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Contents

List of Abbreviations	VII
List of Contributors	XII

PART 1

The Law and Practice of the United Nations

- 1 UN Security Council Reform—The Council Must Lead by Example 3
Hans Corell
- 2 Lessons from the ILC’s Work on ‘Immunity of State Officials’: Melland Schill Lecture, 21 November 2017 34
Michael Wood
- 3 The United States and the Paris Agreement on Climate Change 70
Mohit Khubchandani
- 4 On the Governance of International Judicial Institutions: The Development of Performance Indicators for the International Criminal Court 83
Andrea Carcano
- 5 Protection and Use of Transboundary Groundwater Resources under Public International Law—An Analysis of the UN International Law Commission’s Draft Articles on the Law of Transboundary Aquifers 114
Carolin Weber
- 6 The Cross-Fertilization of UNCLOS, Custom and Principles Relating to Procedure in the Jurisprudence of UNCLOS Courts and Tribunals 142
Elena Ivanova
- 7 Sustainable Development Goal 16 at a Cross-Roads 171
Frauke Lachenmann

PART 2

Legal Issues Related to the Goals of the United Nations

- 8 Institutions of International Law: How International Law Secures Orderliness in International Affairs 189
Volker Roeben
- 9 Case Comment: *Navtej Singh Johar v. Union of India*: The Indian Supreme Court's Decriminalization of Same-Sex Relations 218
Gautam Bhatia
- 10 The Nomadic Sense of Law in an International Constitutionalism 234
William E. Conklin
- 11 The Institutional and Constitutional Aspects of the Arab Maghreb Union and the Dispute on Western Sahara as an Obstacle: What Role does the European Union Play in Promoting Maghreb Regional Integration? 284
Mohamed Riyad M. Almosty
- 12 The Control of Conventionality: Developments in the Case Law of the Inter-American Court of Human Rights and Its Potential Expanding Effects in International Human Rights Law 319
María Carmelina Londoño-Lázaro and Nicolás Carrillo-Santarelli
- 13 Disaster Militarism? Military Humanitarian Assistance and Disaster Relief 347
Gabrielle Simm
- 14 Social Movements and the Legal Field: Becoming-Constituent 376
Xenia Chiaramonte
- 15 The International Regulation and Governance of Time 394
Andreas Witte

Book Review

- Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* 427

UN Security Council Reform—The Council Must Lead by Example

Hans Corell

Abstract

The point of departure in the present article is that the UN Security Council must be reformed. But this reform should not focus on extending the membership of the Council, which seems to be the main issue in the discussion at present. It is imperative that the Council is maintained as an executive organ since this is a precondition for its effective functioning. Too many members would destroy this requirement completely, in particular if additional members are granted veto power. Already 15 members may be past the limit for an executive organ. Additional members will endanger the Council's ability to fulfil its obligations under Art. 24 of the UN Charter: the primary responsibility for the maintenance of international peace and security.

Instead, the reform should focus on resolving the real problem with the Council, namely the manner in which the permanent members sometimes behave. The exercise of the veto power must be in conformity with the UN Charter, which now must be viewed against the background of the development of international law since the UN was established more than 70 years ago. The manner in which some permanent members exercise their veto power is simply not in conformity with the Charter.

Against this background it is absolutely necessary that the five permanent members engage in a profound discussion about their performance and the manner in which the veto power is exercised. Here, there is need for statesmanship. The members of the Security Council, and in particular the permanent members, must lead by example.

What the Council must focus on is conflict prevention. This requires determination and consequence. The focus must be on the challenges that humankind is facing and will face ever more in the future and the threats to international peace and security that these challenges are causing. The need for the rule of law and protection of human rights are obvious elements in this analysis. Furthermore, the growth of the world population in combination with climate change simply must be addressed in an effective manner. The Council must focus attentively on these 'conflict multipliers'.

The discussion must also focus on peacekeeping and responsibility to protect. With respect to responsibility to protect there is great need for improvement. We cannot accept in the 21st century that fundamental human rights are violated and that crimes against international humanitarian law are being committed on a large scale without

consequences. Another important element in this context is empowerment of women. In addressing these questions there is need for close cooperation with regional organizations. This cooperation already exists, but the question is how it can be developed and what lessons can be learnt from the past.

Since the five permanent members are also recognized as nuclear-weapon States under the 1968 Non-Proliferation Treaty, they must confirm their obligations under this treaty and make serious their obligation to work for a nuclear-weapon free world.

A reform along the lines discussed in the present article can be made without amending the UN Charter.

Keywords

Climate – Executive – Human Rights – Nuclear – Population – Protect – Rule of Law – Statesmanship – Veto – Women

I Introduction

The Max Planck Foundation for International Peace and the Rule of Law has invited me to contribute an article on proposals for the reform of the UN Security Council, specifically its composition and cooperation with regional organizations, adding that it would be open to other topics as well. Since I have focused on Security Council reform on many occasions after I left the UN in 2004, having served as the Organization's Under-Secretary-General for Legal Affairs and the Legal Counsel since 1994, I accepted this invitation. In so doing, I decided to focus on what I see as the main problem with the Security Council, namely the fact that the permanent five members do not always act in a manner than one would expect in today's world.

My reasoning should be viewed against the background of my years in the UN Secretariat, my activities thereafter and in particular as a member of the Council of the International Bar Association's Human Rights Institute (2005–2018),¹ as Legal Adviser to the Panel of Eminent African Personalities involved in the Kenya National Dialogue and Reconciliation (2008–2013), my focus on the polar regions in later years, and the present geopolitical situation.

In an article, published in 2017, I developed my thinking with respect to reforming the Security Council.² My conclusions were in brief:

¹ See <https://www.ibanet.org/IBAHRI.aspx> (accessed 12 April 2019).

² H. Corell, 'Reforming the United Nations Security Council' in J.C. Sainz-Borgo et al. (eds), *Liber Amicorum Gudmundur Eiriksson* (O.P. Jindal Global University 2017) 309.

- That the focus of a reform should not be on extending the membership of the Security Council but on a reform that could be executed almost immediately and without amendments to the UN Charter;
- That the reform should focus 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;
- That 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;
- That in 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 UN have chosen democracy;
- That the main responsibility rests with the permanent members of the Council and that, if they fail, there is a clear risk that the UN will lose authority and that the Organization will be undermined;
- That the lodestar for the reform must be to safeguard the system of collective security in the UN Charter; and
- That at present there is a clear risk that political expediency and an almost frantic focus on extending the membership of the Council may result in that it becomes inoperable with the consequence that the damage to the system of collective security will be irreparable.³

Against this background, the following presentation will focus on specific elements that the Security Council must take into consideration in today's world. Of particular importance here is that the use of the veto must be in conformity with the mandate of the Security Council and that the challenges we face in the following fields must be addressed to reduce the risk of conflict in the world: the need for the rule of law and human rights; the growth of the world population; climate change; responsibility to protect; empowerment of women; and nuclear disarmament.

