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## I. INTRODUCTION

In 2022, the UN will be celebrating its 77th Anniversary.<sup>1</sup> A question on the minds of many is whether the UN Security Council (UNSC) should be reformed in view of the many changes that have occurred in the world since the establishment of the UN. The principal change driving the debate

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1. The Charter was adopted at the San Francisco Conference on June 26, 1945, and came into force on October 24, 1945. *The San Francisco Conference*, U.N., <https://www.un.org/en/about-us/history-of-the-un/san-francisco-conference> (last visited Oct. 8, 2022).



II, which was encouraged and supported by the UN.<sup>10</sup> The 1963 amendment dealing with voting in the UNSC provides that such decisions on procedural matters are to be made by an affirmative vote of nine members and on all other matters by an affirmative vote of nine “including the concurring votes of the five permanent members.”<sup>11</sup>

There have been a number of proposals to reform the UNSC over the years, almost all of them on further enlarging the number of Member States on the UNSC and addressing in some manner the institution of permanent members and their veto power.<sup>12</sup> In addition, many of the more recent proposals addressed the working methods of the UNSC and the transparency of its work. This paper will address those reform proposals for enlarging the number of Member States and the institution of permanent members and the veto power. The paper will also note a fundamental new procedural reform recently adopted by the U.N. General Assembly (hereinafter UNGA) in response to the Russian invasion of Ukraine and its use of the veto to frustrate any significant action in the Security Council to resolve that conflict.

To put these issues in perspective, the paper will start with a bit of history regarding the institution of permanent members of the UNSC and the veto.

## II. THE ESTABLISHMENT OF THE INSTITUTION OF “PERMANENT MEMBERS” AND THE VETO.

The institution of permanent members of the UNSC with unrestricted veto power was opposed at the San Francisco conference and has remained an issue throughout the seventy-seven years that the UN has existed.<sup>13</sup> In response to such opposition at the San Francisco Conference, the US, the UK, Russia and China—in a joint Statement to the other delegations (designated in the joint statement as “the four sponsoring Governments”)—insisted on what was termed the “Yalta Formula” for voting in the Security Council.<sup>14</sup> The formula gives the Permanent Members the veto in regard to “decisions which involve ... taking direct measures in connection with the settlement of disputes, adjustments of situations likely to lead to disputes, determination of threats to the peace, and suppression of breaches of the

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10. See, e.g., Simma, *supra* note 2, at 14.

11. U.N. Charter, art. 27, ¶ 3.

12. See e.g., Simma, *supra* note 2, at 396-97.

13. See generally Simma, *supra* note 2.

14. U.N. Conference on International Organization San Francisco, 1945, *Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council*, 710-714, U.N. Doc. UNIO Vol. 11-E-F, (June 8, 1945).

peace” which are “to be governed by a qualified vote—that is, the vote of seven<sup>15</sup> members.”<sup>16</sup> France, which became the fifth Permanent Member shortly following the issuance of the joint statement, separately concurred with the joint Statement.<sup>17</sup> In the Statement, the four sponsoring governments reminded other delegates to the conference, that under the Yalta formula, the Permanent Members could not act by themselves to make such decisions alone since a majority of seven—now nine—votes would be required for any such decisions. As the four sponsoring Governments further explained in their joint statement, they could not be expected in its then present condition of the world to assume the obligation to act in such serious matters as the maintenance of international peace and security in consequence of any decision in which they did not concur.<sup>18</sup>

Nonetheless, other states continued to oppose the veto at the conference. However, in the face of the determined position of the four sponsoring governments that they were not prepared to consent to the proposed UN Charter in the absence of the veto, Article 27(3) reflecting the Yalta Formula, was adopted.<sup>19</sup>

There have been proposals for reforming the UNSC in regard to the unrestricted use of the veto throughout the decades, almost from the inception of the UN.<sup>20</sup> Thus, for example, in a number of resolutions, the UNGA called upon the Permanent Members, among other measures, to “exercise the veto only when they consider the question of vital importance, taking into account the United Nations as a whole, and to state upon what ground they consider this condition present” when there is not unanimity among members of the Security Council.<sup>21</sup>

