanent members must now lead the way by fully respecting their obligations and bow to the law. If this does not materialise, it will damage the UN Charter system of collective security. An enlarged Council without a firm and credible commitment to respect the law risks making this system inoperable.

It is suggested that, irrespective of the outcome of the negotiations on the composition of the Council, the five permanent members adopt a declaration along the lines set out in the Annex to this letter.

The composition of the Security Council as of 1 January 2009

In addition to the five permanent members China, France, the Russian Federation, the United Kingdom, and the United States of America, as of 1 January 2009 the

following ten states will be members of the Council (with year of term's end indicated): Austria (2010), Burkina Faso (2009), Costa Rica (2009), Croatia (2009), Japan (2010), Libya (2009), Mexico (2010), Turkey (2010), Uganda (2010), and Viet Nam (2009).

The mandate of the Security Council

According to Article 24 of the Charter, the Members of the UN “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.” In Article 25, the Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the Charter. These provisions in combination with, in particular, Chapter VII of the Charter mean that the Security Council is the most powerful body of the Organization.

The Council construes its mandate independently, and over the years some very far-reaching decisions have been taken under Chapter VII of the Charter. The Council has even deemed it within its competence to establish international criminal tribunals and has adopted resolutions that in reality bear the characteristics of legislative acts.

In later years, the Security Council has also included human rights and the rule of law in its agenda. On 22 June 2006, in connection with the Council’s consideration of the item entitled “Strengthening international law: rule of law and maintenance of international peace and security”, the President of the Council made a statement on behalf of the Council (S/PRST/2006/28) that contains the following paragraphs:

“The Security Council reaffirms its commitment to the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world.”

“The Security Council attaches vital importance to promoting justice and the rule of law, including respect for human rights, as an indispensable element for lasting peace.”

The problem is, however, that the members of the Council do not always live up to what they themselves insist is necessary for the maintenance of international peace and security.

It is true that during the Cold War, the Council was for the most part incapable of delivering on its mandate. However, things changed when the Berlin Wall came down in 1989. At that time there was great hope that a new era would commence when the members of the Security Council would act in consonance. But, alas, it did not take long before this hope started fading away. Analyzing why this is so, the conclusion must be that the main responsibility for this failure rests squarely with the five permanent members of the Security Council (see below).

Even more seriously, lately we have witnessed how permanent members have flagrantly violated the Charter. Two cases in point are the attacks on Iraq in March 2003 and on Georgia in August 2008. It is also noteworthy that permanent members of the Council sometimes block actions that obviously should be taken.

The issue of the Security Council and the rule of law has been addressed within the framework of a recent Austrian initiative. The report from this welcome effort – *The UN Security Council and the Rule of Law – The Role of the Security Council in Strengthening a Rules-based International System – Final Report and Recommendations from the Austrian Initiative 2004-2008* – contains many important recommendations that should be implemented. However, for some reason the report does not really get to the heart of the problem except for a gentle reminder that the Council is most legitimate and effective in promoting the rule of law “when the Council submits itself to the rule of law.”

Reflections on the Security Council and Its Mandate

In a recently published article, *Reflections on the Security Council and Its Mandate to Maintain International Peace and Security* – attached; also available under “Selected Material” at <http://www.havc.se> – I looked back at my experiences from working with the Council and its members during my 10 years as UN Legal Counsel.

As it appears, my main concerns are that members of the Council sometimes violate the UN Charter and the tendency among some of its members to sometimes apply double standards and to manoeuvre looking to their own immediate interests rather than viewing things in a global and more long-term perspective. This does not meet the standards required by an international system based on the rule of law.

What the Members of the Security Council Must Do

To someone engaged in work to enhance the rule of law, the negative effects of the behaviour of some of the members of the Security Council are apparent. Lecturing on this topic in developing countries, I am sometimes faced with the question: “Why are you coming here lecturing on the rule of law when ‘they’ do as they please when it suits their interests?”

