

## The Rule of Law: The Security Council and Accountability



Representatives of the Office of the Prosecutor talk in the ICC before a public hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Qaddafi.

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Security Council Report's second *Cross-Cutting Report on the Rule of Law*, a thematic issue which has been on the agenda of the Security Council since 2003, analyses statistical information on the rule of law in the decisions of the Security Council and the Secretary-General's reports to the Council in 2011 and 2012.

The report also focuses on the discourse and practice of the Security Council regarding accountability and ending impunity for international crimes and gross violations of human rights as an aspect of the rule of law. It provides the legal context of the development of individual accountability under international law and tracks the historical background of pertinent

Council practice. The report then explores eight case studies to illustrate how the Council has addressed issues of accountability in specific situations. In the main, the report finds that despite its rhetorical commitment to accountability as a principle, and an understanding that accountability is a practical tool that can promote peace and security, the Council has been inconsistent in its approach to this matter. It concludes that a more consistent approach by the Council, with an added emphasis on accountability issues, could have a positive impact on situations on its agenda and its effectiveness in maintaining international peace and security. •

# Executive Summary

- 2 Executive Summary
- 2 Background and Normative Framework
- 2 Our 2011 *Cross-Cutting Report on the Rule of Law*
- 3 The Rule of Law and Individual Accountability
- 3 *Cross-Cutting Report* Methodology
- 3 Key Developments of the Rule of Law on the Thematic Level
- 6 Statistical Analysis on The Rule Of Law
- 6 Methodology
- 7 Resolutions
- 7 Presidential Statements
- 8 Reports of the Secretary-General
- 8 Accountability and International Crimes
- 10 Historical Context: The Security Council and Accountability
- 12 Case Studies
- 12 Yugoslavia and Rwanda (Ad Hoc Tribunals)
- 15 Afghanistan
- 17 Democratic Republic of the Congo
- 23 Côte d'Ivoire
- 27 Sudan
- 30 Kenya
- 32 Libya
- 35 Yemen
- 37 Conclusions
- 39 UN Documents and Useful Additional Resources

Even before the rule of law has become integral to the peacekeeping and peacebuilding efforts of the Security Council, the issue of accountability for serious human rights violations and international crimes has appeared regularly in the rhetoric of the Council. Transitioning from discourse to practice has not been simple, although the Council has expanded its toolkit of options to ensure accountability for such actions while discharging its primary responsibility for the maintenance of international peace and security.

This report will examine the recent practice of the Security Council regarding accountability and ending impunity for serious crimes as an aspect of the rule of law, nowadays a thematic issue regularly found on its programme of work.

In the main, the report finds that despite its rhetorical commitment to accountability as a principle, and an understanding that accountability is a practical tool that can promote peace and security, the Council has been inconsistent in its approach to this

matter. As several of the case studies demonstrate, the Council at times used the tools available to it to ensure accountability and had an impact on the ground as well as in long-term improvement in country situations. But it has been inconsistent in emphasising the importance of accountability mechanisms and measures, or following up on its own previous decisions regarding individual accountability. In some situations, when it has ignored issues of accountability, whether as a strategic decision in addressing a conflict or because it was divided or lacked the political resolve, the Council may have negatively impacted on the conflicts dealt with. While many variables are always at play in any given conflict, the cases examined show that at times, the willingness or unwillingness of the Council to back its own rhetoric with action can make a difference. Therefore, a more consistent approach by the Council, with an added emphasis on accountability issues, could have a positive impact on situations on its agenda and on its effectiveness in maintaining international peace and security. •

## Background and Normative Framework

### *Our 2011 Cross-Cutting Report on the Rule of Law*

In our first *Cross-Cutting Report on the Rule of Law* published on 28 October 2011, we examined the relationship between international law and the Security Council and its treatment of the rule of law. The report complemented a broad new body of work collectively labelled “rule of law” in Security Council deliberations and actions in the last 15 years or so, including an eponymous thematic agenda item as of 2003.

The report examined two main aspects of the rule of law. First, it gauged the degree to which the rule of law has been incorporated into the country-specific work of the Council, including as an avenue to incorporate human rights related action. The report included a statistical analysis of Council resolutions and presidential statements and of the Secretary-General’s reports submitted to the Council. It also took an in-depth look at two of the country-specific situations on the agenda of the Council, that of the Democratic Republic

of the Congo (DRC) and Liberia.

