A Look at the Transitional Approach to Security Council Reform

by Jonas von Freiesleben *
24 June 2008

At the last meeting of the Open-Ended Working Group on the Question of Equitable Representation on and increase in the Membership of the Security Council and Other Matters Related to the Security Council, on 17 June, a task force composed of Ambassadors Ismat Jahan of Banglasdesh, Heraldo Muñoz of Chile, Roble Olhaye of Djibouti, João M Guerra Salgueiro of Portugal and General Assembly President Sgrjan Kerim, who made the appointments, presented their status report to the membership. It included a reform suggestion based on the idea of a transitional approach. If they were to use this approach, Member States would agree on basic reforms now, with a view to revisiting them at a mandatory review conference to take place after an agreed-upon period; at which time states could reverse or amend their previous agreed upon arrangements. The following provides some additional insight on the legal and political implications of such a transitional approach.

The report was a result of extensive consultations held with all Member States individually or through their regional or major interest groups to listen to their concerns and receive their recommendations on how to move the negotiations forward at this stage.

It concluded that none of the written contributions received from Member States offered a sufficient basis for launching intergovernmental negotiations, and the report found that entrenched positions continue to haunt the process, despite expressions of flexibility and a general recognition of the need to compromise.

Overall, the main positions of the different regional and major interest groups remain far apart, with the main source of disagreement centering on the category of new seats; some argue in favor of adding more non-permanent seats to the Council, while others support the inclusion of additional permanent seats.

As a result, the report suggests a compromise solution called the "timeline perspective" that would "…identify what may be achievable in the short term, during the remaining 62nd session, or during the following one, and what would be left to revisit in a number of years through a mandatory review (in 10,12 or 15 years, for example). […] That solution would keep avenues open to all preferred options to be reconsidered at an agreed moment in the future."

The timeline perspective echoes previous unsuccessful attempts at forging compromise by suggesting that Member States agree on partial reform now, while retaining the option of revisiting, evaluating, amending - or perhaps even changing them - at a mandatory review conference that would be written into the Charter and scheduled to take place after a fixed amount of time.

By moving away from negotiating a long-lasting "reform package," and focusing instead on agreeing to an interim solution to be implemented now, the hope is to break the current impasse over the different categories of seats, and induce reluctant Member States to enter into actual intergovernmental negotiations at this stage. These negotiations would be based on the promise of including a mandate to hold a review conference at a later, specified time to consider changes or additional measures as part of any agreement that is reached now.

Previous Proposals Involving a Transitional Approach

While ideas involving test or trial periods are hardly new in negotiations on structural changes to the United Nations system, it has only materialized once in UN history. In 1945, the founding members of the UN inserted a clause in the Charter- Article 109, paragraph 3 – requiring the General Assembly to decide, after ten years, whether it wished to deal with the question of Charter amendments by calling a General Charter Review Conference. The item, which will be discussed in-depth later in this paper, was on the agenda in 1955, but failed to garner a majority of votes.

In the context of Security Council reform, the concept of a transitional approach (sometimes also referred to as "an intermediate model," "an interim solution" or as in the Task Force report, "a timeline perspective") was first floated by Germany in the mid-1990s in an attempt to entice skeptical states to begin direct negotiations. Most such proposals included "transitional" permanent seats for Germany and their partners in the Group of Four (G4): Brazil, Japan and India. Although India often notes their preference for a comprehensive and permanent settlement, in reality they appear to accept the idea of a "transitional approach" as well.

In a speech to the Working Group in 1996, German ambassador, Dr. Gerhard Henze, stated that, "…a review clause would open up possibilities for further improvements […] The review would of course have to address all aspects of the reform package, including new permanent memberships. Therefore, by reforming the Security Council we will not create new 'eternal' or only 'momentaneous' members, but new permanent and non- permanent members. It is as simple as that."

