

# Strengthening the rule of law through the United Nations Security Council

## Workshop paper series



### Strengthening the Rule of Law through the Security Council

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Strengthening human rights policy coherence within Security Council approaches to the rule of law: Recommendations for action

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Dr Annemarie Devereux



Regulatory  
Institutions  
Network



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**Strengthening Human Rights Policy Coherence within Security Council  
approaches to the Rule of Law: Recommendations for Action**

**by**

**Dr Annemarie Devereux\***

As the title for my presentation suggests, I am starting from a substantive view of the rule of law, in which compliance with international human rights norms forms part of the criteria for determining the ‘rule of law’. In another paper in this series of workshops, I presented the case for a ‘human rights based approach’ to the rule of law. In this segment, we have been asked to focus our ‘1000 words’ on concrete recommendations for the Security Council in relation to the rule of law. In this context, I would like to explore measures designed to promote greater policy coherence with respect to responding to alleged egregious violations of human rights. For the purpose of this paper, the term ‘human rights’ is used broadly to encompass not only international human rights law, but also aspects of international humanitarian law and international criminal law. The following are 5 suggestions for action, focusing on the operations of the Security Council:

*(1) Involve the High Commissioner and other relevant officials in formal briefings of the Security Council.*

Gaining an accurate, up to date picture of the human rights situation in particular contexts is vital for informed Security Council deliberations, particularly where the Security Council is seeking to respond to a threat to international peace and security involving the commission of egregious violations of human rights. The High Commissioner for Human Rights is in an ideal situation to provide such briefings given OHCHR’s field presences, and its substantive support for Special Procedures of the Human Rights Council and many relevant International Commissions of Inquiries/Fact Finding Missions, amongst other functions. Yet, because of the institutional setup of the UN (with the High Commissioner being an office holder appointed by the Secretary

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\* Visiting Fellow, RegNet, ANU. The author has been engaged as a Senior Legal Adviser and Senior Human Rights Officer with OHCHR and several ICOIs, in addition to working with DPKO peace missions in Timor Leste, and the UN’s Counter Terrorism Committee Executive Directorate supporting the Security Council’s Counter Terrorism Committee. She has also worked with the Office of International Law in the Australian Attorney-General’s Department. The views in this Article are expressed on a personal basis and do not represent the views of any of the organisations with which the author has been associated.

General and approved by the General Assembly),<sup>1</sup> there is no automatic right for the High Commissioner to address the Security Council. Whilst there are promising signs of an increased receptiveness of Security Council members to have briefings from the High Commissioner (eg in relation to Syria), a more systematic approach could be adopted: – eg giving the High Commissioner a standing invitation to address the Security Council in relation to country situations in both formal and informal sessions.

*(2) Maximise the Benefits of International Commissions of Inquiry and Follow Up to Commissions of Inquiry*

Within the UN system, International Commissions of Inquiry (ICOIs) and Fact Finding Missions (FFMs) are increasingly being established to investigate gross violations of international human rights and serious violations of international humanitarian law and related international crimes. They have, for instance, been established by the Security Council, the General Assembly, the Human Rights Council, the Secretary General and the High Commissioner for Human Rights in accordance with their respective powers and mandates. Looking at the Security Council in particular, in the 1990s, the Security Council notably authorized ICOIs to look into events in the former Yugoslavia and Rwanda. In both cases, the reports of the ICOIs helped to build the momentum for the ad hoc international tribunals subsequently established. The Security Council was also active in the early 2000s in establishing ICOIs in relation to the situations in Côte d'Ivoire and Darfur. In more recent years, it has been more common for the initiative to come from other bodies, in particular the Human Rights Council.<sup>2</sup> The Security Council could consider more regular establishment of ICOIs itself as part of a sequenced approach of response to a situation: to help the Council be as informed as possible as to the scope and extent of violations and the potential international responses.

