THE DEMONIZATION OF THE SECURITY COUNCIL
(TALK BY MICHAEL WOOD IN STOCKHOLM ON 10 MAY 2004)

1. It's a pleasure to be invited to address the Swedish Branch of the International Law Association. The Association has done much, over the years, to involve many people, specialists and non-specialists, in the development of international law. I am pleased to see that the Swedish Branch is thriving. We also have an active British Branch, and of course the headquarters of the Association in London. I hope to see many of you in Berlin in August for the biannual conference.

2. I should like to pay tribute at the outset to the Swedish contribution to international law and to United Nations law. One only has to look around this room to see how impressive it is.

3. I would also recall the recent UK-Swedish treaty celebrations. In April this year, as I am sure you all know, we celebrated the 350th anniversary of the conclusion of the Treaty of Peace and Free Trade signed by Queen Christina and Oliver Cromwell. I am pleased that our Lord Chancellor was able to attend the festivities in Uppsala. It is worth recalling, in the context of today's topic, that the Joint Declaration stated that –

> "Britain and Sweden continue to uphold the principles of peace, friendship, open trade and the rule of law that informed the 1654 Treaty. We are determined, indeed, to establish these principles not just throughout our continent but throughout the world."

4. I have to say at the outset that I am speaking in a personal capacity. I shall cover quite a wide field, not to say a legal and political minefield. I hope to stimulate discussion, and will leave time for questions on this or any other matter.

5. What I aim to do is to talk about some of the common criticisms of the Council. I would hope to dispel some of the myths; but equally to see what criticisms are justified and how they are being or can be addressed. I might say in passing that I was part of the UK delegation in the Council from 1991 to 1994, though I have followed

its work in some fields quite closely since then. But I may have a rather rosy view of the Council based on my experience in those years.

6. I have called this talk the "demonization" of the Security Council. That is no doubt an exaggeration, but not much of one in some cases. Some seem to view the Council as some kind of sinister magician, that waves a wand and casts evil spells. I must make it clear that I thought of this image just before reading Professor Ian Cameron's recent article on targeted sanctions, in which with reference to the Council he writes that "200 years of building up safeguards in criminal jurisdiction should not be capable of being removed by waving an international law wand".

7. I am sure that we would all agree, as a starting point, that it is important to maintain and indeed enhance the effectiveness of the Security Council. If we are to avoid increasing pressures for unilateral action we need a Security Council that is capable of acting promptly and effectively and that does so act whenever necessary. In this context, "legitimacy" is very important. As is often pointed out, legitimacy and effectiveness do not pull in opposite directions. In the long term (and I believe that a long-term view is important), a Council that is not perceived to be legitimate will not be effective.

8. Accusations levelled at the Council (sometimes rightly, sometimes wrongly) include the following. No doubt many in this room could think of others. I have come up with ten common criticisms, the first five of which are essentially political and the remainder essentially legal or procedural (read the list).

i) The Council is unrepresentative and undemocratic and will lack legitimacy until its membership is changed.

9. At the outset I would note that it is not always straightforward to apply concepts such as "democracy" and "representation" in the case of inter-governmental organisations. Is the General Assembly any more "democratic" than the Security Council?

10. I do appreciate the difficulty that many States are likely to be on the Council only once or twice in a century. Enlargement is unlikely significantly to improve this situation. It seems to me that the solution really lies in finding greater ways to ensure the involvement of interested non-members of the Council in its work.

11. But the overriding consideration here must be to maintain the capacity of the Council for prompt and effective action. It cannot be made too large.

12. More attention could be paid to the Charter criteria for the election of non-permanent members. Article 23 refers to "due regard being specially 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 organisation".

13. It may be that there will not be agreement in the near future to enlarge the Council. With that in mind it does no service to the Council to suggest that with the present composition (15) it lacks legitimacy, whereas with 21 or 24 or whatever it will be representative and hence legitimate.

ii) <u>The Council is the tool of the P5, or the P3, or the P1</u>.

14. This criticism appears to be very widespread, although not perhaps among those who follow the Council's work closely in New York.

15. Of course, any permanent member can block most non-procedural decisions – though not of course those under Chapter VI, or Article 52.3, where they are a party to a dispute. But they cannot, even where they agree among themselves, ensure the adoption of a decision – for that they need at least four of the elected ten with them.

16. Differences among the P5 or the P3 (or, one is tempted to say, within the P1) are on many issues greater than those between individual permanent members and many of the non-permanent members.

17. It certainly is not the case that the permanent members ignore the rest of the membership, but I can see that it may sometimes look like that e.g. the recent counter-proliferation resolution (1540).