The report found that the Council has embraced the notion that establishing and improving the rule of law in conflict and post-conflict situations is an integral part of the mandates it creates. This integration takes on different forms and contexts, such as institutional reforms, ensuring the security of civilians, and in particular improving human rights conditions as part of peacekeeping and peacebuilding efforts. While generally incorporating rule-of-law elements into its mandates and its thematic decisions, the Council has been inconsistent in its approach to the rule of law when addressing certain situations on the ground.

Second, it examined the degree to which the Council has been guided by the rule of law—taking into account the due process rights of those affected by Council measures—in the course of its resort to targeted sanctions under Chapter VII of the UN Charter. The report found that due to legal and political pressures, the Council has

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## Background And Normative Framework (con't)

expanded the scope of due process rights it affords individuals and entities affected by its sanctions.

### The Rule of Law and Individual Accountability

The definition of the rule of law is not a matter of consensus. Within the UN system, the definition provided by the Secretary-General in his report entitled “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies” (S/2004/616) has carried much weight. The Secretary-General defined the rule of law as:

“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in

decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

The issue of “accountability to laws” and measures to ensure adherence to the law are included in this rather robust and inclusive definition of the rule of law. The present *Cross-Cutting Report on the Rule of Law* will provide an insight into the work of the Council through the lens of this particular aspect of the rule of law. In fact, the rule of law has been referred to by the Council when discussing the need to end impunity and hold individuals accountable for their alleged crimes, in resolution 1315 (2000) on Sierra Leone, for example. As will be seen below, individual accountability for international crimes and gross violations of human rights is also the basis for the development of international criminal law, a field of law that the Council has contributed to before the rule of law became so prevalent in its own work. With the rule of law becoming integral to the Council’s work, individual accountability has become an aspect if its rule-of-law related activities in country specific situations and

other thematic issues such as children and armed conflict and the protection of civilians.

### Cross-Cutting Report Methodology

As is customary with our *Cross-Cutting Reports*, the next section will provide an update on Council practice pertaining to the rule of law undertaken since our 28 October 2011 *Cross-Cutting Report*. We will then provide an update on the statistical analysis of references to the rule of law in Council resolutions and presidential statements and in the Secretary-General’s reports submitted to the Council in 2011 and 2012. The report will then focus on Council practice regarding individual accountability for international crimes and human rights violations in the situations on its agenda. To do so, it will first provide the legal context of the development of individual accountability under international law and will then track the historical background of pertinent Council practice. In light of the background provided, the report will explore several case studies that will illustrate how the Council has been dealing with issues of accountability in specific situations. •

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## Key Developments of the Rule of Law on the Thematic Level

In its presidential statement of 29 June 2010 (S/PRST/2010/11), the Council requested a report on the implementation of the recommendations contained in the Secretary-General’s 2004 landmark report on the rule of law (S/2004/616). The corresponding report entitled “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies” was submitted to the Council on 12 October 2011. It focused on transitional justice and provided an overview of ways in which the Council and its mandates have approached the issue in the past. It recommended that the Council:

- make explicit references to transitional justice where appropriate;
- continue to support action plans for police and judicial reform;
- encourage more funding for justice and security institutions;
- not endorse any amnesty for gross violations of human rights; and
- encourage accountability.

On 19 January 2012, the Council held an open debate on the promotion and strengthening of the rule of law in the maintenance of international peace and security (S/PV.6705). Participating in the debate (in addition to all Council members) were the representatives of 26 states and the EU. The Secretary-General briefed the participants at the outset of the debate, stressing the role of the Council in promoting UN efforts in three broad areas: promoting accountability and reinforcing norms through transitional justice; building justice and security institutions; and focusing on justice for women and girls to foster gender equality. He went on to encourage the Council to include the promotion of transitional justice measures more broadly in the mandates of peacekeeping and political missions, and to reject any endorsement of amnesty for genocide, war crimes, crimes against humanity or gross violations of human rights and international humanitarian law. He also urged the Council

to encourage strengthening national prosecutions for serious international crimes and to support remedies and reparations for the victims as part of its rule-of-law efforts.

In a presidential statement adopted at the end of the debate (S/PRST/2012/1), the Council reaffirmed its belief that sustainable peace requires an integrated approach based on coherence between political, security, development, human rights, including gender equality, and rule of law and justice activities. The Council emphasised the importance of the rule of law as a key element of conflict prevention, peacekeeping, conflict resolution and peacebuilding. The Council also reaffirmed its strong opposition to impunity for serious violations of international humanitarian law and human rights law.

