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“The Future of the United Nations”

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MICHAEL REISMAN: I would like to thank the President of the General Assembly who has apologized that he has to run to other engagements. We will continue with the schedule. I have been invited by the organizers of this timely conference to reflect on the issues that were considered yesterday in our off the record conference, and more generally on the larger subject of inquiry that has brought us all here today.

I'm afraid that I will be somewhat more critical and less inspiring than the previous speakers, but I should start by saying that the title of our conference is The Future of the United Nations, and I have no doubt that the United Nations has a future and that the United Nations will be in our future.

Those who have studied the United Nations for years as some of you in the audience have, will appreciate that this organization which was designed to deal with crisis, has often found itself in crisis. And it has proved to be resilient and to respond to the challenges that have been presented to it, precisely because there is a compelling need in the modern world for an organization such as the United Nations.

Each of the crises has been accompanied by the demands for structural change or for reform. Now in modern bureaucracies, in the United States Federal Government for example, if you want to push an item forward and cut through the usual bureaucratic restraints, you use a technique that is used as securitizing.

If you have to send 10,000 blankets to Somalia and you know that it's going to take months to get something like that through the bureaucracy, you identify the

request as a matter of national security. And that moves things forward much more quickly.

I think that in international organizations there is probably a comparable technique which we might call crisis-izing, by raising to crisis levels certain problems, in some cases, that may not be structural, but my in fact derive from serious mistakes by those who had managerial or policy responsibility. Or, in the United Nations, by governments that failed to show the courage or the perception to do what was necessary to do.

And in many of these circumstances, rather than taking personal responsibility and making the changes or in some cases applying criminal law, it is easier to identify the problem as systemic and to state that it occurred because there was some failure in the structure of the organization, and therefore we need to revise the organization and create one more –

FEMALE VOICE: [Inaudible – off microphone]

MR. REISMAN: Mr. Lateef, do you by chance have a hand microphone that might be more effective?

FEMALE VOICE: It's working now.

MR. REISMAN: Is this better? The point that I was making was that before we become extremely concerned or even hysterical, it is appropriate to look at some of these problems in historical perspective and to appreciate that we may be going through a phenomenon that is quite familiar. And that I want to emphasize again that while I don't minimize the challenges that are currently being faced, I have every certainty that the United Nations has a future and it will be in our future.

The United Nations charter is a political and a legal document. Now, though we tend to mythologize law and to assume that it has a majestic neutrality, the fact of the matter is that every legal arrangement is essentially struck in political bargains and so it discriminates in favor of some and against others. It indulges some and either deprives or indulges less others.

And that means that every legal arrangement, the moment it is struck, already generates a testing and a stress and an opposition that demands change for it. This is part of the dynamism of law that lawyers and politicians are familiar with, but that we often overlook when we speak generally about law, ascribing to it an almost natural or permanent quality.

This is exactly what happened with the United Nations charter. It was a political document as Mr. Steven Schlessinger [phonetic] will be explaining in a while. It was struck in a complex political process in which both power, interdependence and notions of authority played a role. The ink was scarcely dry when agitation

for adjustment in this section or that section began. And it has persisted until this time.

The crisis that precipitated the high level report, however, was a different magnitude. After the attacks on 9/11, the United States to some extent drawing on some theories that had been available in previous national security documents issued by presidents, the United States said that henceforth it would reserve to itself a right in the war against terror to both anticipatory and preemptive attack.

This was based on the notion that there was no real defense against the type of terrorism that the United States faced and that the only way to operate was to constantly be on the offensive as a way of keeping the adversary off balance.

Now, this is not consistent with the United Nations charter. Article 51 of the charter which reserved to states one window of action, the use of military force when under attack said that the contingency for that use of military force in self defense was an armed attack. And an armed attack is an attack that has been accomplished. It's one that's objectively verifiable.

You will find tank tracks crossing the border, you will find spent shells, you will find destroyed villages. These are all evidence of armed attack and these justify a military response without the approval of the Security Council.

The United States was asking for something else. And although the invasion of Afghanistan received the approval of the security council and as a result, deferred the question of whether or not the United States' claim could be accommodated through the United Nations charter.

