

Conference Henri Lafontaine

Challenges for a Peaceful World: An Agenda for the XXIst Century

A joint initiative of Uppsala University and Wallonie Bruxelles International

Reforming the United Nations Security Council

Keynote Address by

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This address is also available under “Selected Material” and “United Nations” at <http://www.havc.se>

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Excellencies,
Ladies and gentlemen,

Allow me first to thank the organisers – Uppsala University and Wallonie Bruxelles International – for inviting me to deliver this address at this conference in remembrance of Henri Marie Lafontaine – a professor of international law, a senator in the Belgian legislature for 36 years, and an internationalist who was awarded the Nobel Peace Prize in 1913.

The organisers have asked me to focus specifically on the topic *Reforming the United Nations Security Council*. I am gratified to do so, since reforming the United Nations in a manner that the Organisation can serve the purposes and apply the principles laid down in its Charter of 1945 is a major challenge for creating a peaceful world. A key element, if not the most important component in this effort, is to reform the Security Council.

I will address the topic in three distinct parts:

- the present geopolitical situation, as compared to the situation in 1945;
- the options for reforming the Security Council; and
- the way in which the Charter requires the Council to fulfil the mandate that the members of the United Nations have conferred on it, namely the primary responsibility for the maintenance of international peace and security.

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

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 9,5 billion in 2050.¹

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

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

¹ See <http://www.un.org/en/development/desa/population/publications/trends/wpp2012.shtml>.

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

In those days the international legal system was not as developed as it is today. The progress in this field since then has been significant, notably in areas like human rights and 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 Rome Statute of the International Criminal Court, at present ratified by 122 states.

Although the concept rule of law is not expressly mentioned in the UN Charter, gradually UN members 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 the emphasis on the importance of the rule of law as one of the key elements of conflict prevention, peacekeeping, conflict resolution, and peacebuilding and that justice, including transitional justice, is a fundamental building block of sustainable peace in countries in conflict and post-conflict situations.²

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

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

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

Options for reforming the Security Council

With respect to options for reforming the Security Council let us first recall that the Council from the beginning had eleven members. An amendment to the UN Charter increased the membership to fifteen in 1965, among them the original permanent five 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

² See e.g. General Assembly resolution A/RES/47/1 of 24 September 2012.

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

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 have emphasised in a letter to the members of the United Nations of 10 December 2008, the composition of the Council cannot be completely delinked from the legal aspects of the Charter and the mandates entrusted to the different UN organs.³

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

In 2009, the President of the General Assembly appointed Mr. Zahir Tanin, Permanent Representative of the Islamic Republic of Afghanistan, to chair the intergovernmental negotiations on his behalf – an appointment that has been renewed through the years.

In addition, on 22 October 2013 the President of the General Assembly appointed the following six Permanent Representatives to serve as an Advisory Group to himself, namely the Permanent Representatives of Belgium, Brazil, Liechtenstein, Papua New Guinea, San Marino and Sierra Leone.⁴ Its purpose is to produce a basis for the start of the intergovernmental negotiations including available options.

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

³ *Security Council Reform: Rule of Law More Important Than Additional Members*, available at <http://www.havc.se/res/SelectedMaterial/20081210corelllettertounmembers.pdf>.

⁴ Available at <http://www.un.org/en/ga/president/68/pdf/letters/10222013-Security%20Council%20Reform%20Informals.pdf>.

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

The way in which the Charter requires the Council to fulfil its mandate

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

Allow me to quote from my letter to the UN members of 10 December 2008:

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

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

Consequently, I now once again repeat my proposal 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 the 10 December 2008 letter containing the following four elements:⁵

⁵ The Annex is attached for ease of reference.

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

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 by France introduced by President François Hollande in the debate in the General Assembly on 24 September 2013. Let me quote the following from his statement:

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.⁶

This proposal was further developed by Foreign Minister Laurent Fabius in an article in the New York Times on 4 October. This is what 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

⁶ See <http://www.franceonu.org/france-at-the-united-nations/press-room/statements-at-open-meetings/general-assembly/article/24-september-2013-opening-of-the>.

where the vital national interests of a permanent member of the Council were at stake.⁷

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 permanent five 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.

