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14 May 2012

Excellency,

I have the honour to refer to your letter of 9 May 2012, in which you refer to the draft resolution A/66/L.42/Rev.1 which has been tabled under Agenda Item 117, with the co-sponsorship of Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland. I understand that it is scheduled that a debate on this resolution will take place on 16 May 2012.

You have asked our Office the following question on the draft resolution: “What is the majority requirement for the adoption of the draft resolution A/66/L.42/Rev.1, in the case it is called for a vote by a member state?”

The draft resolution is entitled “Enhancing the accountability, transparency and effectiveness of the Security Council”, and includes an annex entitled “recommendations to the Security Council” which sets out measures that are “recommended for consideration by the Security Council in order to institutionalize and/or improve current practices”. The annex contains separate headings entitled (1) the relationship between the General Assembly and other principal organs; (2) the effectiveness of decisions; (3) subsidiary bodies; (4) operations mandated and on-site missions carried out by the Security Council; (5) governance and accountability; (6) the appointment of the Secretary-General and (7) the use of the veto. The last heading indicates that the measures contained therein are recommended for consideration by the permanent members of the Security Council.

At the outset, we note that the draft resolution is being introduced under agenda item 117 entitled, “Follow-up to the outcome of the Millennium Summit”, rather than under agenda item 122 entitled “Question of equitable representation on and increase in the membership of the Security Council and related matters”. It is the first time that a draft resolution of this nature has been introduced under this agenda item. However, this does not alter the legal analysis which applies both in relation to the procedural issues and the substantive issues of law.

Dr. Mutlaq Al-Qahtani
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Your question as to the majority requirement for adoption of this draft resolution raises two issues which, although related, should be considered separately.

(i) Article 18 of the Charter and Rules 83 and 85 of the Rules of Procedure

The majority requirement for the adoption of a draft resolution is ultimately a matter for the Members of the General Assembly to decide, in accordance with the Charter of the United Nations and the Rules of Procedure of the General Assembly. Consequently, should there be disagreement amongst Member States concerning the majority required to adopt the draft then it will be necessary for the Assembly itself to determine that question, in accordance with the Charter and the Rules of Procedure.

In accordance with Article 18(2) of the United Nations Charter, decisions of the General Assembly on “important questions” shall be made by a two-thirds majority of the members present and voting, which is mirrored in Rule 83 of the Rules of Procedure. In accordance with Article 18(3) which is also mirrored in Rule 85 of the Rules of Procedure, “decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting”.

In practice, in most instances, the General Assembly has not indicated whether the voting procedure under Article 18(2) has applied and it is relatively uncommon for the General Assembly to refer to the majority which is required for the adoption of a resolution. The General Assembly in practice has referred to Article 18 in a limited number of situations in which there has been a divergence of views as to the majority required for the adoption of a resolution. It is even more exceptional for the President of the General Assembly to make a determination on the majority required.

In circumstances in which it is clear that a draft resolution falls within a category of question elaborated in Article 18(2), the Charter requires a two-thirds majority for its adoption. In situations in which a genuine doubt exists as to whether a particular draft resolution falls within the ambit of Article 18(2), the procedure in Article 18(3) may be used by the General Assembly in order to determine whether Article 18(2) applies. This Office has previously advised to this effect in 1982 in a situation in which a draft resolution clearly and unequivocally did fall within Article 18(2), and noted in that situation that “in a case as clear as [that one], application of [the Article 18(3) procedure] would not be proper”.

In the present situation, it is not clear that the draft resolution falls within the ambit of Article 18(2). We note, however, that there is precedent that a General Assembly resolution on the issue of Security Council reform has in the past been assumed to require a two-thirds majority for adoption. Resolution 40(I) of 13 December 1946 on voting procedures in the Security Council recommended, *inter alia*, to the Security Council the “early adoption of practices and procedures, consistent with the Charter, to assist in reducing the difficulties in the application of Article 27 and to ensure the prompt and effective exercise of its functions” and that, “in developing such practices and procedures, the Security Council take into consideration the views expressed by members of the United Nations during the second part of the first session of the General Assembly”. During the sixty-first

plenary meeting of the first session, the resolution was adopted by a two-thirds majority, following the President's statement that, "I think you will agree in considering that this resolution requires a two-thirds majority in order to be considered as adopted".

It is, of course, open to the General Assembly to take a vote as to whether Article 18(2) applies. One example of a situation in which the President of the General Assembly decided to take a vote under Rule 85 of the Rules of Procedure is to be found during the sixty-fourth meeting of the 41st session of the General Assembly. This, however, was not a case of Security Council reform. In that case, the President of the General Assembly opened to a vote in accordance with Rule 85 the question of whether draft resolutions on Apartheid were an important question within the meaning of Article 18(2). In that instance, the General Assembly rejected the proposal that a two-thirds majority be required, and then moved to vote on the draft resolutions before it.