After the 1963 amendment to the Charter expanding the size of the UNSC from eleven to fifteen, the calls for reforming the Security Council



In 2004, the UN's High Level Panel on Threats, Challenges and Change, originally established to prepare for the 2005 World Summit, called on the Permanent Members of the UNSC to commit voluntarily to refrain from invoking the veto in cases of genocide and large scale human rights abuses.<sup>28</sup> The High Level Panel also addressed the issue of criteria for new permanent members of any expanded UNSC, recommending that any such new permanent members should be among those states that have contributed "most to the United Nations financially, militarily, and diplomatically," particularly through contributions to the UN budget and through participation in UN peacekeeping operations.<sup>29</sup> The High Level Panel also recommended that in regard to any expansion of the UNSC, new permanent members should "represent the broader UN membership" and should not impair the "effectiveness" of the UNSC.<sup>30</sup>

In 2008, the UNGA agreed to move the long deadlocked discussions on Security Council reform from the Open-ended Working Group to the Intergovernmental Negotiations in an informal Plenary of the UNGA.<sup>31</sup>

not on the enlargement of the UNSC but on its working methods in order to enhance the accountability, transparency and inclusiveness of its work with a view to strengthening its legitimacy and effectiveness.<sup>34</sup>

### *G4 Proposal*

Four Member States—Brazil, Germany, India, and Japan—put forward a proposal, calling for six new “national permanent seats” for the economically strongest and most influential countries—putting themselves and two unspecified African countries as candidates for such seats.<sup>35</sup> According to the proponents of this proposal, genuine reform of the Council can only be achieved by expanding both permanent members and non-permanent members with the new national permanent members enjoying the same right to veto as the existing permanent members.<sup>36</sup> The proposal would increase the membership of the UNSC from fifteen to twenty five by adding, in addition to the six permanent seats, four non-permanent seats. The six new permanent seats would be allocated as follows: two from Africa; two from Asia; one from Latin America and the Caribbean (GRULAC); and one from Western European and Others Group (WEOG).<sup>37</sup> The new permanent members would not be entitled to exercise the right of veto until the question of the extension of that right to new members is decided upon separately by a review conference. The four new non-permanent members would be allocated as follows: two from Africa, one from Asia, and one from GRULAC.<sup>38</sup>

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34. 2004 *Open-ended WG Report*, *supra* note 23, at ¶¶ 17-24; Rep. of the Open-ended Working Group on Question of Equitable Representation on and Increase in Membership of the Security Council and Other Matters related to the Security Council, Annex 1 Enclosure, ¶ 15 G.A. Rep. U.N. Doc. A/62/47 (Oct. 9, 2008) [hereinafter *2008 Report of Open-ended WG, Enclosure*]. Such measures included inter alia proposals for: more substantive exchanges of views among the UNSC, the G.A. and ECOSOC; the UNSC exploring ways to assess the extent to which its decisions have been implemented; subsidiary bodies of UNSC to include non-members with strong interest and relevant expertise in their work; and permanent members using their veto to explain their reason for doing so.

35. *Id.* at ¶¶ 11-12; Intervention by H.E. Mr. M.S. Puri Ambassador Acting PR of India during negotiations on “Size of an enlarged Council and working methods of the Security Council” on 7 April 2009 (Apr. 7, 2009).

36. See Statement by Mr. Vivek Katju, Special Secretary, International Organizations and Political issues, at the Informal GA Plenary Meeting on “Intermediate model” at the United Nations, 3 September 2009 (Sept. 3, 2009).

37. 2008 *Report of Open-ended WG, Enclosure*, *supra* note 34.

38. *Id.* at ¶¶ 11-12.

