

# INTERNATIONAL LAW ASSOCIATION

## UNITED NATIONS REFORM STUDY GROUP

### Informal Reform in the Security Council

Nico Krisch

#### 1. Introduction

Security Council reform is, in both public perception and high-level diplomacy, the centrepiece of efforts at reforming the UN, but also the most intractable reform issue. The most visible efforts, notably in the General Assembly working group on Security Council reform, have focused on issues of membership, resulting in a plethora of concrete proposals, of which in particular the two worked out by the 2004 report of the High Level Panel on Threats, Challenges and Change, taken up by the Secretary-General in his 2005 report, have become focal points of the debate.<sup>1</sup> The 2005 World Summit pursued this by calling for greater representativeness of the Council<sup>2</sup>, but discussion has stalled over the inclusion of new permanent members, their powers, and the extent of a general increase in membership. Because of the vested interests of the current Permanent Members of the Council and their centrality to formal Charter amendments, prospects of reform in this area are very uncertain.<sup>3</sup>

In the shadow of the discussion on membership, Security Council reform has been debated, and has in part proceeded, on a number of other fronts, especially on the Council's working methods and the related issues of participation and transparency. Less the focus of open discussion, but all the more relevant for the practice of the organisation is the far-reaching and continuing change in Security Council powers, which has only recently become the object of broad-based critique. In what follows, this paper will focus on these two areas; it will highlight reform initiatives undertaken so far and sketch prospects and possibilities for further change.

#### 2. Informal Reform in the Security Council

Council reform is an ongoing process, and it depends only in part on formal Charter amendments. The limits of informal change are indeed few, as has been shown, for example, in the redefinition of Article 27(3)'s treatment of abstention by permanent members in the early practice of the Council, and later ratified by the International Court of Justice.<sup>4</sup> Charter language has likewise not prevented change in the delimitation of powers

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<sup>1</sup> High Level Panel on Threat, Challenges and Change, *A more secure world*, 2004, <http://www.un.org/secureworld/>, paras. 250-256; UN Secretary-General, *In larger freedom*, 2005, <http://www.un.org/largerfreedom/>, para. 170.

<sup>2</sup> *World Summit Outcome*, GA Res. 60/1 of 24 October 2005, UN Doc. A/RES/60/1, para. 153.

<sup>3</sup> For an overview of the divergent positions, see the paper by the Chair of the Intergovernmental Negotiations on Security Council Reform of 10 May 2010, <http://www.un.org/ga/president/64/issues/screform100510.pdf>.

<sup>4</sup> ICJ, Advisory Opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, paras. 21-22.

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between the Council and the General Assembly, with the latter slowly eroding the limitations of Article 12; another change eventually sanctioned by the ICJ.<sup>5</sup> But if textual limits in the Charter may not exclude even far-reaching reform, they may serve as focal points of political resistance and render change more difficult, especially on organisational issues where the rules are relatively clear, and on issues that do not lend themselves to slow, incremental change.

The extension of Security Council powers since 1990 is an example of how incremental change can lead to large-scale reform through practice. Since then, the Council has expanded the notion of “threat to the peace” to use its enforcement powers in internal conflicts, against serious human rights abuses and the deposition of elected governments. It has come to interpret its power to enact non-military measures as including the creation of criminal tribunals and other investigating bodies, of commissions to demarcate boundaries, of territorial administration by the UN; and it has come to target non-state groups and individuals rather than states through its increasingly detailed sanctions regimes.<sup>6</sup> And while some of its actions were disputed at the time of their adoption, today the general power of the Council to use such measures is no longer contested in a significant way. In particular crises, principled critique has been overcome by the desire (and pressure) to take immediate action, and as the extended powers were used repeatedly in such crises, the power of precedent grew and space for sustained opposition dwindled.

Contestation has moved to more recent attempts by the Council at expanding its powers, namely its attempts at “legislating” and at considering topics outside the narrower area of peace and security, such as AIDS and climate change. Especially developing countries see these as encroaching upon prerogatives of the General Assembly and are suspicious of the further empowerment such a shift would bring for the permanent members. Most vocally with respect to a debate the Council convened on Climate Change in April 2007, both the G-77 and the NAM issued statements deploring the transgression of Council powers, and many states, including China and Russia, expressed similar concerns in the debate.<sup>7</sup> Likewise, a significant number of states have expressed principled criticism of the Council’s recent assumption of “legislative” powers by creating general obligations independently of a particular conflict, as it has done as regards terrorism and the proliferation of nuclear weapons.<sup>8</sup> With respect to SC resolution 1540 (2004) on non-proliferation, a large number of countries raised concerns about the legislative role of the Council, pointing out (among other things) that it “could disrupt the balance of powers between the General Assembly

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<sup>5</sup> ICJ, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 27-28.

<sup>6</sup> See only Jochen A. Frowein & Nico Krisch, ‘Chapter VII of the Charter’, in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary*, Oxford: Oxford University Press, 2<sup>nd</sup> ed., 2002, 722-726, 740-745, 714-716.