II The Use of the Veto

Considering the reasons for the veto power it is obvious that the manner in which the use of the veto has developed over the years is not in conformity with the idea behind the inclusion of 'including the concurring votes of the permanent members' in Art. 27 (4) of the UN Charter. The fact that permanent members use the veto when there is no clear connection to their own security

³ *Ibid.*, at 318–319.

undermines the authority of the Council and results in situations where people are exposed to suffering that is completely unacceptable.

I raised this matter in a letter to the members of the UN on 10 December 2008, suggesting that the permanent five members should make a solemn declaration that would be binding under international law along the lines of a draft attached to the letter. For ease of reference the draft declaration is annexed to the present article.

One of the four elements of the draft declaration is that the permanent members should use their veto power only if their most serious and direct national interests are affected and, in case they do use the veto power, explain their reasons for doing so.

I still believe that this is a path that the permanent five members should take. However, a more likely solution might be the one proposed by France and Mexico, namely a collective and voluntary agreement among the permanent members of the Security Council to the effect that the permanent members would refrain from using the veto in case of mass atrocities. As of 27 June 2017 this initiative was supported by 96 countries.⁴

The alternative is the Code of Conduct regarding Security Council Action against Genocide, Crimes against Humanity and War Crimes, proposed by the Accountability, Coherence and Transparency (ACT) Group in 2015. The Code 'calls upon all members of the Security Council (both permanent and elected) to not vote against any credible draft resolution intended to prevent or halt mass atrocities'.⁵ As of January 2019, there were 119 States supporting the code, including two permanent members of the Security Council, namely France and the UK.⁶ A prerequisite for a meaningful reform of the Security Council is that the three remaining permanent members join the Code. If not, we will unfortunately have to wait for the next Syria.

In this context, one should mention an interesting study by a campaign started by students at Uppsala University in Sweden, called 'Stop Illegitimate Vetoes'. As it appears from their website, they have analysed the 50 vetoes cast between 1991 (when the Soviet Union became the Russian Federation) and 10 March 2019: none by France and the UK, 11 by China, 23 by the Russian Federation,

4 Political Declaration on the Suspension of the Veto in Cases of Mass Atrocities, see <https://perma.cc/QK6F-CTAM> (accessed 12 April 2019).

5 Available at <http://www.centerforunreform.org/?q=node/798> (accessed 12 April 2019).

6 See <https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php> (accessed 12 April 2019).

and 16 by the US.⁷ Their conclusion is that 48 of these vetoes are illegitimate since they do not concern the security of the members themselves.

III The Need for the Rule of Law and Human Rights

Looking at conflicts around the world, the root causes are basically the same: no democracy and no rule of law. A core ingredient in the rule of law is human rights. It is therefore necessary to strengthen the rule of law and protection of human rights.

One of the most disturbing elements in later years is that the rule of law and human rights are not respected in a manner that is absolutely necessary for achieving international peace and security. This is all the more regrettable as both the UN General Assembly and the Security Council have made clear statements relating to the importance of the rule of law and human rights. The General Assembly has also stressed the need for democracy.

Of particular importance in this context is that the members of the UN have come to an understanding that the rule of law is an indispensable prerequisite for international peace and security; see e.g. the Resolution adopted by the General Assembly on 24 September 2012 entitled 'Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels'. The following two paragraphs of this Declaration are of particular relevance here:

1. We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world.

[...]

5. We reaffirm that human rights, the rule of law and democracy are inter-linked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.⁸

⁷ A Report is available at <http://stopillegitimatevetoes.org/thereport/> and a Companion at <http://stopillegitimatevetoes.org/wp-content/uploads/2018/06/Report-Companion-Revision-14.pdf> (accessed 12 April 2019).

⁸ UNGA Res 67/1 'Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels' (24 September 2012).

With respect to the definition of the rule of law, reference could be made to Secretary-General Kofi Annan's Report to the Security Council in 2004, entitled 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies':

The rule of law [...] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁹

For my part, I often use a very straightforward and brief definition, consisting of four elements: (1) democracy; (2) proper legislation respecting international human rights standards; (3) the institutions to administer this law, including independent and impartial courts; and (4) the individuals with the integrity and the knowledge to administer these institutions.

It should be noted that there is a special interdependence between the two first elements. This is because many countries are not yet democracies. It is, however, necessary to develop a legal order through legislation also in those countries. At the same time, to be fully legitimate, legislation has to be adopted by a national assembly that is elected in free and fair elections; and these can only be held in democratic societies. This means that there will be a fairly long transitional period in many countries before the two first conditions for the rule of law are met.

The third element, the institutions, including independent and impartial courts, is an obvious component.

The fourth element may be the most demanding challenge: the individuals with the integrity and the knowledge necessary to administer these institutions. This requires education—one could even say upbringing.

If we look at the need for the rule of law in a geopolitical perspective, it is imperative that a concerted effort is made to establish human rights, the rule of law and democracy in order to achieve proper world governance. It is crucial that the two paragraphs in the Declaration quoted above are taken seriously.

9 UNSC 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General' (23 August 2004) UN Doc. S/2004/616.

Against this background the need for the rule of law, of which respect for human rights is a core element, and democracy in the world community is apparent. States that fall short in this respect deserve to be criticized; in present-day society this matter can no longer be considered internal within the meaning of Art. 2 (7) of the UN Charter. The rule of law is an indispensable prerequisite for proper global governance. In addition, and most importantly, the rule of law is not only a legal matter. It is much more comprehensive. It encompasses ethical elements that must be supported by all—also at the grassroots level.

Two further paragraphs from the 2012 Declaration could be quoted in this context:

12. We reaffirm the principle of good governance and commit to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid.

13. We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.

An initial challenge associated with establishing the rule of law is the requirement that the States themselves actually abide by the rule of law and that international organizations live up to their own proud declarations on the importance of the rule of law. Another challenge, as already mentioned, is the growing world population which can lead to tensions, in particular if aggravated by climate change that may have serious consequences for the human habitat.

Armed conflict is an issue, in particular conflicts generated by religious extremists. Yet another challenge is terrorism, which has to be vigorously combated, not through a ‘war on terror’—a very dangerous misnomer—but through law enforcement.¹⁰ A further major challenge is transnational organized crime, which has extremely serious effects on the proper governance of States. There is also an inherent risk that the territories of ‘failed States’ and States that do not have proper defence and police forces may become platforms for such criminal activity.¹¹

¹⁰ Reference is made to the International Convention for the Suppression of the Financing of Terrorism (signed 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

¹¹ Reference is made to the United Nations Convention against Transnational Organized Crime (signed 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

One of the most serious impediments to implementing the rule of law is corruption. States have to act with determination here and live up to their obligations. The 2012 Declaration states that:

25. We are convinced of the negative impact of corruption, which obstructs economic growth and development, erodes public confidence, legitimacy and transparency and hinders the making of fair and effective laws, as well as their administration, enforcement and adjudication, and therefore stress the importance of the rule of law as an essential element in addressing and preventing corruption, including by strengthening cooperation among States concerning criminal matters.