18. In those cases where the permanent members first negotiate among themselves (this is not very frequent, but it does often cover the most sensitive drafts), they may appear to present a draft to the rest of the Council as a fait accompli. It is very important that they should not be seen to be "bouncing" the elected members of the Council, and whenever possible time should be given for full discussion.

iii) The iniquities of the veto: the veto is undemocratic, contrary to the principle of sovereign equality, is abused, allows the permanent members to blackmail or bully

19. It is worth restating what is already well known. First, the veto is a fact of life – without it there would have been no Charter, no UN, no Security Council. Second, the Charter provisions are better than the unanimity rule of the League. Third, the veto is cast less frequently than in the past – the UK last cast a veto in 1989 ~~(15 years ago – check)~~, though there is of course always the possibility of the hidden veto.

20. I think a good case could be made for saying that the possibility of the veto, and hence the absence of "automatic majority" voting (as in the General Assembly and many other international bodies) contributes to the seriousness of the Council's work and the respect in which its resolutions are, generally speaking, held. Imagine what would have become of the Council if the Soviet Union had been constantly out-voted during the Cold War, or if the one remaining superpower could be routinely out-voted today.

21. It is not always easy to be a permanent member, with the power of veto. Indeed, it is not always easy to be a member of the Council. (I recall that in the past Mexico did not want to be on the Council because it knew it would have to take hard choices which might upset its northern neighbour.) For example, consider the saga of Resolution 1422 in July 2002 ~~(now 1487)~~. It would have been easy to abstain, and one would have avoided much odium, but think what the consequences would have been for peacekeeping, for the Council, for the United Nations if 1422 had failed to pass.

That is not to say that we condone the blackmailing tactics which lay behind 1422, but they were a fact of life which had to be worked around. It is much easier for those who do not have to take a position to criticise those who do.

iv) The Council fails to act when it should. Conversely, the Council acts too quickly and without proper assessment of the facts.

22. The Council does need to be very careful before making assertions of fact and especially before expressing legal conclusions. When it does act with care it may also be criticised e.g. for not calling genocide genocide or aggression aggression or naming names. But we have to be careful not to prejudge guilt, and not to interfere with future prosecutions. Some saw the Lockerbie resolutions as doing this e.g. the obligation to pay appropriate compensation. There may have been some not very happy wording, but certainly it was not intended to be prejudicial, indeed on the contrary.

23. A particularly embarrassing example of failing to assess the facts was the hasty attribution of the Madrid bombings to ETA.

v) The Council is selective in what it deals with.

24. The Council is not alone in being selective. We all are, inevitably. Limited resources mean hard choices.

25. The criticism is sometimes unfair, since those who make it are not comparing like with like or taking account of the different realities. For example, enforcement measures were taken against Iraq for failing to comply with SCRs, but not against Israel. Among other things, this overlooks at least one simple point: that the former were legally binding, the latter are not. (Nevertheless, we do work for the implementation of all UNSCRs, whether they fall under Chapter VI or Chapter VII. How we do so will vary, depending on the situation and the recommendations or measures laid down by the Council.)

26. I now turn to the more legal criticisms.

vi) The Council exceeds its Charter powers/acts ultra vires e.g. it determines threats to the peace where there are none, and it is beginning to act like a "super-legislature".

27. It is generally agreed that Article 39 gives a very wide discretion to the Security Council in determining a threat to the peace. Are there any limits? Yes, but I would not like to seek to define them in a changing world.

28. By way of a slight digression I shall say a word about the use of force. One possible answer to the current debate about pre-emption/preventive action in the face of "emerging threats" is for the Security Council to be ready to authorise action (non-forceful or using force) to overcome such threats. That issue is, of course, a major part of the work of the Secretary-General's High Level Panel which is reviewing the way in which the UN responds to threats to international peace and security. I would also commend the British Attorney General's speech of 21 April in this connection. There is a trend towards a broader definition of threats to the peace, extending beyond traditional ones to, for example, emerging internal conflicts, overthrow of democracy, large-scale human rights abuses etc. It would be useful if we could build up a political consensus on the circumstances in which the Council approves action to counter such threats.

29. A second major debate is whether the Council can "legislate". The fear is expressed that it is becoming a "super-legislature". I suppose this means that it may legislate for the whole world, and without regard to existing national laws or treaty obligations e.g. 1373, 1540 (counter-proliferation). This trend is certainly contrary to the general earlier understanding of the nature of the Council, which is that it was not a legislature and only took Article 41 measures in respect of specific situations. Many see this as quite an alarming development. I understand this, and indeed share the concerns expressed by countries such as Sweden, Canada and Germany. Such concerns are to be taken very seriously. The Council must be careful not to over-reach itself, and use its extraordinary powers in cases where there are not genuine threats to the peace.

vii) The Council pays no attention to the constraints laid down by the Charter: in particular, it does not act in accordance with the Purposes of the Charter; especially it ignores human rights.

30. The criticism here is often expressed in very strong terms (e.g. at a recent Heidelberg conference). The picture is drawn of a rampant Council, out of control, charging around like some mad elephant, ignoring all rules and limitations on its powers.