It is often said that the Security Council is a political body. So it is. But this does not mean that the Council is not bound by the law. In a State under the rule of law also political organs must bow to the law. So, too, must it be at the international level. An obvious example is that the members of the Security Council must respect the UN Charter, in particular the rules governing the use of force, and must observe international human rights standards.

International law is often said to be ambiguous. This may be true in certain areas. But there are also instances where the law is crystal clear, e.g. the prohibition against the threat or use of force. It is equally clear that the way in which the Council has designed the system of listing individuals and entities suspected of having terrorist connections – these procedures are established under Security Council resolution 1267 (1999) – is simply not consistent with internationally recognized human rights standards.

It is in the nature of things that the Council is faced with one conflict situation after another. But are the members of the Council aware that they themselves might contribute to some of these conflicts by not setting the example? If they did set the example, they would send a very powerful signal to the world community. No doubt this would have preventive effects with the result that the workload of the Security Council would decrease.

Humankind is presently facing its greatest challenges ever. The world population, at present 6.7 billion, is expected to rise by 40 per cent during the next 40 years; in 2050 there might be 9.2 billion people on the globe. At the same time, we experience a rapid climate change that, irrespective of its causes, may make large portions of land inhabitable. Drastic steps have to be taken, including a serious discussion on ethical grounds, to achieve changes in consumption patterns. The difference in CO2 emissions is a case in point: over 20 tons per capita per year in the U.S. in 2007, compared to 3,8 tons per capita per year in China and 1.2 tons per capita per year in India (source: <http://unstats.un.org>).

At the same time, there are conflicts that demand great attention by the state community that simply should not be allowed to exist. These conflicts are often generated by petty motives, fuelled by personal ambitions of equally petty men.

At their meeting in June 2008, the InterAction Council of Former Heads of State and Government adopted a communiqué in which they stated that one of the most urgent actions required for the maintenance of international peace and security and for responsible world governance is to restore respect for the UN Charter. They went on to say: "By necessity, the powerful states must take the lead. This applies in particular to the members of the Security Council, the organ entrusted with the primary responsibility for the maintenance of international peace and security. As the organ that has been entrusted with the competence to act on behalf of the members of the organisation, the Security Council must honour this trust."

Among the recommendations that the InterAction Council made at their June meeting – see under Communiqué at <http://www.interactioncouncil.org> – are the following:

- Insisting that states observe scrupulously their obligations under international law, in particular the Charter of the United Nations and encouraging the leading powers to set an example by working within the law and abiding by it, realizing that this is also in their interest
- Underlining the importance of the Security Council exercising its mandate effectively and decisively in accordance with the responsibility granted to it by the UN Charter
- Acknowledging that there are situations which require the Security Council to act with authority and consequence in accordance with the principle of the responsibility to protect
- Acknowledging that the challenges mankind faces must be addressed through multilateral solutions within a rule-based international system

The obvious conclusion is that the members of the Security Council simply must respect international law and in particular the UN Charter and fundamental human rights standards both when they serve on the Council and in general when they act internationally or at the national level. In other words: The members of the Council must set the example by adhering to the rule of law and in particular respect the law of which they are the custodians – the UN Charter.

When Should the Security Council Intervene?

In addressing matters relating to international peace and security, the Council acts in a political setting. It is true that there is a legal obligation to react if a genocide should occur. The Council might also find itself in a situation where the responsibility to protect is engaged. In the Summit Outcome Document (A/RES/60/1), the General Assembly made the following commitment when it declared (in para. 139) that “we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” This provision was reaffirmed by the Security Council in resolution 1674 (2006) of 28 April 2006.

This is a field of international law that is developing, and the Council is not restricted to the situations enumerated in the General Assembly resolution but is free to make its own assessment. This applies in particular when the Council considers whether to authorize or endorse the use of military force in a particular situation. In case this assessment is made in a transparent manner, there is every reason to believe that a decision to use force or not to use force would be respected by the world community.