The Security Council in a Presidential Statement on 21 February 2014 recalled the 2012 Declaration, recognizing the need for universal adherence to and implementation of the rule of law, and the vital importance it attaches to promoting justice and the rule of law as an indispensable element for peaceful coexistence and the prevention of armed conflict. In the same Statement, the Security Council also reaffirmed its commitment to international law and the UN Charter and to an international order based on the rule of law and international law.¹²

The protection of human rights and criminal justice are likewise core elements in a rule of law system. Any governance system that cannot deliver in this respect is doomed to be defective. In the worst-case scenario, a State with a weak governance system risks becoming a 'failed State'. With increasing globalization and interconnection among States, those States that fall behind in establishing democratic governance under the rule of law will pose a threat to international peace and security, thus putting also other States, even fairly stable democracies, at risk.

It is important to note that, at present, there is no alternative to the existing system of world governance, which is through sovereign nation States interacting within the UN where almost all of them (193) are members. It is obvious that we should concentrate on how to improve the existing system. Members of the Security Council have an important role to play here through leading by example.

Governance has to be democratic, and the rule of law must be applied. And, as always, where power is exercised it must be scrutinized, in particular by

¹² UNSC Statement by the President of the Security Council: The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security' (21 February 2014) UN Doc. S/PRST/2014/5.

watchful and critical media. Furthermore, State sovereignty has to be exercised in the interest not of a sovereign but of the people, and relations to other States should be based on good neighbourliness.

The problem here is that States have a tendency to identify their national interests from a very narrow perspective, not to say on the basis of sheer self-interest. What is required in this analysis is more statesmanship and, in case of conflict, a preparedness to listen to others and, if possible, to adjust in a manner that may take their interests into consideration.

What all this boils down to is that people must gain knowledge and insight about what needs to be done and find the political will and the necessary techniques to achieve this. It is absolutely necessary that education about human rights and the rule of law is offered in schools as early as possible. Politicians and the general public must also be educated.

In a meeting of the InterAction Council of Former Heads of State and Government in 2008, former Chancellor Helmut Schmidt of Germany made a comment that inspired the elaboration of a paper called 'Rule of Law—A guide for politicians'. This guide is now available free of charge for downloading and printing from the web in 25 languages with more to come.¹³

During my ten years as UN Legal Counsel, I had the opportunity to follow the Council's work closely, not only formally but also in informal consultations and at the retreats that Kofi Annan arranged for the 15 UN Ambassadors and their spouses. At the beginning of this period, just after the Cold War, the Council actually began to work really well. But soon there were complications with serious consequences for the Council's ability to fulfil its core mission of preventing conflicts.

One grave issue is that the five permanent members often cannot agree when the need is the greatest. The latest serious instance is Syria.

Another serious problem is that permanent members themselves sometimes flagrantly violate the UN Charter. One example is the 2003 invasion by the US and the UK of Iraq which had disastrous consequences. This was followed by the Russian Federation's attack on Georgia in 2008 and on Ukraine in 2014.

These violations and the recent events in Syria demonstrate the disastrous consequences that occur when the Security Council does not respect its obligations under the UN Charter. The loadstar here must be the rule of law and

13 'Rule of Law—A guide for politicians', elaborated under the auspices of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University, Sweden, and the Hague Institute for the Internationalisation (now Innovation) of Law (HiIL), available at <https://rwi.lu.se/2017/03/rule-law-guide-politicians/> (accessed 12 April 2019).

the obligations that it imposes on the Council. If the members of the Security Council show that they can join hands when a certain threshold is crossed in a conflict, it would send a very powerful signal around the world and help to prevent conflicts in the future.

iv The Growth of the World Population

When the UN was established in 1945, the world population was around 2 billion. According to the UN Population Division's 'World Population Prospects: The 2017 Revision', the current world population is 7.6 billion and is expected to reach 9.8 billion in 2050.¹⁴ It is obvious that this enormous population growth will have extremely serious consequences for our human habitat. One serious effect will of course be rising CO₂ emissions unless science and business can develop methods for counteracting this development. For the Security Council, the population growth may constitute a serious 'threat multiplier', and needs to be observed with great attention by the members of the Council.

v Climate Change

As is commonly known, rising CO₂ levels have caused climate change that has to be addressed immediately. The 1992 UN Framework Convention on Climate Change (UNFCCC)¹⁵ and the 2015 Paris Agreement¹⁶ have been concluded to this end.

The central aim of the Paris Agreement is to strengthen the global response to the threat of climate change by keeping the global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. There are presently 184 parties to this Agreement, including the permanent members of the Security Council, except the Russian Federation. Unfortunately, the US has recently decided to withdraw from this Agreement.

It goes without saying that a common effort simply has to be made to cope with the results of the climate change; there is a clear connection with international peace and security here. It may be that at the turn of the next century

¹⁴ UN DESA / Population Division 'World Population Prospects: The 2017 Revision' (21 June 2017).

¹⁵ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

¹⁶ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), annexed to UN Doc. FCCC/CP/2015/10/Add.1.

there could be a one meter sea level rise. This would have disastrous effects on the globe and create millions of refugees. The refugees crossing the Mediterranean these days are but trickles in comparison to what will be the result of a sea level rise caused by melting glaciers and sea ice.

I have often noted that many are not aware of the importance of the polar regions in this context. These regions are enormous areas. Around the North Pole we have the Arctic Ocean where the legal regime is the UN Convention on the Law of the Sea.¹⁷ On the South Pole we have the Antarctic continent, where the legal regime is the 1959 Antarctic Treaty.¹⁸ The size of the sea in the North, surrounded by continents, and the continent in the South, surrounded by sea, is basically the same: 14,000,000 km². This is almost one and a half times the size of the US.

The melting sea ice in the North may not affect the sea level all that much, but it reduces the albedo (reflection of solar radiation) effect of the white ice which causes the temperature to rise twice as fast in the Arctic as in the rest of the world. This also causes melting of the permafrost in large areas, entailing great problems. One effect is the release of methane, another important greenhouse gas which will increase global warming. And in Antarctica the glaciers on the continent contain 90 per cent of the freshwater resources of the globe. If that starts melting!

To this should be added the risk for further desertification in parts of the world, which will generate additional climate refugees. The impact of climate change on peace and security in Africa is increasing, particularly in the Lake Chad Basin, the Sahel region and the Horn of Africa region.