*AU Proposal*



UNSC should be reformed to ensure that it better represents the world today while remaining capable to take the effective action necessary to confront today's security challenges.<sup>43</sup> They reaffirmed their support for the candidacies for permanent seats for Germany, Brazil, India, and Japan, as well as a permanent seat for Africa (the G4 proposal). They stated that they were ready to consider an intermediate solution, which might include, inter alia, a new category of non-permanent seats with longer terms, which might evolve into permanent seats at some future time.<sup>44</sup> The Co-Chairs of the Open-ended WG suggested that the UNGA may wish to consider a transitional or intermediary approach to reforming the UNSC, including the creation of extended non-permanent seats of various durations as a compromise for making progress on the issue of enlarging the UNSC and the veto.<sup>45</sup>

Indeed, all five Permanent Members have made statements supporting enlarging membership of the UNSC but were of one voice that any such enlargement should be based on a broad consensus and not undermine the efficiency and effectiveness of the UNSC.<sup>46</sup> The United States and Russia have stressed that only a modest expansion<sup>47</sup> will ensure the Council's continued effectiveness.<sup>48</sup>

In the end, little progress has been made on the issue of the enlargement of the UNSC and the veto. Member States seem to agree that UNSC expansion should contemplate additional seats, but not much else.<sup>49</sup>

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43. *Id.* at 13.

44. *Id.*

45. *Id.* ¶¶ 17, 25-28.

46. *Id.* ¶ 19.

47. *Id.* ¶¶ 29-31 (outlining various options on the number and category of seats proposed); see also 2008 Report of Open-ended WG, Enclosure, *supra* note 34; Letter Dated 20 March 2008 from Permanent Representative of Cyprus to United Nations Addressed to the President of the General Assembly, Enclosure, Annex II, G.A. Rep. U.N. Doc. A/62/47 (Oct. 9, 2008) (compilation of ideas and positions, including ideas for an intermediate approach to enlarging the UNSC, Elements for Security Council enlargement, and appeal to Permanent Members to exercise restraint on invoking the veto regarding war crimes, genocide, and crimes against humanity, "Elements for Working Methods").

48. See, e.g., Press Release, G.A., Plenary Meetings Coverage, Member States Call for Removing Veto Power, Expanding Security Council to Include New Permanent Seats, as General Assembly Debates Reform Plans for 15-Member Organ, in passim, U.N. Press Release GA/12091 (Nov. 20, 2018) [hereinafter 2018 GA Press Release].

49. 2008 Report of Open-ended WG, Enclosure, *supra* note 34, at ¶¶ 29-31; see also 2008 Report of Open-ended WG, Enclosure, Letter Dated 20 March 2008 from Permanent Representative of Cyprus, *supra* note 47.

#### IV. WHERE IS THE UN HEADING IN REFORMING THE UNSC?

##### *Enlargement of the UNSC*

Recent years have not witnessed any significant progress in the efforts to enlarge the UNSC. The principal obstacle to achieving progress lies not with the Five Permanent Members of the UNSC. They have all endorsed the enlargement of the UNSC in principle with a general caveat that any such enlargement should not undermine the efficiency and effectiveness of the UNSC to address matters under Chapter VII dealing with international peace and security.<sup>50</sup>

For many years, the United States has maintained that it supports an expansion of the UNSC, stressing, however, that it supports only “a modest expansion” of both permanent and non-permanent members in order not to undermine the efficiency and effectiveness of the UNSC to perform its vital functions.<sup>51</sup> In regard to the criteria for choosing additional permanent members of the UNSC, the US has stated that such consideration must take into account the candidates’ ability to contribute to the maintenance of international peace and security.<sup>52</sup>

The UK supports the expansion to make the UNSC more representative, but, like the US, cautions against compromising the effectiveness of the Council.<sup>53</sup> France, similarly, has stressed the need to make the UNSC more representative without compromising its effectiveness.<sup>54</sup> Russia also supported expanding the Council to make it more representative but stresses that such efforts should not undermine the UNSC’s ability to react to challenges effectively and efficiently. Russia

enlarge the membership of the UNSC. The Members of the UNGA, particularly the members of the Group of 77, which represents 132 of the 193 Member States and includes Member States from all of the regional groups except for WEOG, have not been able to agree on which of the many proposals for enlargement to support.<sup>57</sup> Even within the WEOG, there is disagreement as to whether there should be an additional permanent seat and who might occupy the seat.<sup>58</sup>

While the UK and France have long endorsed the G4 proposal, none of the other Permanent Members have done so. Nor have any of the recognized UN regional groups endorsed the proposal.

