
LIBER AMICORUM

*In Honour of a
Modern Renaissance Man*

His Excellency

GUÐMUNDUR EIRÍKSSON

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University for Peace





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Reforming the United Nations Security Council

I. INTRODUCTION

Reforming the United Nations Security Council in a manner that enables the Organisation to serve the purposes and apply the principles laid down in its Charter of 1945 is a major challenge for creating a peaceful world. As a matter of fact, reforming the Security Council is a key element, if not the most important component in this effort. However, the present focus on extending the membership of the Council does not serve this purpose. A reform should concentrate on the working methods of the Council and in particular on the performance of the five permanent members. A great advantage is that this can be achieved without amending the Charter of the United Nations.

2. THE PRESENT GEOPOLITICAL SITUATION

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 two billion. Today, we are slightly over seven billion, and according to the latest prognosis of the United Nations Population Division we will be some 9.6 billion in 2050.¹

* The Author served in the Swedish judiciary from 1962–1972 and in the Ministry of Justice from 1972–1984. He was Ambassador and Head of the Legal Department of the Swedish Ministry for Foreign Affairs from 1984–1994 and Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations from 1994–2004.

This Article is based in part on an address delivered by the author on 11 December 2013 at a Conference Henri Lafontaine on the topic “Challenges for a Peaceful World: An Agenda for the XXIst Century”, a joint initiative of Uppsala University and Wallonie Bruxelles International. The views expressed 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 2008–2013 to the Panel of Eminent African Personalities, established by the African Union and chaired by former United Nations Secretary-General Kofi Annan to assist the Kenya National Dialogue and Reconciliation after the post-election violence in 2007–2008.

¹ See World Population Prospects: The 2012 Revision by the UN Population Division, available from <http://esa.un.org/wpp/>.

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 its Charter. Today, 193 sovereign states are members of the Organisation. Unfortunately, it will take a long time before all these members can be defined as democracies.²

At the time of the establishment of the UN, wars and armed conflicts were fought mainly between states, and the first efforts at United Nations peacekeeping were designed to address such situations. Today, conflicts are primarily internal and United Nations peace operations are designed accordingly, including for peace enforcement and peacebuilding. The concept of the responsibility to protect has been developed and endorsed both by the General Assembly and the Security Council.³

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

In those early years, the international legal system was in its infancy. The progress in this field since has been significant, notably in areas like human rights and humanitarian law. Then, very little 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 124 states.⁴

Although the concept *rule of law* is not expressly mentioned in the Charter of the United Nations, gradually the members of the Organisation have come to realise 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 General Assem-

² See e.g. The Economist Intelligence Unit's Democracy Index 2015, available from www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2015.

³ See in particular paragraphs 138 and 139 in General Assembly resolution A/RES/60/1 of 16 September 2005 and Security Council resolution 1674 (2006) of 28 April 2006.

⁴ See <http://legal.un.org/icc/statute/romefra.htm>.

bly resolution A/RES/67/1 of 24 September 2012 with its 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.⁵

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

A notable development in this field is a very important and constructive resolution adopted by the Security Council on 28 April 2014 — the first thematic resolution on security sector reform. In this resolution, there are eight highly pertinent references to the rule of law, including a reaffirmation “that an effective, professional and accountable security sector without discrimination and with full respect for human rights and the rule of law is the cornerstone of peace and sustainable development and is important for conflict prevention”.⁶

At the same time there has been remarkable 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 Charter of the United Nations and when the need for reforming the Council is discussed.

3. OPTIONS FOR REFORMING THE SECURITY COUNCIL

With respect to options for reforming the Security Council let us first recall that the Council originally had eleven members. An amendment to the Charter of the United Nations increased the membership to fifteen in 1965, among them the original five permanent members of the Council: China, France, the Russian Federation, the United Kingdom and the United States of America.

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. The main trend

⁵ Available from www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/1.

⁶ UN Security Council resolution 2151 (2014) [on security sector reform], 28 April 2014, S/RES/2151 (2014).

in the debate, the latest held in the General Assembly on 14 September 2015, seems to be that states support an enlargement of the Council in both the permanent and non-permanent member categories.

With few exceptions, the debate tends to focus completely on the various options for increasing 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 World War II. It is therefore understandable that the Council membership has become an issue. However, as I 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 organs of the United Nations.⁷

With respect to an extended membership, I believe that the highest figure presented is 29 members. 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 many members are added, there is a clear risk that the Council becomes inoperable. In my view, 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, in the debate little attention is paid to the effect of an increased membership without a firm commitment on the part of those elected to respect international law and in particular the Charter of the United Nations, 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 the Council under Article 24 of the Charter. 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. Several reform proposals were put forth but none managed to move the discussions into negotiations. Important progress was finally made in 2014 when Sam Kutesa of Uganda, chairing the 69th Session of the General Assembly, disseminated a letter encouraging member states to start "text based negotiations." He appointed Courtenay Rattray, Permanent Representative of Jamaica to the United Nations as the new Chair of the

⁷ The text of this letter, entitled *Security Council Reform: Rule of Law More Important than Additional Members*, is annexed to the present article.

intergovernmental negotiations. Rattray gathered the views of member states and prepared a draft text; a detailed document which laid out the positions of various countries and blocs on how to reform the Security Council by expanding or modifying the powers and number of permanent and non-permanent members. In July 2015, Kutesa disseminated another letter that included a text "form[ing] the basis for the Intergovernmental Negotiations on the Reform of the Security Council." On 14 September 2015, the General Assembly endorsed the text as the basis for negotiations in what some have called a landmark decision.⁸ Although key countries, the Russian Federation, the United States and China, refused to contribute to the negotiating text this is still an important step. Ambassador Sylvie Lucas, Permanent Representative of Luxembourg is now tasked with leading the intergovernmental negotiations forward.