There have been promising signs of the Security Council seeking to make greater use of the fruits of ICOIs, even where established by other bodies. In 2012, for instance, the Chair of the Syrian ICOI (a body established by the Human Rights Council) was invited to address members of the Security Council at an informal 'Arria formula' meeting. It is also relevant to ask whether more can be done by the Security Council in relation to the effective operation of ICOIs established to by other bodies. Might for instance the Security Council become actively involved in calling upon the relevant State party to cooperate with ICOIs, even when not established by the Security Council? When ICOIs have completed their functions, could a copy of their reports be submitted to the Security Council as of course? Might the Security Council more regularly receive briefings on the findings of ICOIs? Might the Security Council also be

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<sup>1</sup> The High Commissioner for Human Rights was an office established in 1993 pursuant to General Assembly Resolution 48/141, 20 December 1993, UN Doc A/RES/48/141. As to the method of appointment, see operative paragraph 2(b).

<sup>2</sup> The Commission on Human Rights/Human Rights Council has established some 12 bodies in the last 15 years situations as diverse as: Lebanon, Sudan, Occupied Palestinian Territories, Honduras, Libya, Côte d'Ivoire and Syria.

more actively engaged in follow up to endorsed recommendations of ICOIs?<sup>3</sup> In this latter respect, one precedent which might usefully be highlighted is the case of the Independent Special Commission of Inquiry (ISCOI) for Timor Leste in 2006. Follow up to the investigations and prosecutions recommended by the ISCOI was integrated by the Security Council into the mandate of the peacekeeping operation, the United Nations Integrated Mission in Timor Leste (UNMIT). More formal consideration could be given to the range of recommendations made by ICOIs, including where the recommendation is made for the Security Council to refer a country situation to the ICC (a matter dealt with further below).

### *(3) Systematise Procedures for Considering Referrals to the ICC*

While the International Criminal Court (ICC) was designed not as the primary means, but as a complementary means (to national processes) for investigating and prosecuting international crimes, the Security Council has the power to refer a situation to the ICC,<sup>4</sup> a particularly important power as it relates both to situations of State parties and non-State parties to the Rome Statute of the ICC. At this point, whether or not a particular country situation is referred to the ICC is essentially a political decision by members of the Security Council. While politics are likely to continue to dominate the process, it is worth asking whether there are processes which could be introduced to ameliorate or perhaps further illuminate the politics of this decision making (and thus in time perhaps lead to more structured decision making)? Should there, for instance, be a committee of the Security Council that would consider calls for referrals to the ICC (eg when made by UN officials or ICOIs or a member State of the Security Council), and report back to the Council in relation to its investigation? Might such a committee articulate criteria for the type of situations the Council should refer to the ICC?<sup>5</sup>

### *(4) Consider the possibilities for active law making with respect to human rights matters.*

The breadth of the ‘Security Council’s exercise of law making power’ has been remarked upon in other contexts, particularly that of counter terrorism. It is worth recalling in this context the type of provisions included in Security Council Resolution 1373,<sup>6</sup> including requirements that States refrain from certain acts, freeze funds of terrorists, take necessary steps to prevent the

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<sup>3</sup> The topics of the Security Council’s role in relation to non-Security Council mandated ICOIs and the importance of follow up to ICOIs were canvassed in a meeting hosted by OCHA and the Permanent Mission of Portugal, outlined in the *Report of the Secretary General on the Protection of Civilians*, 22 May 2012, UN Doc S/2012/376, para 69.

<sup>4</sup> Article 13(b), Rome Statute of the International Criminal Court.

<sup>5</sup> The topic of a potential checklist for the Security Council in considering requests for referral was raised in the Secretary General’s recent report on the Protection of Civilians: see *Report of the Secretary General on the Protection of Civilians*, 22 May 2012, UN Doc S/2012/376, para 68; and *Highlights from the Workshop: Accountability and Fact Finding Mechanisms for Violations of International Humanitarian Law and Human Rights Law: The Role of the Security Council – Past and Future*, 1 November 2011, available online at <http://ochanet.unocha.org/p/Documents/Accountability%20Workshop%201%20Nov%202011%20Highlights.pdf>

<sup>6</sup> Security Council Resolution 1373, 28 September 2001, UN Doc S/RES/1373.