In the presidential statement, the Council further reinforced its resolve to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting

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## Key Developments of the Rule of Law on the Thematic Level (con't)

humanitarian exemptions. The Council requested the Secretary-General to report by 18 January 2013 on the effectiveness of the UN in promoting the rule of law in conflict and post-conflict situations. While a briefing on the rule of law is expected on 30 January 2013, the report itself is likely to be delayed by several months.

As for its own adherence to the rule of law and due process, the Council created the Office of the Ombudsperson and tasked it with receiving, processing and making recommendations on requests from individuals, groups or entities seeking to be removed from the 1267/1989 Al-Qaida Sanctions List, in an independent and impartial manner.

On 17 December 2012, the Council adopted resolution 2083, renewing for 30 months the mandates of the Ombudsperson and the Analytical Support and Sanctions Monitoring Team assisting the 1267/1989 Al-Qaida Sanctions Committee. Council members were generally supportive of renewing both mandates, although differences arose

over the length of the mandate renewals. Most members were amenable to extending the mandate period for both the Ombudsperson and the Monitoring Team from 18 months (as it was in their last mandate) to 36 months. China and Russia, however, were reluctant to extend the mandates for that length of time. The US, the pen holder of the resolution, proposed a compromise solution of 30 months.

In addition to the length of the new mandates, another innovation, in line with a recommendation proposed in the report by the Ombudsperson (S/2012/590), is that she will now be allowed to ask the 1267/1989 Committee to consider granting exemptions to individual petitioners to travel in order to meet with her if she is unable to travel to them. Resolution 2083 also requests the Secretary-General to provide the Office of the Ombudsperson with necessary resources, including for translation services, and urges member states to provide the Ombudsperson with all the relevant information,

including any relevant confidential information. Finally, the resolution sets up a process allowing the Focal Point mechanism created in resolution 1730 (2006) to receive applications—from individuals and entities on the Al-Qaida Sanctions List—for travel and assets freeze exemptions that would then be considered by the 1267/1989 Committee.

On 1 July 2012, the Arusha branch of the International Residual Mechanism for Criminal Tribunals commenced its operations, in accordance with resolution 1966 (2010), carrying out a number of essential functions of the ad hoc international tribunals after the completion of their respective mandates. On 5 July, the Council issued a press statement (SC/10700) welcoming the beginning of operations. The Council also recalled the contribution of the ad hoc and mixed tribunals, the International Criminal Court (ICC), as well as chambers in national tribunals in the fight against impunity, and called on states to cooperate with these judicial bodies.

### RULE OF LAW/ICC OPEN DEBATE

On 17 October 2012, the Security Council held an open debate on “the promotion and strengthening of the rule of law in the maintenance of international peace and security” (S/PV.6849 and Resumption 1). The debate was on the subject of peace and justice with a special focus on the relationship of the Council with the ICC. This was the first thematic debate focusing on the ICC rather than specifically on the two referrals agreed to by the Council, under Article 13(b) of the Rome Statute of the ICC, in resolutions 1593 (2005) on Darfur and 1970 (2011) on Libya. Beyond the two referrals, the Council has also acknowledged the ICC in resolutions 2053 on the DRC, 2062 on Côte d'Ivoire, and 2071 on Mali. It also did so with regard to sexual violence in conflict in resolution 1960 and concerning children and armed conflict in resolution 2068.

Guatemala, the most recent state party to ratify the Rome Statute (2 April 2012), initiated the debate and circulated a concept note on 1 October (S/2012/731). The concept note takes the view that the functions of the Council and those of the ICC are complementary, since they are both aimed at protecting populations at risk. It recalls that a precursor to the establishment of the ICC were the ad hoc criminal tribunals established by the Council itself in response to events in the former Yugoslavia and Rwanda. At the same time, the concept note raises questions regarding the appropriate sequencing of peace and justice. In particular it notes that the Council has agreed to short-term trade-offs when political considerations are prioritised over

principles, such as insisting on accountability without reservations.