Nonetheless, the proposal initially met with skepticism from delegations fearing that a transitional approach could translate into permanency. New Zeeland ambassador, Colin Keating, highlighted these concerns at a meeting of the Working Group later that year: "There is already a provision in the Charter which permits review. So what would a new provision add," he asked. "The only meaningful element that a periodic review could contribute to an overall compromise package would be to adjust the way in which Article 108 operates […] so that any new class of privileged members would not be able to unilaterally frustrate future reviews then it would add a meaningful element to an eventual compromise."

The German delegation immediately replied: "…an appropriate place for a periodic review clause would be article 23 (4, 5 new) of the Charter of the United Nations. Article 23 would read as follows: Article 23 (1) [to be adapted] (2) [to be adapted] (3) Each new member of the Security Council shall have one representative. (4) New permanent members who are not the original five permanent members are subject to a periodic review in accordance with Article 108. The review process is compulsory and will take place after fifteen years. Ratification of the review result does not necessarily require ratification by the new permanent members."

The concept of a transitional approach quickly became a catch phrase in the Working Group. Even members of factions opposing new permanent seats in the Security Council added the words to their vocabulary in an effort to show their willingness to enter into negotiations. However, to many outside observers the use of the words did not appear to include an equal willingness to compromise their views.

The Republic of Korea, a staunch opponent of adding more permanent seats to the Council, stated in October 1996 that, "Another development is that even those who support an increase in permanent members accept the proposition that the word 'permanent' should not imply 'eternal,' a point made continually by delegations with strong reservations on that increase. We note that a

nation widely regarded as a direct beneficiary of an increase in permanent membership, put forward the idea that new permanent members should not be eternal but subject to periodic review with a 15-year interval in the form of a General Assembly vote. Although their proposal as a whole may not enjoy broad support, it echoes my delegation's repeated advocacy that the qualifications of Security Council members must be checked against time and that democratic review in the form of elections is essential. Furthermore, the combination of 'permanent' and 'periodic review' might be seen as having something in parallel with the mix of 'non-permanent' and "longer tenure."

Nevertheless, the idea of a transitional approach persisted. Nine months later, in July 1997, the United States joined the ranks of states supporting the concept as Ambassador Bill Richardson told the Working Group: "…we are now prepared to accept a review clause so that what is decided this year is not set in stone for all time."

During the following years, other Member States, especially those sympathetic to the G4, kept the idea alive in various forms.

In the summer of 2005, the G4 submitted draft resolution A/59/L.64, calling for the use of a transitional approach, "…to review the situation created by the amendments referred to in paragraph 6 above fifteen years after their entry into force."

A few days later, Swedish Ambassador Anders Lidén proposed a moderating addition to the G4 proposal that would make it, "…possible for other Member States to review the performance of the new permanent members and with the support of a 2/3 majority replace them if they fail in their responsibilities. It should not be easy to replace a new permanent member, but it should be possible without going through the full procedure of changing the Charter," he said.

Although A/59/L.64 failed to garner sufficient support, two years later two different teams of facilitators appointed by then President of the General Assembly Sheikha Haya Rashed Al Khalifa, expanded on the concept in two sets of reports (A/61/47 SUP – Annex I and A/61/47 SUP – Annex IV). These reports suggested that Member States explore the concept of a transitional approach further. In Annex I the facilitators (Ambassadors Ali Hachani of Tunisia, Frank Majoor of the Netherlands, Andreas D. Mavroyiannis of Greece, Mirjana Mladineo of Croatia and Heraldo Muñoz of Chile) recommended that "Issues on which Member States will not agree in the negotiations would have to be deferred to the review." Adding to this premise in Annex IV the second group of facilitators (Ambassadors Christian Wenaweser of Liechtenstein and Heraldo Munoz of Chile) noted that "A transitional approach assumes an interim arrangement and should have as an integral component a mandatory review to take place at a predetermined date to review and assess the adequacy of this arrangement."