GRULAC members other than Brazil, both large and small, have different ideas as to how to reform the UNSC membership and which GRULAC member should occupy any permanent seat on the UNSC—or even whether there should be a permanent seat for an individual country versus some kind of non-permanent regional seat.<sup>59</sup> Thus, many GRULAC countries support the UfC proposal calling for regional seats to be filled for extended periods on a rotational basis.<sup>60</sup> The situation is similar in regard to other regional groups, including the WEOG.<sup>61</sup> Thus, none of the regional groups other than Africa have a proposal for enlarging the UNSC.

Additionally, the African proposal has other problems. Given the concerns raised by the Five Permanent Members SC.mayenxp(c)9.2 (a)-1.6 ()TJ[(pr)-3.9 (i)-4.9(ve)- d2(h

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action against genocide, crimes against humanity, and war crimes.<sup>70</sup> supported by 107 Member States. The Code of Conduct is open to all Member States of the U.N.<sup>71</sup>

The Code of Conduct arose out of the work of a group of twenty-four Member States of the Accountability, Coherence and Transparency Group (ACT Group) in consultation with civil society and the Secretariat of UN.<sup>72</sup> As proposed, “[a]t its heart, the Code of Conduct contains a general and positive pledge to support Security Council action against genocide, crimes against humanity and war crimes—to prevent and put an end to these crimes.”<sup>73</sup> More specifically, the Code of Conduct calls upon the Permanent Members to not vote against credible UNSC resolutions that are aimed at preventing or ending those crimes.<sup>74</sup>

The number of Member States supporting the Code of Conduct has grown over the years. As of 2020, some 121 States supported the Code.<sup>75</sup> Notably, among the Member States supporting that ACT initiative at the time are not only the small and medium States that had previously launched the S5 reform proposal, but two of the four Member States that had made the G4 proposal (Japan and Germany), many Member States that were

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Given the longstanding opposition of at least three of the five Permanent Members (US, Russia, and China) to any legally binding restrictions on the exercise of the veto, it is understandable that the calls within the UNGA for reforms relating to the exercise of the veto have focused on voluntary restraints or procedural reforms that do not require any Charter amendment.<sup>79</sup>

Supporters of reforming the use of the veto by voluntary restraints can take heart from the success the UNGA has had in achieving agreement on certain procedural reforms in the working methods of the UNSC.<sup>80</sup> Nonetheless, while they continue to press the case for more substantive voluntary reforms, the continuing opposition of three of the Permanent Members makes even such voluntary reforms unlikely. Perhaps, if agreement were to be reached on the subject of the expansion of the UNSC, there would be an added incentive for the three, as part of an overall package, to more favorably consider some form of voluntary restraints. Only time will tell.

In the meantime, with the recent invasion of Ukraine by Russia and its invoking of the veto to frustrate any action by the Security Council regarding the crisis, the General Assembly revived and overwhelmingly endorsed<sup>81</sup> a procedural proposal of some two years ago by Liechtenstein for the General Assembly to respond to such vetoes.<sup>82</sup> The procedural reform creates a standing mandate for the Assembly to be convened automatically within ten days every time a veto has been cast in the Council.<sup>83</sup>

The permanent member or members responsible for casting a veto would be accorded precedence in the list of speakers, essentially inviting such member or members to lead off and address the Assembly meeting convened under this resolution.<sup>84</sup>

The new resolution makes an exception to this mandate for convening a meeting to discuss a veto where the General Assembly has already

79. 2008 Report of Open-ended WG, Enclosure, *supra* note 34, at ¶¶ 17-24; 2004 Open-ended WG Report, *supra* note 23, at ¶ 15.

80. See, e.g., U.N. President of the S.C., Note by the President of the Security Council, U.N. Doc. S/2017/507 (Aug. 30, 2017) (“For a consideration and user-friendly list of recent practices and newly agreed measures which will serve as guidance for the Council’s work.”).