The concept note also states that the relationship between the Council and the ICC, as such, should be comprehensively discussed in the Council to achieve two goals. First, to explore how the ICC, as a tool of preventive diplomacy, can assist the Council in carrying out its mandate to uphold the rule of law and second, to examine how the relationship between the two bodies has developed since the entry into force of the Rome Statute in 2002 in order to consider the way forward in strengthening their synergies.

To secure the agreement of all Council members to holding the debate, Guatemala did not seek an outcome to the meeting. Fifty states (including the Council members) and the EU participated. Addressing the Council at the outset of the open debate were the Secretary-General, the President of the ICC, Judge Sang-Hyun Song, and Phakiso Mochochoko, representing the Office of the Prosecutor of the ICC. The President of the Assembly of States Parties, Ambassador Tiina Intelmann (Estonia), also addressed the Council, as did her predecessors in a joint statement by Ambassador Christian Wenaweser (Liechtenstein).

Interestingly, the debate did not produce many opposing views to the ICC, notwithstanding the fact that only seven of the 2012 Council members were states parties to the Rome Statute and that the AU has formally adhered to its request for an Article 16 deferral for President Omar al-Bashir of Sudan.

China, India and Pakistan had the strongest

reservations, with China arguing that the ICC “must not be reduced to a tool” available to some to pursue individual goals and interests or to impede the work of the Security Council in seeking the political settlement of conflicts. India stressed that neither the ICC, nor the ad hoc criminal tribunals for that matter, were the solution to ensuring peace and justice at the national and international levels. It contended that “the solution lies in building national institutions through capacity building efforts so that they can function in a way consistent with the rule of law.” In a similar vein, Pakistan argued for the primacy of national jurisdiction and for ending impunity through strengthening local courts and national capacity.

Likewise, not a state party to the Rome Statute, the US acknowledged nonetheless that the ICC can be “an important tool for accountability”. It furthermore stated that it has engaged with the ICC Prosecutor and Registrar to consider how to support specific prosecutions already underway and that it has responded positively to informal requests for assistance. Russia recognised “the great potential” of the Court as “a serious new tool” with which to achieve international justice. It did, however, caution that the accumulated experience showed that a Council referral to the ICC “often gives rise to serious political and legal consequences that do not lead to any straightforward solution”.

The debate produced several calls for the Council to improve its interaction and cooperation with the ICC, including by:

## Key Developments of the Rule of Law on the Thematic Level (con't)

- ensuring effective follow-up by the Council on its Article 13(b) referrals to ensure its own credibility and the legitimacy of international criminal justice, especially regarding cooperation with the ICC in securing arrest warrants;
- avoiding language recusing the UN from any financial obligation regarding Article 13(b) referrals, in contradiction with the provisions of Article 115 (b) of the Rome Statute and Article 13 of the 4 October 2004 Relationship Agreement between the UN and the ICC, which provide for UN funding for Council referrals, subject to approval by the General Assembly; and
- deleting language exempting certain categories of individuals from ICC jurisdiction in future referral decisions.

A number of specific options were referenced by some speakers, including:

- establishing an indicative checklist to guide the engagement of the Council with the ICC at the time of its consideration of any potential Article 13(b) referrals (Portugal);
- spelling out the rules concerning complementarity in any future referral decisions in accordance with the entirety of the Rome Statute, and Article 19 in particular (Liechtenstein), or more precise drafting of any future referrals to clearly identify obligations regarding cooperation (Australia);
- taking the Relationship Agreement between the ICC and the UN as the general framework for forward thinking on interaction between the Council and the ICC (Togo), or taking full advantage of the “wide range of room to manoeuvre” that the Agreement still offers (Spain);
- making timely pronouncements by the Council in response to notifications of non-cooperation (Germany) or state's failure to implement outstanding arrest warrants (UK);

- establishing a committee or working group of the Council on the ICC (Togo) or amending the existing mandate of the informal working group on the ad hoc tribunals to include the ICC (France);
- establishing a working group of the Council to monitor and follow up on each Article 13(b) referral (New Zealand);
- establishing a working group or a Rome Statute caucus within the Council to examine the practice of past referrals and the effectiveness of investigations stemming from them and to look into the modalities for future referrals (Estonia);
- agreeing to a code of conduct between the permanent members of the Council by which to collectively undertake not to use the veto in situations where massive crimes are committed (France) or voluntarily agreeing not to use the veto in such circumstances (New Zealand);
- agreeing to apply the strict guidelines issued by the ICC Prosecutor on contacts with the accused (France) or addressing the issue of non-essential contacts as part of the cooperation provided for in the Relationship Agreement between the UN and the ICC (Argentina);
- considering whether ICC indictees should be designated for sanctions purposes (Australia) or a more automatic listing of ICC indictees by the sanctions committees (France);
- adding an exemption clause to the Council-mandated travel bans to allow for the transfer of ICC indictees to The Hague (France);
- deleting any provisions in Article 13(b) referrals that amount to “selective criminal accountability” (Brazil);
- not having the Council endorse immunity agreements that are contrary to international law (Liechtenstein);
- holding open debates with a special focus on