If Article 18(2) were to apply to the adoption of the draft resolution, the category of "recommendations relating to peace and security" appears, on its face, to be the most potentially relevant category. However, the practice referred to above suggests that when a draft resolution relating to the working methods of the Security Council was adopted by two-thirds majority of the members present and voting, the General Assembly did not always explain its reasons for adopting the draft resolution by way of that majority.

(ii) General Assembly resolution 53/30 of 23 November 1998 and the Open-ended Working Group

It is also important to consider the recent practice of the General Assembly in dealing with the question of Security Council reform. By resolution 48/26 of 3 December 1993 the General Assembly established 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 (the "OEWG"). The language of resolution 48/26 refers to the General Assembly "recognising the need to review the membership of the Security Council and **related matters**" and thereby deciding "to establish an Open-ended Working Group to consider all aspects of the question of increase in the membership of the Security Council, **and other matters related to the Security Council**" (emphasis added).

Between 1993 and 2009, the OEWG reported annually to the General Assembly. Its work was divided into two clusters. Cluster I dealt with issues of equitable representation on and membership of the Security Council, and Cluster II addressed other matters, including reform of the working methods of the Security Council.

On 23 November 1998, the General Assembly adopted resolution 53/30 which provides as follows: "Mindful of Chapter XVIII of the Charter of the United Nations and of the importance of reaching general agreement as referred to in resolution 48/26 of 3 December 1993, determines not to adopt any resolution or decision on the question of equitable representation on and increase in the membership of the Security

Council and related matters, without the affirmative vote of at least two thirds of the Members of the General Assembly”.

By way of background I would like to point out that the report of the OEWG for the 53rd session (A/53/47) refers to the fact that on 23 November 1998, the General Assembly adopted resolution 53/30 with regard to one of the agenda items of the OEWG namely, “majority required for taking decisions on Security Council reform”.

In 2005, this Office was called to advise on draft General Assembly resolution A/59/L.64 entitled “Security Council reform”. In our advice, we indicated to the President of the General Assembly that the language of both Article 108 of the Charter and resolution 53/30 clearly requires an affirmative vote of two-thirds of the membership of the United Nations when Member States are acting in accordance with its provisions.

Bearing in mind the work of the OEWG, the General Assembly adopted decision 62/557 of 15 September 2008, in which it recalled its previous decisions relevant to the question of equitable representation on an increase in the membership of the Security Council and other matters related to the Security Council and decided that intergovernmental negotiations would commence in informal plenary of the General Assembly. In accordance with paragraph (e) of that decision, the General Assembly decided, inter alia that intergovernmental negotiations would include “the five key issues”, which include the question of the veto; regional representation; the size of an enlarged Security Council and working methods of the Council; and the relationship between the Council and the General Assembly.

It is instructive to note, in relation to decision 62/557, that the phrases “and related matters” and “matters related to the Council” are both used, the former in the title of the decision, and the latter in the full title of the OEWG. As set out above in relation to resolution 53/30, it appears that these phrases were both intended to encompass reference to reform of the working processes of the Security Council. There are references in decision 62/557 to the work of the OEWG, which had included the working practices of the Security Council.

Therefore, both the OEWG created under resolution 48/26 and the General Assembly when adopting both resolution 53/30 and decision 62/557 considered the working methods of the Security Council to fall within matters related to the reform of the Security Council.

As to the draft resolution itself, it is of note that in its preambular paragraphs it makes specific reference to the work of the OEWG and the fact that “efforts to improve the working methods of the Security Council will help to promote a comprehensive reform of the Security Council, including the increase in its membership”. By operative paragraph 2 of the draft resolution, the General Assembly “invites the Security Council to consider the measures contained in the annex to the present resolution, in order to further enhance the accountability, transparency and inclusiveness of its work, with a view to strengthening its effectiveness and the legitimacy and implementation of its decisions”.

Importantly, the annex to the draft resolution includes a number of paragraphs which relate to or make reference to the working methods of the Security Council and its subsidiary bodies. Moreover, the final section of the annex to the draft resolution entitled "Use of the veto" includes a number of paragraphs which appear to touch upon the operation of the Security Council as provided for in Article 27 of the Charter and is thus a further indication of the fact that the draft resolution falls within the ambit of resolution 53/30.

In conclusion therefore and for the reasons cited above, it would appear that the draft resolution falls within the purview of General Assembly resolution 53/30 of 23 November 1998 and General Assembly decision 62/557 of 15 September 2008. Therefore, bearing in mind action taken by the General Assembly thus far on Security Council reform, it would be appropriate if the General Assembly were to adopt the draft resolution with the affirmative vote of two-thirds of the Members of the General Assembly.

However, whether the draft resolution does fall within the scope of General Assembly resolution 53/30, and if so, whether the General Assembly wishes to follow the provisions of that resolution, is ultimately a matter for the General Assembly to decide.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Patricia O'Brien", with a long horizontal line extending to the right.

Patricia O'Brien
Under-Secretary-General for Legal Affairs
The Legal Counsel