81. G.A. Res. 76/262 (Apr. 26, 2022); see also Ben Donaldson, *Liechtenstein’s ‘Veto Initiative’ Wins Wide Approval at the UN. Will It Deter the Major Powers?*, UNA UK (Apr. 28, 2022), <https://una.org.uk/news/liechtensteins-veto-initiative-wins-wide-approval-un-will-it-deter-major-powers>.

82. U.N. Security Council, *supra* note 70 at 69-71.

83. See Donaldson, *supra* note 81.

84. *Id.*

convened a special session on the same situation under the Uniting for Peace resolution adopted by the General Assembly in 1950, in connection with the Korean conflict.<sup>85</sup> Notably, a special emergency session under the Uniting for Peace resolution process was called for by the Security Council on 27 February 2022 to examine the situation in the Ukraine following Russia's invasion—the eleventh such emergency special session under the Uniting for Peace resolution.<sup>86</sup>

This proposal for the new procedural reform had eighty-three co-sponsors from every regional group and three Permanent members—the UK, France and the US—and was adopted by consensus.<sup>87</sup> The principal proponent for this procedural reform has suggested that the authors of this initiative “hope that the adoption of this procedural reform will spur a wider debate as to whether the Council should not only reconsider the use of the veto but open space for “innovation””<sup>88</sup>

Only time will tell how this new procedural reform will play out, especially in terms of the related Uniting for Peace resolution already in place—and already invoked for example in regard to the Ukraine situation.<sup>89</sup> Only time will tell whether the hope for further “innovation” regarding the veto will be realized.

The foregoing has examined the prospects for UNSC reform of the veto within the framework of the UNGA. However, this issue has been the subject of discussion within civil society and the academic community as well. It would be remiss in this discussion concerning the future of the UNSC during the 21st Century to fail to take account of those developments, if only briefly.

With respect to civil society, several legal professional entities have weighed in on the issue, with some advocating legally binding restraints on the exercise of the veto in situations

With respect to academia, there has been considerable discussion of the issue. Many of those addressing the issue have begun to advocate for mandatory, legally binding restraints on the exercise of the veto where resolutions before the UNSC implicate mass atrocity crimes.<sup>92</sup> Pursuant to that view, international law has evolved to the point where such restrictions on the use of the veto already exist as a matter of law—without any need to amend the Charter.<sup>93</sup>

These arguments build on the UNGA’s Declaration on Responsibility to Protect<sup>94</sup> and evolving international law and practice as it relates to the Genocide Convention<sup>95</sup> and the 1949 Geneva Conventions<sup>96</sup> as well as the evolving principle of *jus cogens* as they apply within the context of the Purposes and Principles of the Charter.<sup>97</sup> The thrust of these arguments is that the exercise of the veto of a UNSC resolution to prevent or punish genocide, serious war crimes, and crimes against humanity violates binding treaty obligations of Member States, including the Permanent Members of the UNSC, as well as the principle of *jus cogens*, and is contrary to purposes and principles of the UN Charter.<sup>98</sup>

Thus, proponents of that view point to the fact that the Genocide Convention contains an obligation to “prevent genocide” and the 1949 Geneva Conventions provide for states parties “to respect and ensure respect for those Conventions.”<sup>99</sup>

These ideas raise serious and complex issues of international law. While it is beyond the scope of this paper to provide an in-depth analysis of

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91. *Id.* at 335, 339. The American Bar Association recently adopted a policy urging the Permanent Members to commit “in principle” to voluntary restraint in exercising their veto power with respect to resolutions proposing measures to prevent genocide, serious war crimes, ethnic cleansing, or crimes against humanity. *Midyear Meeting 2022 - Item 606*, ABA HOUSE OF DELEGATES, Feb. 15, 2022.

92. *See e.g.*, JENNIFER TRAHAN, *EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES* (Cambridge Univ. Press 2020).

93. *Id.* at 142-247.