It was not long before the test came and that was the United States' insistence on the invasion of Iraq. This could not be justified on the basis of an armed attack as it was justified in 1991, because there was none. It had to be justified on the basis of a theory of either anticipatory or preemptive self defense, both of which elements were raised in the justifications presented by the United States.

The Security Council as we all know, did not approve the United States. The United States proceeded on the theory that it did not need an additional Security Council approval, but an acute crisis was presented to the organization. A crisis largely based on the demand of the United States to provide for its security by a set of anticipatory techniques that were not contemplated by the charter.

To deal with this, the Secretary General convened and commissioned the High Level Panel. And it's important that we not forget that. If you look at the terms of reference that the Secretary General issued when he created the High Level Panel, you will find that they deal essentially with security; with collective security again and again.

The aim of the High Level Panel on threats, challenges and change is to recommend clear and practical measures for ensuring effective collective action

based upon a rigorous analysis of future threats to peace and security. An appraisal of the contribution collective action can make and a thorough assessment of existing approaches instruments and mechanisms.

The High Level Panel, as Mr. Orr explained earlier took account of the demands of all the actors of the United Nations, and that is appropriate in a complex political process. But before we look at some of the other recommendations, I think it's important to go to the critical issue for which the High Level Panel was initially convened.

And we should appreciate just how serious this is. This is an international organization which was designed genetically to prevent conflicts between the organization and one of the major members, or permanent members as they're referred to in the charter. The veto power was a critical feature that ensured that.

There have been circumstances in which the organization found itself ranged against a permanent member. For example, in 1962 when the Soviet Union indicated that it would not pay for actions conducted under the authority of the General Assembly, essentially supported by the United States, and as a result it was going to fall into arrears and lose its vote in the General Assembly.

The International Court in an advisory opinion upheld the position espoused by the United States, which was one of assembly authority. And the Soviet Union indicated it would not comply.

The organization blinked. The issue was brushed away because a confrontation between the Soviet Union at that time and the organization would have been intolerable. And this was the problem. The nature of the problem that was presented for the High Level Panel.

Now, the High Level Panel made a considerable concession to the United States. Article 51 as I've said did not accommodate the demand that the United States was making. The High Level Panel said, "A threatened state according to long established international law can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate."

In other words, armed attack is not the only contingency. This did not go as far as the United States claimed in its National Security statements, but it went far beyond the language of the charter. And this was an effort to reach that accommodation.

Now, as part of this complex package however, many other issues were taken up. And I'd like very briefly to touch on some of them before we move to a panel discussion of many of the others.

The High Level Panel stated that the principal of non-intervention in the domestic affairs of states, which had been a cardinal principal of the charter regime, had to

yield in cases of severe human rights violations, but it did not acknowledge the right of individual action by states.

The Security Council, given its composition and in particular given the diversity of viewpoint of the permanent members that I will not be impolitic and go be more explicit, does not always respond to humanitarian crises. In many circumstances, particularly those requiring effective military action, the reaction to humanitarian crises must be by unilateral action.

The High Level Panel, while saying that the domestic jurisdiction bar can no longer act as a protection for serious violations of human right, now says that the Security Council must do it, and also lays out a set of guidelines which by chance could apply to unilateral action. So here also a careful reading of the High Level Panel represents a movement in favor of serious deficiency in the original conception of the charter.

Finally, let me talk about the Security Council. The issue of its revision. Article 23 of the charter established a council of 11 members with five permanent members, essentially the victors in the Second World War, and those who had designed the United Nations charter. It allowed for the election at two-year intervals for two-year terms of six other members. And Article 23 of the charter spelled out the criteria were supposed to govern the selection by the General Assembly of those of its members who would have a two-year term.

Let me read the very last part of Article 23 to you, because it's quite instructive since it represents a prioritization of at least what the designers thought was the appropriate criteria for selection for a non-permanent post in the Security Council: "Due regard shall be paid in the first instance to the contribution of members of the United Nations to the maintenance of international peace and security, and to the other purposes of the organization. And also to equitable geographical distribution."