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

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

The fact that the Security Council established the international war crimes tribunals for the former Yugoslavia and Rwanda and initiated the establishment of the Special Court for Sierra Leone testifies to this. And now we also have the International Criminal Court, established by the 1998 Rome Statute. Under Article 13 b) of the Statute the Council is authorized to refer to the Prosecutor of the ICC situations in which one or more crimes under the Statute appears to have been committed. This option has been used by the Council in two situations: the Sudan and Libya. However, if the Council avails itself of this procedure it is important that the Council also acts in consequence and vigorously supports the ICC. This applies in particular if the evidence in the situation at hand leads the Prosecutor to officials at the highest national level and specifically if arrest warrants are issued.

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

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

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 under the rule of law the only way forward is that international law is applied to all actors objectively and according to the same standards.

⁷ See http://www.nytimes.com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html?smid=tw-share&_r=1&&pagewanted=print.

Conclusions

What then are the conclusions to 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 at that without amendments to the UN Charter.

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

At the same time the discussions on the composition of the Security Council, should continue with a focus on an even more radical reform than is presently contemplated and within the limits of its present size. In these discussions there is need for statesmanship, 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. In the long-term perspective, it would rather be preferable that any changes in the Council's composition are decided when the tendencies in the present geopolitical shift appear more clearly and when there are additional democracies among the members of the United Nations.

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

This approach should be acceptable also to the permanent five members since it would put them in a position to actually deliver. And, again, the question is whether the situation in Syria could have been avoided if the permanent members a few years ago had adopted a strategy along the lines suggested here. If international peace and security is to be ensured for the future, the main responsibility rests on the permanent members of the Security Council. If they fail, there is a clear risk that the UN will lose authority and that the Organisation will be at risk.

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

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

I am fully aware that many states may react negatively to the ideas advanced in this address, 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. By way of example, the fact that Africa does not have such representation is an anomaly.

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 a longtime perspective, thinking of coming generations. The lodestar must be to safeguard the system of collective security in the UN Charter. There is at present a clear risk that political expediency and an almost frantic focus on extending the membership may result in an inoperable Council. If this happens, the damage to the system of collective security will be irreparable.

Thank you for your attention!

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 Council⁸

We, the permanent members of the Security Council,

Mindful of the responsibility of the Security Council under the Charter of the United Nations for the maintenance of international peace and security;

Realizing that the ever present threats to international peace and security are now exacerbated by the effects of climate change in combination with a rapidly growing world population;

Aware of the fact that failure on the part of the Security Council to act in situations where action is obviously required may cause unnecessary human suffering and may tempt others to intervene, including by the use of force, without the required authorization of the of the Council;

Realizing that such actions by others will undermine the respect for the Charter of the United Nations and may in themselves pose a direct threat to international peace and security;

Conscious of the fact that a failure by the members of Security Council to set the example by scrupulously adhering to international law and the Charter of the United Nations will have devastating effects on the efforts to establish the rule of law at the national and international level,

Have agreed to make the following solemn undertaking: [new paragraph] We pledge

- To scrupulously adhere to the obligations under international law that we have undertaken and in particular those laid down in the Charter of the United Nations;

- To make use of our veto power in the Security Council only if our most serious and direct national interests are affected and to explain, in case we do use this power, the reasons for doing so;

- To refrain in our international relations from the threat or use of force against the territorial integrity or political independence of any state unless in self-defence in accordance with Article 51 of the Charter of the United Nations or in accordance with a clear and unambiguous mandate by the Security Council under Chapter VII;

- To take forceful action to intervene in situations when international peace and security are threatened by governments that seriously violate human rights or fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity or when otherwise the responsibility to protect is engaged. [end]

⁸ 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.