31. It is a pity that the criticism is often so wild, because the point is an important one.

32. The assertion that the Council has failed to act in accordance with the Purposes and Principles of the Charter is a most serious one, if true. It is a claim that the Council has acted illegally, in contravention of the Charter, and specifically Article 24(2). (I note in passing that, while often expressed in terms of the Purposes and Principles, it is essentially a failure to act in accordance with the Purposes in Article 1, rather than the Principles in Article 2 that people seem to have in mind.)

33. A difficulty with this claim is that the Purposes set out in Article 1 are very broad and essentially programmatic. They are many and potentially conflicting, so it is very difficult to say that the Council is not acting in accordance with them. The Council's chief duties are those arising under its primary responsibility for the maintenance of international peace and security. That primary responsibility was conferred "in order to ensure prompt and effective action". So in a sense, for the Council the first of the Purposes set out in Article 1 must have priority.

34. A specific claim, and one to be taken very seriously, is that the Council takes actions which override States' international human rights obligations, be they treaty or customary. Sometimes this is put in terms of ignoring even jus cogens. There are two separate questions: first, is the Council entitled to do so (see Articles 24 and 103); second, if it can, should it, as a matter of policy or legal policy in any particular case. Before answering these questions, it is worth recalling that many human rights are derogable, are not absolute, and indeed sometimes have to be balanced against each other. And there are many different perceptions of human rights; States, NGOs, courts

and commentators often disagree as to their content. I don't have time to deal with this matter in any depth. A great deal has been written, including by Professor Cameron in his recent article in the Nordic Journal of International Law. At risk of over-simplification, my answers to the two questions are:

i) yes, the Council does have power to derogate from or over-ride human rights, but

ii) it should, as a policy matter, take great care not to do so unless it is absolutely necessary. Only thus can it retain legitimacy and support.

35. These issues have, of course, arisen particularly (but not exclusively) in connection with sanctions under Article 41. Sweden in particular has rightly highlighted the matter, including through seminars and other activity in New York and Brussels. I greatly welcome this, and value the input. I know that sometimes you think we don't listen – perhaps that's due to British reticence – but I can assure you that we do, and we listen carefully. And we are keen to work together on matters such as sanctions issues e.g. how to make sure that due process of a sort applies when sanctions lists are drawn up. We do have the same concerns. Once we know the outcome of the Luxembourg cases that could be an occasion for further useful discussions.

viii) The Council imposes impossible obligations on States, which often run counter to their constitutional/legal traditions and the implementation of which gives rise to real internal difficulties (political, judicial, human rights).

36. This point is closely related to the previous one. But it goes wider. There are also real practical problems for hard-pressed bureaucracies and legislatures e.g. to give effect to 1373.

ix) The Council is not subject to oversight (whether judicial or otherwise).

37. Accountability is weak. We have reporting to the General Assembly, the annual Assembly debate; media coverage; academic criticism. But these often do not amount to much, and come long after the event. There is then the familiar debate about

judicial review. The recent discontinuance of the Lockerbie cases means we may have to wait for an answer to that question.

x) The Council (or the P5) lacks transparency.

38. The word "transparency" is pretty opaque. I'm not sure what it means in any particular context. But the accusation covers a host of important issues.

39. First, Council decisions should be as clear as possible. We do make efforts. Compared with much that comes from Brussels they are not bad. Resolutions and statements should be carefully drafted, and it is worth making the effort to ensure that they are clear and do what is intended. (Of course, there may be good political reasons why some are ambiguous – I won't get into 1441, but ambiguity should not arise from carelessness.) To this end, it would be good if more delegations to the Council included lawyers. One particular question is when the provisions of SCRs are legally binding. There is a degree of uncertainty, but the best practice is that there should be an Article 39 determination; a reference to acting under Chapter VII or under a specific Article (41, 42); and the word "decides". It is also important that everyone concerned with the work of the Council understands that acting under Chapter VII does not equate to the use of force; it does not even equate to binding measures. Recommendations may also be adopted under Chapter VII, and frequently are.

40. Second, over the last ten to fifteen years considerable improvements have been made in the Council's working methods and documentation. These have often been stimulated by constructive suggestions from outside the permanent members and indeed from outside the Council. There is now far more information available, and available very quickly, than was ever the case in the past.

41. Third, and this is even more important, there is far more interchange within the Council and between Council members and non-members, NGOs etc. Arria-type meetings, consultations with troop contributors etc. This is very welcome. It improves the quality of decision-making; and it increases the level of legitimacy. In particular, when it comes to drafting texts (resolutions and presidential statements) members should not be "bounced" into accepting particular drafts on a "take it or leave it" basis.

There should always be as full consultation among all members as the situation permits (since this can often lead to improvement). And the wider UN membership too should be listened to. An example of greater openness is the follow-up to the UK initiative on "Justice and the Rule of Law: the UN role".

42. In conclusion, I would only wish to stress again how much we value cooperation in this and other fields between Missions in New York, and between capitals, and with academic and professional bodies. Not least with the Swedish Mission, with Stockholm and with private bodies here in Sweden such as the ILA and the Universities.