Obviously, the geopolitical changes that have occurred since the establishment of the United Nations require a reform of the Security Council, including of its composition. However, the question is what is most important: a well-functioning Council or changes in the composition of the Council. The obvious answer to this question is that the Council simply must function in a manner that allows it to fulfil its mandate under the Charter. In particular, the members of the Council must respect the principle of the rule of law and, above all, they must bow to the Charter of the United Nations. At the same time the Council must be maintained as an *executive* organ.

Against this background, the question must be asked whether the composition of the Council must be changed at the moment. Would it not be better to focus on a more radical reform of its composition than is presently contemplated and carry it out when we have seen the results of 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.⁹ Then more far-reaching reforms could be made within the present size of the Council resulting in a composition that reflects the membership of the Organisation in a more reasonable and just manner than at present.

⁸ General Assembly Decision 69/560 "Question of equitable representation on and increase in the membership of the Security Council and related matters".

⁹ See note 5 *supra*.

4. THE MANNER IN WHICH THE CHARTER REQUIRES THE COUNCIL TO FULFIL ITS MANDATE

Let me now focus on 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 may be the Achilles heel for the fulfilment of the purposes and principles of the United Nations. The situation in Syria is 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 perhaps the present situation could have been avoided.

Even greater damage to our system of collective security is done when permanent members of the Council violate the Charter of the United Nations as happened in Iraq in 2003, in Georgia in 2008, and now in 2014 in Ukraine. Russia's annexation of the Crimea peninsula is an obvious and flagrant violation of international law.

In addition, there are now also grim developments in Iraq and in the Middle East, which are the result of the inability of the Security Council to deal with these situations with determination, using common standards. These are very serious developments that will have negative effects on the relations within the international community in the future.

In my 2008 letter to the members of the United Nations, I referred to the inability of the Security Council to act in certain situations when it should do so.¹⁰ It was against this background that I proposed, and have kept reiterating since, that in the negotiations on the composition of the Security Council all members of the United Nations should engage in a discussion with the five permanent members of the Council to see whether commitments on their part along the lines suggested in the draft declaration attached to the letter might be the way forward rather than increasing the membership of the Council. An alternative solution could be such a step in combination with a very modest increase in the Council's membership.

It is my considered opinion that, irrespective of the outcome of the negotiations on the composition of the Council, the five permanent members

¹⁰ See under "A Commitment by the Permanent Five Members of the Security Council" in the letter below.

should make a solemn declaration that would be binding under international law along the lines set out in the draft declaration annexed to the letter. Again I emphasize 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, this idea could now be further developed in the light of the very interesting proposal introduced by French President François Hollande in the debate in the General Assembly on 24 September 2013 when he said:

The UN has a responsibility to take action. And whenever our organization proves to be powerless, it's peace that pays the price. That's why I am proposing that a code of good conduct be defined by the permanent members of the Security Council, and that in the event of a mass crime they can decide to collectively renounce their veto powers.¹¹

This proposal was further developed by Foreign Minister Laurent Fabius in an article in the *New York Times* on 4 October 2013 in which 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.¹²

As it appears, the French proposal is founded on the same theory as the declaration proposed by me in 2008 — a voluntary, yet binding undertaking by the five permanent members. I sincerely hope that this idea can be further developed and lead to a positive and constructive result that literally would make a world of difference.

¹¹ Available from www.franceonu.org/france-at-the-united-nations/press-room/statements-at-open-meetings/general-assembly/article/24-september-2013-opening-of-the.

¹² Laurent Fabius, A Call for Self-Restraint at the U.N., *The New York Times*, 4 October 2013.

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

In this context it is also important to mention a very interesting alternative approach, namely the Code of conduct regarding Security Council action against genocide, crimes against humanity and war crimes. The code, elaborated in the framework of the Accountability, Coherence and Transparency Group, in consultation with States, civil society and the Secretariat of the United Nations, was launched on 23 October 2015 on the occasion of the seventieth anniversary of the United Nations.¹³

In essence, States Members of the United Nations that support the code pledge to support timely and decisive action by the Security Council aimed at preventing or ending the commission of genocide, crimes against humanity or war crimes. Of specific interest is that when they serve as members of the Security Council they pledge in particular to not vote against a credible draft resolution before the Council on timely and decisive action to end the commission of such crimes or to prevent them. As of 10 June 2016, there are 112 states supporting the Code of conduct, among them France and the United Kingdom.¹⁴ Sadly, the three remaining permanent members of the Council are not among the supporters. Unless they join France and the United Kingdom we are back to square one. Some form of pledge by all the permanent members of the Council is a prerequisite for achieving a successful reform of the Council.