In the final report of the Working Group to the 61st General Assembly, Member States decided to keep the issue of Security Council reform on the agenda, but leave further consideration to the next General Assembly.

On 19 April 2008, Cyprus circulated a new reform proposal. The proposal was a result of the work of an "overarching process," meeting outside the Working Group. It was established in late 2007 at the initiative of Germany, and built on the previous year's reports of the facilitators as well as on all the perspectives of the main stakeholders. The draft was an attempt to provide a basis on which further negotiations could proceed and give a sense of direction for the future. Nevertheless, the idea of a transitional approach was yet again an integral part of the proposal.

The Cypriote delegation phrased their proposal for a transitional framework in paragraph 7 of their draft: "Reform should include mandatory review after a fixed period of time, the exact duration of which must be determined before the reform comes into force and will form an integral part of the reform package. A mandatory review conference to consider the provisions set out in the paragraphs above will take place [15-years] after the provisions have entered into force. These provisions will remain in place until a decision amending them has come into force. The provisions are without prejudice to the process leading up to, the negotiations during, or the decisions made at the review conference."

Although the proposal received harsh criticism in the Working Group, the idea of a transitional approach survived and made it into the report of the Task Force as the timeline perspective.

How Would a Transitional Approach Work?

As outlined above, the concept of a transitional approach has unsuccessfully floated in the Working Group since the mid-1990s. The concept has taken many shapes and forms, however, its defining feature: the test period followed by a review conference, has remained largely untouched. Unfortunately, so have important questions on the practical aspects of an eventual review conference.

Many countries, especially those hoping for a permanent seat, have on the whole appeared unwilling to discuss the complex political and legal aspects of a transitional approach, and the rather opaque circumstances surrounding the implementation of such a model seemed to have created a host of questions among Member States. For instance, while some countries have envisioned the mandatory review as a "sunset clause," in which previously agreed to reforms would become void if not approved at the review conference, other states would prefer automatic continuation if a two-thirds majority cannot be mustered against the reforms.

Adding to the more obvious points of confusion, different states use the same words when describing what basically are different models. In general, questions that need to be resolved center on the potential powers a review conference would have, on the implementation procedures to be included in the Charter, and on the consequences that use of a "timeline perspective" might have for the Organization as a whole.

Roy S. Lee, an Adjunct Professor at Columbia Law School, has worked with the United Nations on numerous legal questions since 1969. He has an in-depth knowledge of UN decision-making and of the provisions of the Charter. He has worked closely with the Sixth (legal) Committee of the General Assembly, been in charge of the International Law Commission, and played an integral part in the creation of the International Criminal Court.

According to Professor Lee, who recently sat down with the Center to talk about Security Council reform, nothing in the Charter would prevent Member States from creating a transitional model followed by a stock-taking review conference. "In principle Member States can do whatever they want with the Charter, but you need to have enough votes to do that," he says. "You have to amend the Charter to add new members to the Security Council, there is no way around that; but if the will of the Member States is there, everything is possible."

Changes to the Charter are governed by Article 108, which reads: "Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their

respective constitutional processes by two thirds of the Members of the United Nations, including all of the permanent members of the Security Council."

The next important question pertains to the powers a review conference would have. Simple review conferences at the United Nations are fairly common and in general do not necessitate Charter amendments. They are often written into resolutions and simply allow Member States to evaluate progress made towards full implementation of goals set by the General Assembly. In the summer of 2006, for instance, Member States met in New York to review the progress made in implementing the GA's resolution to contain the illegal spread of small arms and light weapons.

However, a conference to review the Charter is a different matter. According to Article 109: "1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference. 2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Member States of the United Nations including all the permanent members of the Security Council."

As mentioned earlier, the drafters of the Charter inserted a clause into the Charter (Article 109, paragraph 3) that would allow for a review conference of the Charter to take place after 10 years, but since there was no majority to convene at the time it never happened. "The clause was merely inserted to pacify skeptical Member States," according to Professor Lee.