<sup>7</sup> See Thalif Deen, ‘Security Council Accused of Overstepping Bounds’, *Inter Press Service*, 12 April 2007, <http://www.globalpolicy.org/reform/topics/general/2007/0412bounds.htm>; for the debate in the Council, see UN Doc. S/PV.5663 and S/PV.5663 (Resumption 1) of 17 April 2007.

<sup>8</sup> SC Res. 1373 (2001); 1540 (2004); S/PV.4950 and S/PV.4950 (Resumption 1) of 22 April 2004; S/PV.4956 of 28 April 2004.

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and the Security Council, as enshrined in the Charter.”<sup>9</sup> Unlike previous instances of expanding powers, such broader initiatives are likely to provoke significant opposition because they cannot be framed as easily as an indispensable, quick response to a particular conflict from the only organ capable of action, and because the general character of the obligations affects all states and thus helps mobilise greater resistance.

The second important area of Council reform through practice is its working methods and procedure.<sup>10</sup> Efforts at making the Council’s work more transparent and participatory gathered pace in the early 1990s, in response to the much increased, though largely secretive, activity of the Council after the end of the Cold War. Unsurprisingly, it was shortly after the General Assembly established its working group on Security Council reform that the Council began serious work on procedural issues to regain some legitimacy. Among the broader membership, unease grew over the dominance of informal (and closed) consultations rather than open meetings, over the lack of timely information on initiatives in the Council, and over the lack of input into the Council’s work even by member states particularly affected by its decisions. The Council’s responses ranged from listing its informal consultations in the UN’s daily journal to open briefings about the outcome of its closed sessions, the circulation of draft resolutions before informal consideration, invitations for troop-contributing countries to take part in open Council meetings, and informal meetings with NGOs.<sup>11</sup> However, those measures did not remedy the membership’s unease, and the 2005 World Summit raised pressure by recommending that the Council

...continue to adapt its working methods so as to increase the involvement of States not members of the Council in its work, as appropriate, enhance its accountability to the membership and increase the transparency of its work.<sup>12</sup>

Furthermore, in early 2006, a group of small states (the “S5”) tabled a draft resolution in the GA proposing concrete measures.<sup>13</sup> In response, the SC strengthened its working group on working methods and in July 2006 agreed to consolidate and improve upon its practices, in part by stronger recourse to open and private meetings (open to UN member states) instead of informal consultations.<sup>14</sup> While positively received, this move is unlikely to satisfy critics, partly because it has led to crucial discussions being conducted even prior

<sup>9</sup> S/PV.4950 of 22 April 2004, p.32 (India).

<sup>10</sup> Useful summaries can be found in Security Council Report, *Security Council Transparency, Legitimacy and Effectiveness: Efforts to Reform Council Working Methods 1993-2007*, October 2007, at <http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.3506555/>; Security Council Report, *Security Council Working Methods – A Work in Progress?*, 30 March 2010, <http://www.securitycouncilreport.org/site/?c=glKWLeMTIsG&b=5906427>; J.S. Lund, ‘Reforming the Working Methods of the Security Council’, Center for UN Reform, 18 November 2009, <http://www.centerforunreform.org/node/412>.

<sup>11</sup> See also Susan C. Hulton, ‘Council Working Methods and Procedure’, in Malone (ed.), *The UN Security Council: From the Cold War to the 21<sup>st</sup> Century*, Boulder, London: Lynne Rienner Publishers, 2004, 237-251.

<sup>12</sup> See supra fn. 2, para. 154.

<sup>13</sup> UN Doc. A/60/L.49 of 17 March 2006.

<sup>14</sup> UN Doc. S/2006/507 of 19 July 2006.

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to informal consultations, in expert meetings or meetings of “Groups of Friends” (groups of states with a particular interest in a given situation or conflict). Moreover, in the eyes of many, implementation of the agreed-upon reforms on working methods has been slow and incomplete. The S5 have presented a further proposal in 2009, and in open meetings of the Council on the issue in 2008 and 2010 many states continued to voice dissatisfaction with the progress achieved so far.<sup>15</sup> However, the SC’s moves show that the Council seeks to improve its standing and legitimacy and that, as a result, it is ready to respond to sustained and broadly-based challenges, as it has also done in reaction to human-rights critiques of its sanctions administration – an issue taken up in Vera Gowlland’s contribution to the present report. Such changes also show that enhancing representativeness and broader participation in the Council does not necessarily have to wait for an agreement on membership reform and consequent Charter amendment, but that there may be space for more informal improvement.