It is therefore important that the Security Council intensifies its focus on climate change as a 'threat multiplier'. The debate on 25 January 2019 is welcome, and it should definitely be reflected in the Council's work in the future, including possibly by the adoption of a resolution on the subject matter.¹⁹

VI Responsibility to Protect

The concept of responsibility to protect (R2P) was introduced in the UN system in September 2005 when the General Assembly, based on the proposal by

17 United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

18 Antarctic Treaty (signed 1 December 1959, entered into force 23 June 1961) 402 UNTS 71.

19 See 'Climate Change Recognized as "Threat Multiplier", UN Security Council Debates its Impact on Peace' (25 January 2019) UN News, available at <https://news.un.org/feed/view/en/story/2019/01/1031322> (accessed 12 April 2019).

the High-level Panel on Threats, Challenges and Change,²⁰ adopted the World Summit Outcome.²¹ In this Resolution we find the two famous paragraphs 138 and 139:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, 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. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

The Panel had also suggested that the Council, in considering whether to authorize or endorse the use of military force, should always address—whatever

20 UNGA 'A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change' (2 December 2004) UN Doc. A/59/565.

21 UNGA Res 60/1 '2005 World Summit Outcome' (16 September 2005).

other considerations it may take into account—at least the following five basic criteria of legitimacy:

- (a) The seriousness of the threat,
- (b) The question of proper purpose,
- (c) The question whether the action is the last resort,
- (d) The question whether the means are proportional, and
- (e) The question whether there is a balance of consequences.²²

The criterion last mentioned is in my view of particular interest. In the words of the Panel: Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

It goes without saying that this criterion must be a determining factor when the Council considers whether any UN Member State would be prepared to contribute troops to the operation and when possible troop-contributing States make their own assessment. But above all, 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 understood and respected by the world community.

In his Report of 12 January 2009 ‘Implementing the Responsibility to Protect’, UN Secretary-General Ban Ki-moon referred to three pillars of the responsibility to protect:²³

- The protection responsibilities of the State;
- International assistance and capacity-building;
- Timely and decisive response.

Reflecting on the development so far, he stated that it would be counterproductive, and possibly even destructive, to try to revisit the negotiations that led to the provisions of paragraphs 138 and 139 of the World Summit Outcome:

Those provisions represent a remarkably good outcome, which will well serve the ultimate purpose of the responsibility to protect: to save lives by preventing the most egregious mass violations of human rights, while reinforcing the letter and spirit of the Charter and the abiding principles of responsible sovereignty.

²² See ‘A More Secure World’ UN Doc. A/59/565, at para. 207.

²³ UNGA ‘Implementing the Responsibility to Protect: Report of the Secretary-General’ (12 January 2009) UN Doc. A/63/677.

The Security Council welcomed the adoption of the 2005 World Summit Outcome in October of the same year.²⁴ In April 2006, the Council went one step further and reaffirmed the provisions of paragraphs 138 and 139 regarding the responsibility to protect in a special Resolution.²⁵ The question is now how one should assess the performance of the Security Council since the adoption of the World Summit Outcome. Unfortunately, the result is not what many hoped for when the system was adopted.

Many views have been expressed about the system, both positive and critical. For my part, I am convinced that the Council simply must act in accordance with the provisions in the World Summit Outcome. Much has been written about this, and it is not possible to analyse all this material in a brief article. However, a very interesting review by Jared Genser of the Security Council's implementation of the responsibility to protect that was published in 2018 caught my attention.²⁶

In the article the author has examined eleven situations against the background of the three pillars in the Secretary-General's report: Côte d'Ivoire, Libya, Mali, Central African Republic, Democratic Republic of the Congo, Sudan, South Sudan, Democratic People's Republic of Korea, Myanmar, Syria and Yemen. The three first situations are referred to under the heading 'More Successful Implementation', the following four are referred to under the heading 'Lack of Successful Implementation', while the four last situations are listed under 'Stalled Response'.

In the first category, government obstruction or cooperation have a decisive effect on the possibility of a successful implementation. They also demonstrate the vital importance of cooperation between regional organizations and the Security Council. The author finds that all three cases illustrate the importance of a rapid response capacity for the Security Council to act timely and decisively in the face of humanitarian crises.

With respect to the second category, the four case studies demonstrate that the Security Council's implementation of responsibility to protect is generally unsuccessful when the three conditions are not all met.

24 UNSC Res 1631 (2005).

25 UNSC Res 1674 (2006), at para. 4.

26 J. Genser, 'The UN Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement' (Winter 2018) 18.2 *Chicago J of Intl Law* 419, available at <http://bit.ly/rzpgenser> (accessed 23 April 2019). The Global Centre on R2P has published a summary of the article which is available at <http://www.globalr2p.org/media/files/un-security-council-application-of-r2p-jared-genser.pdf> (accessed 23 April 2019).

With respect to the stalled responses, the author finds that a fourth condition has also prevented the Security Council from implementing its responsibility to protect mandate: the veto of the permanent five members.

The author concludes by making recommendations for improving the UN Security Council's implementation of responsibility to protect based on the following reasoning:

The preceding historical analysis of the Security Council's country-specific implementation of R2P demonstrates the complexities and singularities that set each situation apart, but it also allows for the emergence of a set of factors that, when taken together, consistently have determined whether the Security Council will succeed or fail in its responsibility to implement R2P. What follows are recommendations for achieving better outcomes along those key factors, with the overarching goal of improving future Security Council implementation of R2P.²⁷

I have a personal experience with respect to Syria in this context. When Kofi Annan was appointed Joint Special Envoy of the UN and the Arab League to Syria, he had been Chairman of the Panel of Eminent African Personalities on its mission in Kenya from January 2008 in the wake of the violence that was triggered by the 2007 disputed presidential elections. The elections had been followed by violence in which many people had lost their lives and hundreds of thousands had been internally displaced.

In Kenya, Kofi Annan and his colleagues on the Panel managed to bring the two competing sides together to negotiate and agree to form a coalition government. An agreement on the principles and partnership of a coalition government was signed on 28 February 2008. This was later confirmed in the 2008 Kenya National Accord and Reconciliation Act, which entered into force on 20 March 2008.²⁸ This act would govern the coalition government in the country for five years. During this period a new constitution was also adopted in August 2010.

In March 2012, Kofi Annan presented a six-point peace plan for Syria. In April 2012, we had a discussion on the situation in Syria. He wondered whether he could work in a similar manner in Syria as he had done in Kenya. During our discussion he fell silent for a while, then shook his head and said that he

²⁷ Ibid., at 495.

²⁸ I had the privilege of chairing the Legal Working Group on Governance that elaborated the draft of this legislation. The cooperation with its four Kenyan members was a very positive experience.

did not have the support of the Security Council which was a prerequisite for the mission to succeed, and that he would resign. This he did on 2 August 2012.

