



Adopted from the webcast of extempore remarks: Remarks by Mr. Nirupam Sen, Permanent Representative, at the Joint Debate in the General Assembly on Agenda Item 9 [The Annual Report of the Security Council] & Agenda Item 111 [The question of Equitable Representation on and Increase in the Membership of the Security Council and related matters] on December 12, 2006.

Madam President,

I thank you for this Joint Debate in the General Assembly on Agenda Item 9 (The Annual Report of the Security Council) and Agenda Item 111 (The Question of Equitable Representation on and Increase in the Membership of the Security Council and related Matters). I also thank the distinguished Permanent Representative of Qatar for introducing the Report of the Security Council. My good friend, the distinguished Permanent Representative of Switzerland, compared the Report to a telephone directory. With his characteristic modesty, he was a little unfair to telephone directories: the Report is like a directory without the telephone numbers: do not call us: we shall call you. The Report is trite in language, non-existent in terms of analysis, opaque in content (it provides little insight into why decisions took a certain shape and omits mention of any disagreements), infirm in law and questionable in the context of working methods. It shows that recommendations on new working methods can hardly be implemented without new permanent members who would be held accountable for transforming recommendation into reality.

The Report is a symbol and symptom of a deeper crisis. The exhaustion of member states after more than one and a half years of negotiating reforms is reinforced by disillusionment with their results. Do the developing countries, especially the small and vulnerable, feel a greater sense of justice and fair play? A greater sense of ownership? Is the organization more responsive to their needs? Or are the reforms vitiated by not addressing the central issue of UN Security Council reform? The old Cold War equilibrium is gone but no new equilibrium has taken its place. The old world is dead, the new powerless to be

born. Instead of 'the sad, slow night's departing and the rising of the morn', there is a twilight world with all its burdens and sorrows: the UN, in this context, ought to have been the midwife of history but is not able to play this role because it has not been able to reform itself effectively.

The failure to do so, because the UN is 'uniquely equipped to spearhead the reform of global governance', has an impact on global economic governance also and therefore on the capacity of other international institutions to deliver even development, so critical for developing countries; this negative impact is sometimes not adequately appreciated. The tension between the political and economic order of 1945 and the totally changed world of today is at the heart of problems of global governance. The Articles of the IMF, for instance, were written in 1944. That is why it cannot lighten the burden of conditionalities on the poorest even in the latest Policy Support Instrument of 2005; its fiscal recommendations greatly worsened the Asian crisis of 1997-98; it has produced no idea worth the name on how to address the imbalance at the core of the financial and economic instability of our time. The present structure of the UN Security Council was created at about the same time (in 1945) as the structure of the IMF. It is therefore no coincidence that the solutions are similar: addressing the question of the veto; transparency; accountability; reassignment of seats on the basis of a new formula; a change in the appointments process. This very commonality shows the cross cutting nature of the crisis of global governance. If the IMF were able to maintain world economic stability and the UN Security Council world peace and security, even their antiquated, imperfect and possibly unjust structures of governance might have been accepted. This is manifestly not the case. Hence the urgent need for real reform.

It is unfortunate that some have not been able to think outside the text they have been repeating. I shall not speak on the G-4 text. We are not dogmatic about exact solutions. But we are particular on identifying actual and not imaginary problems and fashioning a solution that addresses these. One may use an analogy from portrait painting. One can go on changing the canvas and even keep throwing away initial sketches in order to improve the final portrait but one will not paint any portrait if one keeps changing the subject of the portrait. It is therefore important to identify this subject –i.e. the real problems. Otherwise the divisions and disillusionment of today will become deeper and, without fundamental change, the UN will be coarsened through continued weakening of mutual trust. The UN Security Council is reaching the end of its shelf life: structural cracks have begun to appear. We need a Capital Master Plan not just for the building but for what is inside it, around the corner. The UN Secretary General described its handling of some recent events as having "badly shaken the world's faith in its authority and integrity". No problem of peace and security has been fully resolved; many are arguably worse. It continually proves Newton's Third Law of Motion – for every force, there is a

force equal in magnitude but opposite in direction. It is said in the scriptures: "Let justice be done though the heavens fall." The UN Security Council's justice, if done at all, is done after the heavens fall – that is why we have been so busy catching skylarks.