commission of terrorist acts, including exchange of information relating to early warning, deny safe haven to those who finance, plan, support or commit terrorist acts, ensure that those involved in terrorist acts are brought to justice and criminalise the relevant acts, afford other States the greatest measure of assistance in connection with criminal investigations or criminal proceedings and to ratify as soon as possible international counter terrorism instruments and the list goes on. The example of Security Council Resolution 1973 may be somewhat controversial and provocative: both because of the breadth of the Security Council's 'law making function' embraced therein, and the ongoing debate as to the consistency of national counter terrorism measures with human rights. But my reason for raising it is to plug into our imaginations: is it conceivable that the Security Council might also respond to the threat posed by egregious violations of human rights in the same way? Putting aside to one moment a 'global resolution' on human rights, could the Security Council when considering an individual country situation, take more robust action: for example, to call upon that State to ratify human rights instruments, to criminalise related international crimes, to call upon that State and other States to not give safe haven to those responsible for such crimes, and to call upon States to afford each other assistance in relation to investigation and prosecution of related international crimes. Whilst not advocating for replicating all the features of the counter terrorism system for human rights, Security Council Resolution 1373 does serve as an interesting precedent to demonstrate what form more rigorous action on human rights might take.

*(5) Address more explicitly the issue of reparations for those who have suffered human rights violations.*

Reparations for those who have suffered human rights violations is an oft neglected topic within the realm of transitional justice. If one conducts a search of the term 'reparations' in Security Council Resolutions, only a few responses are returned and several of the references are in thematic reports. In relation to action on country specific matters, one can find, for instance, a resolution on the Democratic Republic of Congo in 2000 in which the Security Council expressed the view that the Governments of Uganda and Rwanda should make reparations for the loss of life and property damage they had inflicted on the civilian population in Kisangani. In that case the Security Council requested the Secretary General to submit an assessment of the damage as a basis for such reparations.<sup>7</sup> Another example is the 2012 resolution respect to the United Nations Integrated Mission in Timor Leste (UNMIT) in which the Security Council encouraged national authorities to make further progress in finalising draft laws on reparations.<sup>8</sup> For more direct action, one can also note as a useful precedent the Security Council's establishment of the UN Compensation Commission to process the millions of claims relating to Iraq's invasion

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<sup>7</sup> Security Council Resolution 1304, 16 June 2000, UN Doc S/RES/1304.

<sup>8</sup> Security Council Resolution 2037, 23 February 2012, UN Doc S/RES/2037.

and occupation of Kuwait.<sup>9</sup> In comparison to other topics of transitional justice, whether it be prosecutions, truth seeking or institutional reform (particularly that related to the security sector), reparations receives very little explicit attention. The Security Council could usefully address more routinely the obligation on States to provide effective remedies for those who have suffered human rights violations, most particularly through reparations in their various forms.<sup>10</sup> By dealing with the subject more frequently in its resolutions, hopefully there would be a greater prioritising of this important aspect of transitional justice. Even where States commence planning a reparations system, the financing of reparations is often lagging,<sup>11</sup> thus the Security Council and international community in general might also profitably give specialised attention to assistance in providing reparations.

These are obviously many other suggestions which could be made in relation to human rights and the rule of law. However, these five proposals seek to draw upon existing practice of the Security Council to show how further progress could be made in strengthening the coherence and consistency of Security Council action within this field.

Thank you.

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<sup>9</sup> The UN Compensation Commission was established by the Security Council under Resolution 692, 20 May 1991, UN Doc S/RES/692.

<sup>10</sup> As noted in the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (adopted by the General Assembly by consensus in Resolution 60/147, 16 December 2005, UN Doc A/RES/147, Annex), reparations are not limited to monetary compensation, but may take both monetary and non-monetary forms through restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

<sup>11</sup> See for instance, P de Greiff, 'Addressing the Past: Reparations for Gross Human Rights Abuses', in A Hurwitz (ed), *Civil War and the Rule of Law: Security, Development and Human Rights*, Lynne Rienner Publishers, 2008, p. 182.