Against this background, paragraph 66 in Secretary-General Ban Ki-moon's report of 12 January 2009 should be kept in mind:

In sum, as the United Nations community comes to articulate and implement a response strategy consistent with both the call in paragraph 139 of the Summit Outcome for 'timely and decisive' action and the provisions of the Charter, including its purposes and principles, this will make it more difficult for States or groups of States to claim that they need to act unilaterally or outside of United Nations channels, rules and procedures to respond to emergencies relating to the responsibility to protect. The more consistently, fairly and reliably such a United Nations-based response system operates, the more confidence there will be in the capacity of the United Nations to provide a credible multilateral alternative. This would also help to deter or dissuade potential perpetrators of such crimes and violations.²⁹

The last sentence points to an important issue. Just as the criminal justice system is a necessary component of our societies at the national level, so it is necessary to develop a similar system at the international level.

This brings to the forefront the role of the international criminal justice system. According to Art. 13 (b) of the Rome Statute of the International Criminal Court (ICC),³⁰ the Court may exercise its jurisdiction with respect to a crime referred to in Art. 5 in accordance with the provisions of the Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the UN.

This means that the Council should always keep this option in mind. In this analysis it should be remembered that it is likely that the evidence might lead the Prosecutor to persons in very high positions at the national level, including the Head of State or Government. If the evidence leads in this direction, it is precisely persons at this level who should be brought to justice before the ICC. But then the process needs to be supported by the Security Council. This has not materialized in the cases of Libya and Sudan.

29 UNGA 'Implementing the Responsibility to Protect: Report of the Secretary-General' (12 January 2009) UN Doc. A/63/677, at para 66.

30 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

As I have developed in an address concerning international prosecution of Heads of State for genocide, war crimes and crimes against humanity, the possibility of bringing officials at the level of Head of State or Government to justice at the international level is a necessary ingredient in a rules-based international society.³¹ It is at this level that the principal standards applied in conflicts where international crimes may be committed are set, and it is at this level that the overriding orders are given.

If the officials who bear the greatest responsibility for international crimes committed in a particular situation are not brought to justice, this constitutes a clear risk not only for a continuation of the conflict at hand, but also for new conflicts in the future.

It is important that the Security Council lives up to its obligations with respect to responsibility to protect and to peacekeeping in general. In this context one should mention Secretary-General António Guterres' Action for Peacekeeping (A4P) initiative in September 2018.³² Here, the Secretary-General called on Member States, the Security Council, host countries, troop- and police-contributing countries, regional partners and financial contributors to renew their collective engagement with UN peacekeeping and mutually commit to reach for excellence. The A4P is presently supported by 151 countries.

VII Empowerment of Women

Empowerment of women is one of the most central issues for the future. Although this continues to be a sensitive issue in some countries, the 1979 Convention on the Elimination of All Forms of Discrimination against Women now has 189 parties.³³ A comparison with the UN which currently has 193 Member States is telling.

It is obvious that in the modern world women must be allowed to participate in governance³⁴ as well as in family planning. This should be in the interest of all States. And since there is a direct correlation between the standing of

31 H. Corell, 'Challenges for the International Criminal Court' (Winter 2014) International Judicial Monitor, available at http://www.judicialmonitor.org/archive_winter2014/specialreport1.html (accessed 12 April 2019).

32 See <https://peacekeeping.un.org/en/action-for-peacekeeping-a4p> (accessed 12 April 2019).

33 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

34 Note in this context Art. 21 of the Universal Declaration of Human Rights, UNGA Res 217 A (III) (10 December 1948).

the women in a society and the level of development in that society, States that are lagging behind in this respect will suffer in the long run. There is no doubt that countries that are lagging behind in this effort will also constitute 'threat multipliers' with respect to peace and security.

For the Security Council, the focus has been on women, peace and security since the Council started regular consideration of this agenda item in 2000, the same year that the Council adopted its famous Resolution 1325 (2000). The two main purposes of this Resolution is to protect women and children affected by armed conflict, and to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict.

Over the years the Council has discussed many issues related to women: gender and sexual violence in armed conflict; human trafficking; forced marriage; reproductive rights; sexual slavery; kidnappings; and accountability for perpetrators.³⁵ The Council also holds yearly open debates to address the obstacles to the implementation of Resolution 1325 (2000), and the Council increasingly refers to women, peace and security-related issues under multiple items of its agenda.³⁶

The latest open debate on that topic was held on 25 October 2018. The minutes from that meeting are alarming reading.³⁷ The UN head of the entity responsible for gender equality warned of 'systemic failure' to integrate women into such critical processes as peacekeeping, mediation and peace negotiations. According to UN Women, the entity dedicated to gender equality and the empowerment of women and a global champion for women and girls,³⁸ only 2 per cent of mediators, 8 per cent of negotiators and 5 per cent of witnesses and signatories to major peace processes between 1990 and 2017 were women.

Secretary-General António Guterres, in his remarks to the Security Council Open Debate on Women, Peace and Security of 25 October 2018, pointed out that the UN is placing the women, peace and security agenda at the heart of its partnerships with regional organizations. He noted that the participation of women in formal peace processes remains extremely limited and conflicts continue to have a devastating impact on women and girls around the globe.

35 See Repertoire of the Practice of the Security Council/Agenda Items/Thematic Items/Women and Peace and Security, available at <https://www.un.org/securitycouncil/content/repertoire/thematic-items> (accessed 12 April 2019).

36 See e.g. Repertoire of the Practice of the Security Council, 20th Supplement (2016–2017).

37 See UNSC 8382nd Meeting (25 October 2018) UN Doc. S/PV.8382 and Press Release 'UN Gender Equality Chief Briefs Security Council' (25 October 2018) UN Doc. SC/13554.

38 See <http://www.unwomen.org/en/about-us> (accessed 12 April 2019).

Noting that recent data once again reveal the strong link between gender equality and peace, he emphasized: ‘There is a significant gap between what we say in this chamber and what we do outside’.

In the UN Secretariat, special efforts are made to contribute to the protection of women. The Office on Genocide Prevention and the Responsibility to Protect with the two Special Advisers should be mentioned in this context. There is also the Office of the Special Representative of the Secretary-General for Children and Armed Conflict and the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict.³⁹

The Informal Expert Group (IEG) on Women, Peace and Security, the first official Security Council Working Group on this topic should also be mentioned. It was created in 2016 pursuant to Security Council Resolution 2242 (2015).⁴⁰

An interesting development after 2017 is the establishment of the African Women Leaders Network with its New York Group of Friends of the Network with the aim of mobilizing support for action from UN Member States. The group is co-chaired by Ghana and Germany and has approximately 40 members from Africa, Asia, Europe and Latin America.⁴¹

It goes without saying that these efforts to empower and protect women must continue with determination since this is of great importance to the mandate conferred on the Council by Art. 24 of the Charter: the primary responsibility for the maintenance of international peace and security.