The checks and balances of the Cold War, acting within the UN Security Council gave some space to the General Assembly. The absence of any new equilibrium has actually meant the progressive usurpation of the GA's authority by the Security Council. The fundamental reason is not just the imbalance between the Assembly and the Council but the imbalance between the permanent members and the rest. Can therefore this imbalance be redressed through adding new non permanent members even if immediately eligible for reelection? Can they make coercion more difficult, enhance legitimacy and make decisions far more optimal, thereby reducing the need for force? Or do we need new elected and accountable permanent members to do so? Our experience is clear: an individual state cannot easily defy, the UN Charter cannot effectively bind, the General Assembly cannot constrain and the International Court of Justice cannot automatically review UN Security Council decisions (and since Justice Marshall's famous judgement in *Madison Vs Marbury* the right of judicial review is a fundamental democratic tenet). Can non permanent members reintroduce equivalent checks and balances in the post Cold War era or can this be done only by new permanent members?

The present colossal imbalance of power would continue to ensure that blood does not circulate through some UN organs, bringing them close to atrophy. We would have the opposite of the state described by Dr. Johnson in a little known play "Irene": "A happy land where circulating power/Flows through each member of the embodied state". Instead we have a concentration of power and the fact of oligarchy. Would non permanent members, even if their number is expanded and they are immediately re-electable make any difference whatever to the central problem of correlation of power, of oligarchy? Or is it necessary to introduce appropriately in the midst of this oligarchy new permanent members with the principles of election and accountability? Otherwise instead of equal decision making the Security Council and, via it, the Organization will simply register the will of the few. The few will continue to set policy and the politics of the Security Council will not be the politics of policy but the politics of manoeuvre. Instead of addressing the real problem would not an expanded number of renewable non permanent seats create a far more serious problem (as also pointed out by the distinguished Chair of the Federation of Small States, the Permanent Representative of Singapore)? A greater number of immediately re-electable non permanent seats would ensure that the eighty or so member states who have never served on the Council continue not to serve and the chances of Small States of serving on the Council are reduced from once in forty years (the present position) to once in eighty years.

Some have repeatedly made much of elections ensuring accountability. Elections sometimes take the shape of auctions and even when they do not, they hardly ensure accountability. Are the non permanent members accountable and if so to whom? Even in the case of clean slates, do the regional and other groups find them always accountable? Elections may be a necessary but are certainly not a sufficient condition of accountability. In fact the imperfection of the unreformed Security Council to which non permanent members are elected makes it more difficult for them to be accountable and may make them even less accountable. The problem of accountability would encompass both new permanent and all non permanent members. Let us therefore not confuse elections with accountability. Just as, in the field of international economics, getting prices right and liberalization does not ensure maximizing welfare but separate action has to be taken on employment generating policies, so also here, to ensure real accountability one has to consider a permanent self sustaining review mechanism as well as possibly an addition in Chapter II of the UN Charter embodying the democratic principle, as old as Rousseau, of the right of recall – an idea proposed by a few developing countries (members of the African Union) at a largely attended informal meeting recently. Then alone would one have real accountability. In fact accountability should be ensured throughout the UN, including the Secretariat. United States constitutional practice has admirably combined the principles of flexibility and accountability. This should be implemented in the UN by giving the Secretary General the flexibility to appoint the DSG and USGs but having hearings and confirmations by the General Assembly to ensure accountability (incidentally, this would ensure that policy implementation in the Secretariat is actually responsive to the vast majority).

A leading light of the school of expansion of only non permanent seats outlined serious problems in the Security Council which have grown but felt that these could be mitigated by increasing non permanent members and their role and being open to the idea of their immediate reelection. Why have existing non permanent members not mitigated the problems but allowed them to grow? He spoke of encroachment. Why have non permanent members not rolled it back? In fact this shows that even amending the Charter is not enough: there would have to be new permanent members held accountable for defending its balance. Similarly, would not an interim solution that does not address the real problem simply go through the motion of reform without reform? Would there be point in simply adding to numbers without addressing the issues? In short, should one have reform for the sake of reform? Would adding more non permanent renewable and rotational seats address the central problems of either the correlation of power or of accountability? Or would they, in the phrase of the poet Shelley be like "going to a gin shop for a leg of mutton"?

It is important to remember that immediate reelection was permitted in the League of Nations. It failed to either ensure accountability or save the League of Nations. Therefore, when I look at the supporters of the idea of renewable more non permanent seats in the Security Council, I am reminded of the question in the great contemporary US novelist Thomas Pynchon's just published novel "Against the Day": "What are they doing here, so late in history" with "the dismal metonymies of the dead behind them"? Would not electing more non permanent members only create for a moment the illusion of accountability with even less real accountability, the illusion of change with no real change and address imaginary problems while leaving the real problems of correlation of power and accountability to fester and become worse?