94. G.A. Res. 60/1 ¶ 138-9 (Oct. 24, 2005).

95. G.A. Res. 260 A (III), at 277 (Dec. 9, 1948).

96. The Geneva Conventions I, Aug. 12, 1949, 75 U.N.T.S. 31; The Geneva Conventions of 12 August 1949 II, Aug. 12, 1949, 75 U.N.T.S. 85; The Geneva Conventions of 12 August 1949



those issues, it is useful to identify some of those issues.<sup>100</sup> First, the inclusion of crimes against humanity raises an issue of which crimes against humanity the proponents have in mind—beyond those covered in the enumerated treaties. Initially, there is

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Proponents of such existing legal limitations on the veto have argued that the Permanent Members are obligated to refrain from invoking the veto in regard to resolutions seeking to prevent mass atrocity crimes in view of the requirement that they act in accordance with the Purposes and Principles of the Charter. However, this argument also raises issues.

The Charter identifies four “Purposes” in Article 1: 1) “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, in conformity with principles of justice and international laws, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”; 2) “to develop

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those specific powers relate entirely or principally to Article 1—to maintain international peace and security—and not the other paragraphs in Article 1. Thus, the only “purpose and principle” specifically referenced to be substantively applicable to the functions exercised in Chapters VI, VII and VIII is that relating to the maintenance of international peace—and security.<sup>115</sup>

The proponents of recognizing existing legal limitations on the exercise of the veto pursuant to the “Purposes and Principles,” reference in particular the language in Article 1(1) “in conformity with principles of justice and international law” to support such legal limitations on the UNSC in the exercise of the veto and, generally, all of the organs of the UN.<sup>116</sup> However, this argument raises issues. Initially, there is an issue of whether the Purposes were intended to establish legal limitations on the UNSC—or any other UN organ. According to the history of the Charter, the “Purposes” were merely designed to provide a guide for the conduct of UN organs in a fairly flexible manner . . .”<sup>117</sup> There is also an argument that the reference to “principles of justice and international law” in Article 1(1) refers specifically to the means for the adjustment of international disputes which might lead to a breach of the peace—and not to collective measures as provided in Chapter VII.<sup>118</sup>

Thus, the proponents of recognizing existing legal limitations on the exercise of the veto based on the Purposes and Principles of the UN—as set out in Article 1 and the requirement in Article 24 (2) that the UNSC act in accordance with those purposes—raises the fundamental issue of whether those Purposes and Principles were intended to establish legal limitations or policy guidelines.<sup>119</sup> As one noted Charter scholar has opined: “A restriction of the powers of the S.C. based on Article 24(2), second sentence, which in the eyes of the authors of the Charter would appear ‘legalistic,’ would run counter to the purpose of the UN Charter.”<sup>120</sup>

## CONCLUSION

The UN Security Council continues to perform a vital function for the UN and the World related to the maintenance of international peace and

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115. U.N. Charter art. 33; U.N. Charter art. 39; U.N. Charter art. 52.

116. See e.g., Trahan, *supra* note 92.

117. Simma, *supra* note 2, at 50.

118. *Id.* (Paragraph 1 of Art. 1 is composed of two parts, the first of which describes the essential “Purpose” of the Organization, namely, to maintain international peace and security, whereas the second paragraph (sic part) sets out the means designed to achieve this Pu(d)OsUo(an)-14.1 se)0.

security. No observer of the UN would question that the UNSC has not performed perfectly and, at times, has disappointed even its strongest supporters. Nor would they question that the UNSC is in need of a reform to make it more representative of the UN's universal membership. There is also widespread support for limiting the exercise of the veto in situations implicating mass atrocity crimes. Unfortunately, the prospect for achieving such reform are not good, for a variety of reasons discussed above.

That does not mean that reform is not possible. The recent adoption by the UNGA of the Liechtenstein procedural proposal calling for the automatic meeting of the UNGA to discuss any veto that occurs in the Council is an example of what can be done outside of the Council to keep the pressure on the Permanent Members for reform within the Council—even if made possible only by such an extreme event as the Russian invasion of Ukraine.

What is required for even a chance of a significant change, however, is perseverance. For those who believe the time for a reform has come, the fight continues.