VIII Nuclear Disarmament

1 *The Lack of Progress in Nuclear Disarmament*

Another very serious matter is the lack of progress in nuclear disarmament. I have addressed this question in the past.⁴² It is true that we now have the Treaty

39 See under ‘Special Advisers, Representatives and Envoys’ at <http://www.un.org/en/sections/about-un/secretariat/> (accessed 12 April 2019).

40 See UNSC ‘Guidelines for the Informal Expert Group on Women and Peace and Security’ (22 December 2016) UN Doc. S/2016/1106 Annex and PeaceWomen ‘The 2242 Informal Expert Group on WPS’, available at <https://www.peacewomen.org/node/96169> (accessed 12 April 2019).

41 See UNSC ‘Strengthening the Partnership between the United Nations and the African Union on Issues of Peace and Security in Africa, Including on the Work of the United Nations Office to the African Union: Report of the Secretary-General (6 July 2018) UN Doc. S/2018/678, at para. 9.

42 H. Corell, ‘Is It Possible to Outlaw Nuclear Arms?’ in Special Edition: Now Is the Time to Prohibit Nuclear Weapons! (February 2010) 120 *Läkare mot Kärnvapen* 6, available at

on the Prohibition of Nuclear Weapons,⁴³ adopted on 7 July 2017 by the UN conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination. The voting result was 122 States in favour, one vote against and one abstention. It was opened for signature by the Secretary-General on 20 September 2017, and it will enter into force 90 days after the fiftieth instrument of ratification, acceptance, approval or accession has been deposited. There are presently (12 April 2019) 70 signatories and 23 parties to the treaty.

As I argued in my 2010 article, there is certainly a need for this treaty, and its adoption is a very important development. There is no doubt about that.

However, there is a great problem of a legal nature here. None of the nuclear powers have endorsed the treaty, and no NATO country voted for it. In the preamble to the treaty, there are clear references to both the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT),⁴⁴ which is described as the cornerstone of the nuclear disarmament and non-proliferation regime, and which has a vital role to play in promoting international peace and security, and to the vital importance of the 1996 Comprehensive Nuclear-Test-Ban Treaty⁴⁵ and its verification regime as a core element of the nuclear disarmament and non-proliferation regime.

Even if it is a great success that there is now a treaty that prohibits nuclear weapons, a realistic assessment leads to the conclusion that it is extremely important that the nuclear powers fulfil their obligations under the NPT. Only when an elimination of the nuclear weapons according to this agreement is a reality will there be a general acceptance of the Treaty on the Prohibition of Nuclear Weapons.

The NPT recognizes five nuclear States: France, China, the Russian Federation, the UK and the US—in other words, the five permanent members of the Security Council. But as we know, there are more States that possess nuclear arms: India, Israel, Pakistan and now also North Korea. Here it should be noted that the next Review Conference of the NPT Treaty will be held in 2020. The Preparatory Committee for the Conference is scheduled to hold its third session from 29 April to 10 May 2019 at the UN Headquarters in New York. It is

<http://slmk.org/wp-content/uploads/Lakare-mot-Karnvapen-120-ENG.pdf> (accessed 12 April 2019).

43 Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, not yet entered into force) UN Doc. A/CONF.229/2017/8.

44 Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161.

45 Comprehensive Nuclear-Test-Ban Treaty (adopted 10 September 1996, not yet entered into force) GAOR 50th Session Supp 49, 14.

extremely important that this process can be led in a positive direction after the setbacks during later years.

One problem in this context is that most nuclear States believe that the Treaty on the Prohibition of Nuclear Weapons undermines the legal order based on the NPT. An additional great concern is that these States have begun to modernize their nuclear arsenals or claim that they intend to do so.

As is well known, on 8 July 1996, the International Court of Justice delivered an Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.⁴⁶ The following clauses are of particular interest in the present situation:

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;

F. Unanimously,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.⁴⁷

In view of the fact that the nuclear-weapon States have not honoured this obligation and in view of what we now know of the effects of the use of nuclear weapons the question is if the proportionality principle that must be observed also under the law of self-defence can be respected. Is it under any circumstances possible to use nuclear arms without violating the principles and rules of humanitarian law? When using nuclear arms, is it at all possible to make a distinction between combatants and non-combatants? Is it legal to use weapons that are incapable of distinguishing between civilian and military targets?

Against this background maybe the General Assembly should request a second opinion from the International Court of Justice.

⁴⁶ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

⁴⁷ *Ibid.*, at para. 105.

In conclusion it can be said that it is a success that there is now a treaty prohibiting nuclear weapons. But what is required now is that the nuclear-weapon States—the five permanent members of the Security Council—confirm their obligations under the NPT and make serious their obligation to work for a nuclear-weapon free world. It is obvious that all States that possess nuclear weapons must participate here.

2 *The Joint Comprehensive Plan of Action (JCPOA)*

Another problem related to the Security Council is the fact that the US has left the comprehensive, long-term solution to the Iranian nuclear issue, culminating in the Joint Comprehensive Plan of Action (JCPOA) concluded on 14 July 2015.⁴⁸ In this situation it is important to look at the JCPOA and Security Council Resolution 2231 (2015) and its Annexes A and B from the viewpoint of the UN Charter.

The Resolution is of course unique in many senses. An important point of departure is that the JCPOA was negotiated with the participation of the five permanent members of the Security Council. Furthermore, there are several references in the JCPOA that clearly indicate that an endorsement by the UN Security Council is a necessary requirement for the execution of the JCPOA.

Of utmost importance is the reference in the Resolution to Art. 25 of the UN Charter, which indicates that the purpose of the Resolution is to put an obligation on all UN members. The fact that the resolution is adopted under Chapter VII of the Charter should also be seen as an outflow of the obligations that fall upon the Security Council under Arts 24 and 39 of the Charter. The imperatives in the provisions must be noted in particular.

Against this background and considering the history behind the JCPOA, one must question whether the States that concluded the agreement can withdraw from it. However, even if a State that is a party to the JCPOA could withdraw from the agreement as such, this State would still be bound by the obligations on all States laid down in the Resolution. I refer in particular to operative paragraphs 2 and 26 of Resolution 2231, which read:

2. *Calls upon* all Members States, regional organizations and international organizations to take such actions as may be appropriate to support the implementation of the JCPOA, including by taking actions commensurate with the implementation plan set out in the JCPOA and this resolution

⁴⁸ Joint Comprehensive Plan of Action (concluded on 14 July 2015) UN Doc. S/2015/544, as attached as Annex A to UNSC Res 2231 (2015).

and by refraining from actions that undermine implementation of commitments under the JCPOA;

[...]

26. *Urges* all States, relevant United Nations bodies and other interested parties, to cooperate fully with the Security Council in its exercise of the tasks related to this resolution, in particular by supplying any information at their disposal on the implementation of the measures in this resolution.