The most radical General Assembly Resolution on the veto and working methods is Resolution 267(III) of 14 April 1949. It was adopted. It is a melancholy commentary on the declining strength of the General Assembly that today it seems difficult even to table the S-5 Resolution, let alone adopt it. To save time I shall not quote the Resolution at length (I have done so on an earlier occasion) but the Resolution clearly and forthrightly proposes restrictions on the right of the veto; says that the General Assembly can advise on a matter being considered by the Council; emphasizes that TCCs should take part in decisions (not just discussions) on deploying their troops etc. Was any of this ever implemented? Would new non permanent members be able to do what they have not for more than half a century – ensure these working methods? Would they ensure the access of small and vulnerable states to the Council and their participation in its subsidiary bodies? Would such a model empower Africa, that has been the object of history and, in some ways, continues to be so and without whose empowerment any reform is unavailing and worth little?

As the Resolution mentioned earlier shows, the problem of the veto is a real problem. Many delegations have addressed it in the course of this debate. But we have to examine the issue in detail. We would then see that the problem is not one of quantity (of extending it immediately to new permanent members) but of quality – of introducing restrictions to ensure that it is used to advance the principles of international law and the interests of the international community and not national interest. There are those who say that the veto cannot be amended. The short answer is that it has been amended, but the amendment has been informal and therefore legally infirm. The Charter clearly speaks of "the concurring votes" of permanent members. Therefore, Charter commentaries of 1946 make it amply clear that abstention was the equivalent of a veto. It is not treated as such any longer. The Charter can only be amended by procedures set out in Articles 108 and 109. Therefore, this informal amendment is really law making by law breaking. What is more it is to the detriment of the General Assembly. The legal principle of estoppels prevents the GA from challenging a UNSC decision with an abstention by a permanent

member as illegal or invalid because of acceptance over a fairly long period of time. But it cannot even demand further continuation of the practice. The permanent members can give it up any time and go back to the earlier interpretation, without legal problem. Thus it is they who are amending the Charter, not the General Assembly. One may cite similar informal amendments of Article 39 (redefining what is a threat to international peace and security) and Article 29 (on setting up subsidiary bodies): a legal tribunal may be a subsidiary body but the Security Council cannot give it legal powers that it does not possess under the Charter (which is why the case is different from all other subsidiary bodies); nor can implied powers be invoked because the Security Council, under the Charter, does firefighting to execute existing law which has been adequate and does not have the authority to make law (which belongs to the General Assembly). On the one hand the Security Council is quick to bring on its agenda individual rights but on the other is reluctant to restrict the veto which has no place in a paradigm of individual rights.

On many issues the US Constitution points the way for instance the US Congress can set aside a Presidential veto. But in the UN, a special majority of the Security Council or the General Assembly cannot override a Security Council veto even in the case of carefully defined categories of situations. Oppenheim, in his authoritative Treatise on International Law clearly says that if a permanent member used its right of veto to prevent an amendment of the Charter purely for reasons of national interest and not because of its implications for the international community as a whole, it would be an abuse of the right of veto. Thus any such exercise of the veto would be subject to legal challenge.

The problem of working methods is exemplified most visibly in the Rules of Procedure of the Council which are provisional to the point of not being there; they have been replaced by a new rule on how to make encroachment respectable and emasculation of the GA acceptable – a triumph of power over reason, rules or logic. Thus the UNSC is not a solution but a part of the problem; it has become a fetter holding back change; a fetter on addressing the problems of the 21st century; a fetter on the forces of peace and progress.

We shall take counsel with our colleagues in the G-4, our cosponsors, the African Union, the S-5, even the UFC and the wider membership, especially listening to the developing countries, and soon bring forth proposals for negotiations which would address the real problems of the correlation of power; of accountability; of the veto and working methods and not imaginary ones which would make the real problems worse while providing the illusion of reform for the sake of reform. The choice is between real reform and retrogression and even paralysis, action or words, substance or shadow. Otherwise we shall move to a future where the GA feels even more than now “the mildew coming over it and its bones turn to paste”. We do wish to end the exclusion of developing

countries but through an inclusive process – this is the legacy of Gandhi and Mandela. To use some eloquent phrases of one of our leaders at a recent seminar in New Delhi, we seek a reform not for “power politics, military might, division and conflict” but for overcoming these and being, in and with the UN, a “global force for peace, progress and prosperity”.

I thank you, Madam President

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