Law Professor Bardo Fassbender of the University of the Armed Forces in Munich pointed out in an email to the Center that Article 109, paragraph 3; "... wasn't a sunset clause, and since the majority and ratification requirements of Article 109, paragraph 2, were the same as in Article 108, the article was of no practical importance. The General Conference provided for in Article 109 was not meant to operate in any other way than the General Assembly under Article 108." And he adds that it "…was a very weak form of a 'mandatory review,' not obliging the Assembly (or Member States) to discuss Charter amendments in substance."

Professor Fassbender has extensive experience in questions pertaining to the Charter, including work for the UN Office of Legal Affairs, and he has published widely on various Security Council reform issues. He agrees that a transitional approach, even framed as a "sunset clause" is technically possible and within the capabilities of the membership. "From a legal point of view, it would be possible to amend Articles 23 and 27 of the Charter and to add a sentence or a paragraph saying that this amendment will automatically become ineffective (or expire) 10 years after it entered into force," he adds, however: "To be clear enough, one would also have to say expressly that at the same time the previous wording of the two articles becomes effective again, because otherwise there would be no provisions at all, neither the old nor the new version."

Although Professor Fassbender agrees that a transitional approach is feasible in technical terms, he argues that the biggest obstacles would be politically.

"Apart from being without precedent such a solution is highly problematic from a political point of view," Professor Fassbender noted in his email. "It could easily lead the UN into a fatal crisis. A state which has enjoyed the privileges of a permanent member, with or without the veto, for a decade will not be ready to give up this position. In the (likely) case of a disagreement about the future membership, it would hardly be feasible to then return to the old (basically 1945) setup of the Council, and indeed such a going back to the old composition could not be explained to the world

public. Probably, the Council would continue to work in the 'provisional'" composition but be challenged as illegal or unconstitutional. States which at present seek permanent membership will tend to use the sunset clause model in order to calm and reassure their opponents, but even if those opponents go along with it (which I doubt) it's a risky way for the Organization, for the reasons mentioned above."

Similarly, Professor Lee cautioned that although he does not have an in-depth knowledge of the intricacies of the latest proposal in regard to a transitional approach or how its proponents envision the ultimate content of a transitional approach, such an approach could quickly end up a permanent solution.

In another email exchange, Thomas Weiss, chair of the Academic Council on the UN System and Professor at the Ralph Bunche Institute for International Studies at the City University of New York also expressed strong doubts about the political viability of a transitional approach. "How do you temporarily move toward implementing a Charter revision (which requires approval by the members, and in P5 case all of them and the US Senate!)?" He asks, and concludes: "With a stipulation that we will revisit? In my view this is a non starter."

Questions Remain

As discussed, a transitional approach might help to end the current deadlock in the Working Group. It is technically possible to construct, either as a "sunset clause" or with an option for automatic continuation, and to many it is an attractive compromise solution. As one expert noted; "If you are not happy with the item, return it."

But the approach could also prove extremely divisive and destructive in the long run. It could even prove more divisive than the current reform discussions in the Working Group, stirring considerable political controversy if a transitional approach were to morph into a permanent solution - as happened in the past - without satisfying those who expected it to be subject to change.

At first sight, utilizing a transitional approach may well appear appealing as a way to help move Security Council reform forward now. However, in view of the possible consequences outlined by some commentators, before committing to - or alternatively -embarking on and detailing Security Council reform provisions based on a transitional approach, it is to this observer of the utmost importance that Member States recognize and be fully willing to accept the reality that it is impossible to guarantee that additional changes will receive adequate support in the future.

** Jonas von Freiesleben is the Center's Senior Research Analyst.*

Unless attributed to a specific source, all expressions of opinion in this analysis are those of the author. The Center for UN Reform Education does not endorse any particular reform proposals.