On 19 June 2018, the International Association Of Lawyers Against Nuclear Arms (IALANA) suggested that governments should consider requesting the International Court of Justice to render an Advisory Opinion on the legal consequences of Resolution 2231 and the JCPOA. In so doing, they made a reference to a 1971 Advisory Opinion in which the International Court of Justice:

taking into account ‘all circumstances’, held legally binding a provision of a Security Council resolution which provision ‘calls upon all States’ to refrain from acts inconsistent with the Council’s determination that ‘the continued presence of the South African authorities in Namibia is illegal’. Similarly here, under all the circumstances, paras. 2 and 26 of Resolution 2231 are legally binding directives of the Security Council.⁴⁹

It is also difficult to understand operative paragraph 27 of Resolution 2231. This provision is more or less a quote from paragraph xi in the Preamble of the JCPOA. One wonders what the analysis behind this provision is, since the effects of a conduct in accordance with the Resolution will have direct consequences for all States also to the extent that they are bound by the earlier Resolutions adopted by the Council.

Furthermore, the manner in which China, France, Germany, the Russian Federation, the UK, the US and the EU note in Resolution 2231 Annex B their understanding of the situation after the adoption of a resolution endorsing the JCPOA is significant. Their understanding is that the Security Council would make the practical arrangements to undertake directly the tasks specified in their statement,

⁴⁹ IALANA ‘Nuclear Crossroads: The Urgent Need for Action to Prevent Catastrophe’ (19 June 2018), referring to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16.

including to monitor and take action to support the implementation by Member States of these provisions, review proposals described in paragraph 2 of this statement, answer inquiries from Member States, provide guidance, and examine information regarding alleged actions inconsistent with the resolution.⁵⁰

Taking all this into consideration, one can actually question whether the US withdrawal from the JCPOA is legal after the endorsement of the agreement by the Security Council. I refer here to paragraphs 28 and 29 in Annex A. Under all circumstances, the US is bound by the Resolution in the same manner as all UN Member States are bound by it. If they do not agree, maybe paragraphs 36 and 37 might offer an opportunity to find a solution of the problems generated by the behaviour of the US. Under all circumstances the question must be asked if this behaviour by a permanent member of the Security Council and a State under the rule of law is acceptable.

It is also interesting to note that the remaining parties to the JCPOA that are also members of the Joint Commission of the JCPOA, are of the opinion that preserving the nuclear deal is in the security interest of all, see the Statement from the Joint Commission of the Joint Comprehensive Plan of Action of 6 July 2018.⁵¹

IX Cooperation between the Security Council and Regional Organizations

Cooperation between the Security Council and regional organizations is a matter that is given great attention within the UN. The focus is on cooperation between the UN and regional and sub-regional organizations in the prevention and resolution of conflicts. These organizations have an important role to play in conformity with Chapter VIII of the UN Charter.

Over the years there have been contacts, meetings and discussions with organizations like the African Union (AU), the Organization for Security and Cooperation in Europe (OSCE), the League of Arab States (LAS), the Organization of Islamic Cooperation (OIC), the European Union (EU), the Collective Security Treaty Organization (CSTO), the Shanghai Cooperation Organisation (SCO), and the Commonwealth of Independent States (CIS).

⁵⁰ UNSC Res 2231 (2015) Annex B, at para. 7.

⁵¹ Available at https://eeas.europa.eu/headquarters/headquarters-homepage/48076/statement-joint-commission-joint-comprehensive-plan-action_en (accessed 23 April 2019).

Particular attention has been paid to Africa, where one of the UN local offices is the UN Office to the African Union (UNOAU). An important factor here is that half of the UN peacekeeping operations are currently deployed in Africa.

For many years there have been annual UN–African Union joint consultative meetings on the prevention and management of conflict. An important role is played here by the sub-regional organizations: the Intergovernmental Authority for Development (IGAD), the East African Community (EAC), the Southern African Development Community (SADC), the Economic Community of Central African States (ECCAS), and the Economic Community of West African States (ECOWAS).

One interesting area of this cooperation is in the field rule of law and security institutions and initiatives in this field. The UN Regional Centre for Peace and Disarmament in Africa and the African Union Master Road Map of Practical Steps for Silencing the Guns in Africa by 2020 could be mentioned in this context. The African Union–UN Framework for the Implementation of Agenda 2063 should also be mentioned here.⁵² There is also work going on to establish regional standby forces in Africa.

The Secretary-General regularly issues reports on strengthening the partnership between the UN and the African Union on issues of peace and security in Africa. On 19 April 2017, a Joint UN–African Union Framework for Enhanced Partnership was signed. And on 18 September 2017, the UN and the African Union signed a Memorandum of Understanding on Peacebuilding to strengthen cooperation in support of efforts aimed at peacebuilding and sustaining peace in Africa, taking a concrete step towards the implementation of the Joint UN–African Union Framework for Enhanced Partnership in Peace and Security.

Of particular concern at present are the multifaceted challenges facing West Africa and the Sahel because of the various unresolved conflicts in these regions, the ongoing terrorist activities, trafficking and violent extremism, and the impact of climate change. These are matters on which the UN Office for West Africa (UNOWAS) has to focus. The same applies to the fight against Boko Haram in the Lake Chad Basin area and the humanitarian situation in the region.⁵³

The regional cooperation in a more general perspective is organized in many different ways. There are biennial regional organizations meetings. The discussions focus on topics like local and national mediation, engaging non-State

52 See African Union Commission 'Agenda 2063: the Africa We Want' (April 2015).

53 See Repertoire of the Practice of the Security Council, 20th Supplement (2016–2017) Part 1, at 83–86 and 277–281.

armed groups, mediation of election-related violence, and natural resources mediation. In recent years more attention has been paid to mediation support, which has led to more mediation support capacities within intergovernmental organizations.

The five UN Economic Commissions should also be mentioned in this context. They focus on Europe (UNECE), Asia and the Pacific (UNESCAP), Latin America (ECLAC), Africa (ECA), and Western Asia (UNESCWA).

The Secretary-General has emphasized that regional economic communities and regional mechanisms are often the first to experience the early warning signs of impending conflict and have the most to gain from conflict prevention.⁵⁴ He has also stressed that they are important partners to the UN in promoting dialogue and reconciliation, exercising influence on parties to conflict to ensure the implementation of peace agreements, countering terrorism, preventing violent extremism and addressing migration issues.

But they could also cause problems. Reference is made to what is said under responsibility to protect above. Also the Secretary-General has said that that regional interests and proximity to the parties can complicate conflict prevention and resolution efforts.

With respect to the Security Council it is regularly reiterating its determination to take effective steps to further enhance the relationship between the UN and regional organizations, in particular the African Union, in accordance with Chapter VIII of the UN Charter.