### 3. Prospects for Future Reform through Practice

Future reform of the Council, in whatever form, will have to be measured against normative standards adequate to the body’s changed, and varied, functions. Effectiveness was preferred to broader representativeness when the SC was created, on the grounds that it was to perform mainly a police function: silencing the guns and leaving the political or legal resolution of a conflict to others.<sup>16</sup> The Council’s forays into dispute resolution, judicial functions and legislation, and into areas quite beyond the confines of particular conflicts, certainly challenge this initial rationale and require a rethinking of the normative framework beyond attempts merely to bring SC membership into line with the changed geopolitical circumstances of the 21<sup>st</sup> century as compared to 1945.<sup>17</sup> The broader the functions are that the Council performs, the stronger will be demands for a broader, more representative composition as well as greater transparency and accountability to the UN membership as a whole.

While this may eventually require changes in membership and thus a Charter amendment, many steps can be taken below this level. As pointed out above, most decision-making in the Council takes place outside the Council chamber, in informal settings or subsidiary bodies, and efforts at reform through practice should focus on these, rather than on the workings of the Council in open sessions. In many conflicts, for example, Groups of Friends have played a central role in formulating Council policy, and these groups have included Council members as well as non-members. Criticised for the obscure selection of members and their lack of transparency, in a reformed shape they may however be a way for giving a broader membership, perhaps selected by the General Assembly, input into decisions that,

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<sup>15</sup> See UN Doc. S/PV.5968 of 27 August 2008; S/PV.6300 of 22 April 2010. See also the acknowledgment of dissatisfaction by the Japanese Council presidency, S/2010/165 of 5 April 2010.

<sup>16</sup> See Frowein & Krisch, *supra* fn. 6, 705-706.

<sup>17</sup> See Martti Koskenniemi, ‘The Police in the Temple – Order, Justice and the UN: A Dialectical View’, *European Journal of International Law* 6 (1995), 325-348.

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for reasons of efficacy and speed, can hardly involve the Assembly as such.<sup>18</sup> Likewise, for subsidiary organs of the Council, such as the Sanctions Committees, a broader membership may be a useful tool to increase transparency and accountability to non-Council members.<sup>19</sup> This could follow the model of the Peacebuilding Commission, with its complex balance between the GA and the SC in selecting members. The risk of formalizing and expanding such bodies is, of course, that decision-making will move once again to other, more informal arenas. Yet such moves are themselves constrained by the need to defend the precarious legitimacy of the Council.

As the need for greater inclusiveness rises with the breadth of the functions performed, it may be useful to differentiate between different types of issues. Where decision-making in a particular conflict is at stake, limited input of the GA in a preparatory body of the Council, such as a Group of Friends, may be workable. Where broader policy and law-making functions are performed, as for example in the area of terrorism or arms proliferation, the Council has already given non-members a stronger voice<sup>20</sup>, but probably the GA's participation should take place on a yet more equal footing. This may be seen, by those claiming those functions to be the domain of the GA entirely, as legitimating the Council's encroachment of other organs' powers. However, given that the SC is the only organ with strong decision-making and enforcement powers, a gradual expansion of its functions is probably inevitable, unless other well-functioning bodies with binding powers are created. It may thus be more promising to pursue models of cooperative decision-making between the SC and the GA than to try to uphold a separation-of-powers model that has long been eroded from both sides.

One issue on which there has been little movement in the discussions over Security Council reform is that of the veto. Central to public debates about the legitimacy of the SC, attempts at weakening the veto for existing permanent members have provoked such resistance among them that formal changes are very unlikely; the veto also fulfills important functions, as it provides a constraint for a body with otherwise hardly limited powers and prevents the SC becoming a tool in a great power conflict. Proposals below the level of formal abolition or change include commitments of the permanent members not to use the veto in particular circumstances (such as genocide and serious violations of international humanitarian law); but because the qualification of the situation will often be contested, and the choice of means to remedy it will never be obvious, this is unlikely to prove successful. More promising appears the suggestion that the use of the veto should be justified publicly and in written form.<sup>21</sup> Even if this may not reveal the true motives and may lead to empty rhetoric, it may also force the permanent members into a hypocrisy with at least some civilising force.<sup>22</sup> But as the veto is today mostly used informally, prior to

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<sup>18</sup> On Groups of Friends, see Jochen Prantl, *The UN Security Council and Informal Groups of States*, Oxford: Oxford University Press, 2006.

<sup>19</sup> See also the (limited) proposals by the S5, *supra* fn. 13.

<sup>20</sup> See, for example, Stefan Talmon, 'The Security Council as World Legislature', *AJIL* 99 (2005), 175-193, at 186-188.

<sup>21</sup> See the S5 proposal, *supra* fn. 13.

<sup>22</sup> On that effect of hypocrisy, see Jon Elster, 'Deliberation and Constitution Making', in Jon Elster (ed.), *Deliberative Democracy*, 1998, 97-122, at 111.

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open meetings (and precisely to avoid particular proposals being tabled)<sup>23</sup>, the reach of such a requirement of justification will, again, be limited.

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<sup>23</sup> See Céline Nahory, 'The Hidden Veto', Global Policy Forum, May 2004, <http://globalpolicy.igc.org/security/veto/2004/0519hiddenveto.htm>.