The five basic criteria of legitimacy elaborated by the High-level Panel on Threats, Challenges and Change (UN Doc. A/595/65, para. 207) should assist the Council in making a systematic and credible analysis. These criteria are: seriousness of threat; proper purpose; use of force as last resort; proportional means; and balance of consequences. The last criterion is of particular importance: 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?

Admittedly, these considerations are delicate and require very careful analysis with the participation not only of the members of the Council but also of others and in particular States that are prospective troop contributors. In some cases the Council will act. However, if after careful and transparent analysis the Council would conclude that the fifth criterion would prevent a robust intervention this would be fully understood and respected.

In retrospect there are situations where the Council should have acted. The desperate pleas in vain by then Secretary-General Boutros Boutros-Ghali for 3 500 paratroopers to stop the genocide in Rwanda come to my mind. Let us hope that such failures to act can be avoided in the future.

The Composition of the Security Council

According to a decision by the General Assembly on 15 September 2008 (A/AC.247/2008/L.1/Rev.2 as orally amended), the composition of the Council will be subject to negotiations in 2009. Reference is also made to the Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council (A/62/47) and to the official records of the 62nd session of the General Assembly (A/62/PV.122).

What is striking in reading this documentation is the complete focus on the various options on how to increase the membership of the Council. 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 the Second World War. It is therefore understandable that Council membership has become an issue. However, 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.

The question is whether the Council can function as the executive organ it is designed to be if its membership is increased to 22, or 26 as suggested in one of the options. There is a limit to how many members there can be on the Council before it becomes inoperable. This might very well happen if its membership is increased and in particular if additional veto wielding members are admitted.

What is even more striking is that little consideration seems to have been given to the effect of an increased membership if not combined with a firm commitment on the part of those elected to respect international law.

From the viewpoint of all those who suffer in many parts of the world the composition of the Council is of less significance. From that perspective it is of greater importance that the Council actually fulfils its mandate – that it lives up to the trust that the other UN Members have given to it.

It is paramount that these matters are given careful consideration in a free and frank debate in the upcoming negotiations. It is difficult to imagine a more serious threat to the United Nations than an inoperable Security Council.

A Commitment by the Permanent Five Members of the Security Council

The question must be asked: Why are so many people around the globe suffering because of the inability of the Council to take action when it could and should do so? Myanmar, Darfur and Zimbabwe are cases in point. Also the standards applied in the cases of the Middle East and Western Sahara could be mentioned. The present state of affairs should simply not be accepted by the world community.

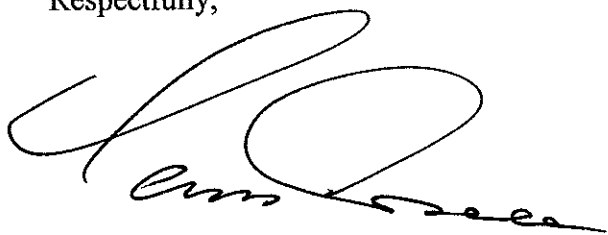
This inability of the Security Council to act in certain situations when it should do so is deplorable. It is all the more sad since the Council is actually in a formidable position to make a difference in the world if its members, and notably the permanent members, joined hands and agreed to adhere 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.

I therefore respectfully propose that in the negotiations on the composition of the Security Council all Members of the United Nations engage in a discussion with the present five permanent members of the Council whether such commitments on the part of the latter 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.

Against this background it is suggested that, irrespective of the outcome of the negotiations on the composition of the Council, the permanent five members make a solemn declaration of the kind that would be binding under international law along the lines set out in the Annex to this letter.

Respectfully,

A handwritten signature in black ink, appearing to read 'Hans Corell', written in a cursive style.

Hans Corell
Former Under-Secretary-General for Legal Affairs
and the Legal Counsel of the United Nations

Note: This letter and its Annex are also available under “Rule of Law” and “United Nations” at <http://www.havc.se> .

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 Council¹

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 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: [new paragraph] 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]

¹ 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.