Notice the priority. The priority is the effectiveness of the participation, which is related to contribution, and then secondly is the insofar as possible, also to equitable geographical distribution.

Now, for most of the history of the United Nations, the Cold War effectively froze the Security Council. It was not an effective actor. Nonetheless, as the General Assembly expanded with the wave of decolonization that occurred in the 1950s and the introduction to the General Assembly of a group that came to call itself the non-aligned movement, there was an interest in achieving a more effective role in the actions of the Security Council.

And so in 1963 the charter was revised and the membership of the Council was expanded from 11 to 15, that is four additional non-permanent seats were available all selected by the General Assembly.

What this did was to potentially change the dynamics of the Security Council such that an action that the non-permanent members did not wish to proceed, could be stopped. This was in effect a non-aligned movement veto, or a Third World veto, if you like, or a General Assembly veto potential. But required the members of the Security Council who had been elected by the General Assembly to view themselves as representatives of the General Assembly and to consult, and not simply to exercise the vote of the Security Council member as if it were a discretionary option given to them for a period of two years.

In any case, because of the inaction of the Security Council during all this period, the concern about the power of the Security Council was substantially reduced. But with the end of the Cold War, the Security Council bounced back to the sort of role that was originally conceived for it in the original design of the United Nations Charter.

And now the United Nations Security Council was making many decisions, many that impacted seriously on many states in the world, and it was also making law, because the Security Council when it indicated that it was operating under a particular chapter of the charter, within a situation in which it created obligations on all other states, and those obligations trumped any treaty obligations the states might have had.

So the Security Council was becoming a law making body. And in these circumstances, there was a new impetus to change the rules of the game. And this brings us to the response of the High Level Panel with respect to the restructuring of the Security Council.

As many of you know, the High Level Panel produced two plans, because as the introductory statement by the Chairman of the panel indicates, the members couldn't agree on many of the issues concerning the restructuring. Plan A and plan B are quite different. Plan A, or model A provides, I'm reading from it: "for six new permanent seats with no veto being created and three new two-year term non-permanent seats divided among the major regional areas."

Model B, the second alternative, provides for: "no new permanent seats but creates a new category of eight four-year renewable term seats and one new two-year non-permanent and non-renewable seat."

Now, I think, you will appreciate that in terms of the provisions of Article 23, neither of these really responds to that provision. Article 23 emphasizes the effectiveness of contribution. And under those terms, there are certain states that qualify for permanent membership and would have if an event such as the Second World War had not occurred, no question about that. But Plan A doesn't necessarily ensure that these states will come into the Security Council.

But as for plan B, which is essentially designed for creating greater representation, the problem that is inherent in it is that once you elect a member

to the Security Council, that member views that the prerogative of being a member of the Security Council as something that it can exercise in its own interest and not on a representational sense.

So in many ways, both of these plans which we now understand from our discussion yesterday are already at a process of evolution in the course of negotiations in the General Assembly, both of these plans have flaws and neither respond to the essential problems that gave rise to them.

It would seem to me that both of these plans face very serious problems. In order to amend the United Nations charter, you need two-thirds a vote of the General Assembly, which could be attainable for certain plans. And then you need the agreement by ratification of all five permanent members of the United Nations.

So the calculus of changing the United Nations charter is 191 minus one equals zero. One state can stop it.

If the plan fails, it is still possible for the General Assembly to develop a system of liaison whereby the members, the non-permanent members that it elects for two years are understood to be representatives of the assembly reporting back to the assembly, and exercising their vote in accordance with assembly wishes, which would enormously enhance the power of the assembly within the General Assembly, within the Security Council.

This would, I would emphasize, not require any adjustment in the United Nations Charter and would be entirely consistent with the change that took place in 1963.

In our discussions yesterday many of the speakers drew attention to the fact that the United States looms as the major power in international politics, and that was the situation in 1945 as well. One speaker said, and I will borrow his words to conclude, that the United States has to learn to live with the United Nations, and the United Nations needs to learn to live with the United States. I am confident that both in fact will learn the necessary lesson.

Thank you.

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