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 have the International Criminal Court, established by the 1998 Rome Statute. Article 13 (b) of the Statute authorizes the Council 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.

¹³ Reference is made to UN Doc. A/70/621-S/2015/978.

¹⁴ See www.globalr2p.org/resources/893.

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.

This authority vested in the Security Council by the Rome Statute is actually one of the key resources available to the Council in the execution of its mandate. The primary goal of efforts 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.

It should be noted that on 22 May 2014, two permanent members, the Russian Federation and China, cast negative votes in the Security Council, preventing the adoption of a draft resolution that would have referred the situation in Syria to the International Criminal Court, while thirteen other members voted in favour. 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, by force if necessary. Not to send this signal would be to just sit back and wait for the next conflict anywhere in the world where democracy and the rule of law are absent. I refer in this context also to the proposal by France mentioned above.

It is also important that the members of the Council abandon their tendency to apply different standards depending on the political situation. In an international society governed by the rule of law the only way forward is that international law is applied to all actors objectively and according to the same standards. This applies in particular to the situation in the Middle East.

Finally, one must conclude that it is astounding to observe the manner in which the Russian Federation has acted in relation to Ukraine — and not only with respect to the annexation of Crimea. This kind of behaviour makes one believe that we are still in the 19th century. The divergences between this behaviour and what is stated in the resolution on security sector reform adopted by the Security Council on 28 April 2014 is unbelievable.¹⁵ Such behaviour by a permanent member of the Security Council is extremely damaging to the whole effort that is being made to establish peace and security in societies respecting human rights and the rule of law.

¹⁵ See note 6 *supra*.

4. CONCLUSIONS

The question is what conclusions should be drawn from this reasoning.

First, 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 reform that could be executed almost immediately and without amendments to the Charter of the United Nations.

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 five permanent members of the Council. The guiding principle for this reform should be respect 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 a more radical reform than is presently contemplated and within the limits of its present size. In these discussions there is need for statesmanship, and in particular circumspection and foresight, when states define their national interests.

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. From a long-term perspective, it would 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 more members of the United Nations have chosen democracy.

To the United Nations 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 also be acceptable to the five permanent members since it would put them in a position to actually deliver. And, again, the question is whether the situations in Syria, Ukraine and the Middle East could have been avoided if the permanent members had adopted a strategy along the lines suggested here a few years ago. 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 United Nations will lose authority and that the Organisation will be undermined.

The argument is sometimes advanced that if the United Nations fails it would be necessary to create a new world organisation. This is ex-

tremely dangerous reasoning. We should respect the Charter of the United Nations and its legacy and always remember that it was produced by a generation that had experienced two world wars.

Surely the permanent members realize that if they undermine the authority of the Security Council and thereby the United Nations as a whole, in any new structure they will never be given the legal authority that they are accorded under the Charter of the United Nations — 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.

I am fully aware that many states may react negatively to the ideas advanced in this article, in particular 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. Let me therefore end on the note that it is not with a light heart that I urge caution here. But I view all this in from a long term perspective, thinking of coming generations. As I have stated in another context: the lodestar must be to safeguard the system of collective security in the Charter of the United Nations.¹⁶ At present, there is 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

TEXT OF LETTER OF 10 DECEMBER 2008 BY THE FORMER LEGAL COUNSEL OF THE UNITED NATIONS HANS CORELL 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 Se-

¹⁶ Hans Corell, "The Mandate of the Security Council in a Changing World", in Jonas Ebbesson, Marie Jacobsson, Mark Klamberg, David Langlet and Pål Wrangé (eds.), *International Law and Changing Perceptions of Security*, Leiden/Boston: Brill/Martinus Nijhoff Publishers (2014) pp. 39–58. Available from www.havc.se/res/SelectedMaterial/20142224ilperceptionsofsecurity.pdf.

curity 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.

REFORMING THE UNITED NATIONS SECURITY COUNCIL

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 se-

rious 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 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/59/565, 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,

Hans Corell

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

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 NA-
TIONS

*Draft Declaration by the Permanent Members of the Security
Council*¹

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

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.

REFORMING THE UNITED NATIONS SECURITY COUNCIL

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]

This *Liber Amicorum* brings together 33 prominent colleagues, friends and former students to honour jurist, diplomat and educator Professor Guðmundur Eiríksson. The wide spectrum of subjects covered reflects the variety of Professor Eiríksson's roles over the course of his illustrious career in international law, of interests he has cultivated and of institutions he has so honourably served.

The volume's primary focus is on the law of the sea but other topics in Professor Eiríksson's areas of interest are also addressed, including the history and development of international law, procedure in international jurisprudence, the functioning of international organizations, the teaching of international law, human rights, humanitarian law, environmental law and international criminal law.

This book should be of great value to scholars, lawyers and other practitioners and a welcome addition to every international law library.