Against this background it is easy to conclude that there is an obvious need for partnership in conflict prevention and peace-making. An important ingredient here is the need for the rule of law and protection of human rights. Another precondition is observance of international humanitarian law.

As a matter of fact, looking at the 17 Sustainable Development Goals there is one thing that must be understood. In order to reach all these goals, one of them must be attained, namely Goal 16:

Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

54 See UNSC 'Strengthening the Partnership between the United Nations and the African Union on Issues of Peace and Security in Africa, Including on the Work of the United Nations Office to the African Union: Report of the Secretary-General (6 July 2018) UN Doc. S/2018/678, at para 54.

Among the targets of this goal are ‘promote the rule of law at the national and international levels’, and ‘substantially reduce corruption and bribery in all its forms’. These are absolutely crucial elements for creating the legal order that is a prerequisite for achieving all the other goals.

It is obvious that one-size-fits-all does not work in conflict prevention and peace-making. However, a common denominator must focus on the establishment of the rule of law and fighting corruption. It is interesting to see that the UN Secretariat has been reorganized in later years to focus on these matters, and also on fighting terrorism and transnational crime.

The question is also how to organize missions in the field. Depending on the situation—whether it is a peacekeeping operation, a peace enforcement operation, or an assistance mission of a different nature—the mission has to be tailored accordingly.

From my personal experience when the UN actually governed Kosovo and East Timor and was responsible for the legislation (through regulations issued by the Special Representative of the Secretary-General after vetting by the Department of Peacekeeping Operations and the UN Office of Legal Affairs) and the administration of justice I know how important it is to have a functioning police and defence force at the national level.

Here it turned out that it was very difficult to quickly establish well-functioning power and authority in these two provinces. Recruitment of police officers, prosecutors and judges is not made in an instant. The vacuum that came about was quickly filled by criminal elements. In such situations there is no other way but to turn to the military to avoid sheer anarchy.

As a matter of fact this has led me to the conclusion that within the State community there should be a common interest that every country has a reasonable armament so that other countries can be confident that order can be maintained there. Police must of course be present with the legal authority to use force to maintain law and order—that is a given. But if the situation becomes so serious that anarchy threatens, one must resort to other means, including assistance from the military. The point of departure must be that the main objective of the armed forces seen in this perspective shall be preventive—that criminals realize that there is no vacuum.

Another lesson in this field is that the personalities involved are able to perform their duties, be it at the national, regional or international level. This is also demonstrated by the analysis of the situations where the UN has exercised its responsibility to protect mentioned above.

At the same time, it is important to note that sometimes the solution can be a regional initiative, rather than that the UN gets involved. The Panel of Eminent

African Personalities in Kenya, appointed by the African Union, is an example. Kofi Annan, Benjamin Mkapa and Graça Machel managed to organize negotiations among two parties: the Government/PNU (President Kibaki) and ODM (Honourable Raila Odinga), which led to the conclusion of the agreement mentioned above and to the adoption of the legislation that was necessary for forming the grand coalition government.

x Concluding Observations

It is obvious that an effective Security Council is a precondition for establishing international peace and security in the future. The UN would be a formidable organization if all its members really followed the Charter. Of particular importance is that the permanent members of the Security Council bow to the law here. Security Council reform is necessary; but at the same time it is fundamental to preserve the Security Council as an executive organ. Too many members would destroy this requirement completely, in particular if additional members are granted veto power.

The hallmark of an executive organ is not that it is 'democratic' in the sense frequently expressed in the debate, but that it is representative.⁵⁵ The task of such an organ within an organization is to perform functions on behalf of all its members, applying rules laid down in the organization's constitution. In so doing, the members of the executive organ must observe those rules strictly and not act in self-interest. In the case of the UN, the rules that its executive organ must apply are laid down in the UN Charter. The Security Council must therefore faithfully apply those rules.

It has frequently been suggested that new members should be added to the Council. The figure eleven has been indicated by several States. If so many members are added, there is a clear risk that the Council becomes inoperable. The enlargement would also not solve the real problem with the Council, namely the conduct of the permanent members. In two of these members there are also major deficiencies with respect to democracy and the rule of law. And a third member has retreated from its leadership; the behaviour of its Head of State has severely affected the administration of an otherwise very competent foreign service.

Against this background and in the short-term perspective, Security Council reform should be limited to the elements suggested in the foregoing, which

55 The latest General Assembly debate on Security Council reform took place on 20 November 2018.

do not require changing even a comma in the UN Charter. However, for this reform to succeed the members of the Council must lead by example. What is needed is statesmanship—statesmen and stateswomen who can look to the horizon and understand that their responsibility extends not only to their own State but to the world community—not only to the present but also to coming generations. As it appears from the foregoing, we are far from this at present.

The permanent five members simply must engage in a profound discussion about their performance and the manner in which the veto power is exercised. Another requirement is that they can agree on how to set the example with respect to the rule of law and human rights. This may take time; but unless these improvements are realized, there is no way that we can create a world where human beings can live in dignity with their human rights preserved.

Furthermore, the members of the Council are fully aware of the risks that the growing world population and climate change entail. The question is whether they properly address these challenges. Spending money and other resources on peace operations that are generated by the inability of the Council to prevent conflict is not acceptable in today's world when we should be focussing on the challenges that will affect all humankind in the future.

With respect to empowerment of women, the matter is on the agenda of the Council, and it is clear that members are aware of the need for improvement in this area.

As regards nuclear disarmament, the obligations under the NPT must be honoured. Only if the permanent members make a serious effort to comply with their obligations will it be possible to bring the other States that possess nuclear arms into the circle.

Finally, with respect to responsibility to protect there is great need for improvement. The issue is clear: we cannot accept in the 21st century that fundamental human rights are violated and that crimes against international humanitarian law are being committed on a large scale without consequences.

Here the situation must be assessed in a broader perspective, including the fact that international criminal law has been developed and that international criminal tribunals have been established, in particular the International Criminal Court operating under the Rome Statute. The Council therefore has a very strong moral obligation to ensure accountability for perpetrators and to respond to the responsibility to protect.

This means that the necessary resources have to be mobilized so that the UN is in a position to act when this is required. It is, however, sad to note that these resources may not materialize in certain situations. The analysis that the Security Council must make will then lead to the sad but inevitable conclusion that the world community is unable to act. If the UN or a UN authorized

arrangement cannot master enough resources to intervene in a credible and responsible manner we ultimately have to face the fact that no coercive action can be taken.

The members of the UN must therefore make a joint effort, including in particular through responsible, credible and even-handed action by the Security Council, to make certain that the system created by the Charter of the UN for the maintenance of international peace and security, including assuring human rights for all human beings, can be effectively upheld.

**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*⁵⁶

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,

⁵⁶ 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.

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]