- the ICC on a regular basis (Slovenia);
- scheduling periodic briefings by the ICC President and Prosecutor as provided for in the Relationship Agreement (Netherlands);
- developing a more formal framework for interaction, regular exchanges or open briefings between the ICC and the Council on resolution 1325 and subsequent resolutions on women, peace and security (Lithuania);
- ensuring that the application of Article 13(b) does not extend beyond triggering the work of the ICC Prosecutor to avoid an extended political role by the Council (Botswana);
- having the Council declare its intention to act pursuant to Article 13(b) unless the concerned state credibly and promptly demonstrates that it is able to fairly and independently try perpetrators of mass crimes (Switzerland);
- establishing clear parameters (Lesotho) or a protocol (Costa Rica) for Article 13(b) referrals in any case in which there are strong indications that the crimes defined by the Rome Statute are being perpetrated, provided there is no action taken in the respective national jurisdiction;
- providing clear explanations to States that request Article 16 deferrals (Tanzania);
- having the Council ensure in its Article 13(b) referrals that ICC staff and officials are granted all the immunities and protection that are necessary to fulfil their mandate (Austria); and
- including in the UN regular budget the appropriations that would support the Article 13(b) referrals (Ecuador).

The opportunities and avenues for increased cooperation and interaction between the Council and the ICC will likely increase in the near future as the options raised during the 17 October debate are mostly conducive to a more constructive relationship.

The General Assembly has also been active on rule-of-law issues. On 9 December 2011, it adopted without a vote a resolution (A/RES/66/102) requesting a report on the rule of law from the Secretary-General in preparation for a high-level event on the rule of law at the national and international levels to take place on 24 September 2012 on the margins of the General Assembly.

The 16 March 2012 report by the Secretary-General (A/66/749) proposed that the General Assembly adopt a programme of action for the rule of law and develop clear goals and mechanisms to enhance dialogue on the issue. Among other things, it suggested establishing a consultative forum of relevant stakeholders to provide global policy advice for the UN system and member states on strengthening the rule of law at the international and national levels. It also

called on member states to seize the occasion of the high-level meeting to make individual pledges in the area of the rule of law. At the high-level event of 24 September, the General Assembly adopted a “Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels” (A/RES/67/1). The declaration stated that impunity will not be tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations must be investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice through domestic mechanisms or where appropriate, regional or international mechanisms, in accordance with international law. The declaration also recognised the contribution of the Security

Council to the rule of law while discharging its primary responsibility for the maintenance of international peace and security.

Several states made rule-of-law related comments during the debate on Security Council working methods on 26 November 2012 (S/PV.6870 and Resumption 1). In particular, some reiterated statements made during the 17 October open debate on the rule of law and the ICC (see above) regarding the establishment of a subsidiary body to discuss ICC related issues. To this end, on 20 November Liechtenstein sent the Council a letter (S/2012/860), also signed by Costa Rica and Jordan, proposing the establishment of such a body to systematically address questions arising from the relationship between the Council and the ICC, or to expand the mandate of its informal working group on international tribunals to this effect. •

# Statistical Analysis On The Rule Of Law

## Methodology

In our 2011 *Cross-Cutting Report*, in order to test how the Security Council had integrated the rule of law into its work, we analysed Council decisions (resolutions and presidential statements, not press statements) from 2003, when the rule of law first appeared on the agenda, through 31 December 2010. This report updates this information through 31 December 2012. The analysis breaks down the total number of decisions adopted into two categories: those that could reasonably be expected to touch upon issues relating to the rule of law and those where issues relating to the rule of law, as previously defined, were indeed covered.

Certain resolutions related to Council mandated missions of a “technical” nature were not counted as relevant, for example those “rolling-over” a mission for a short period. A judgment was also made regarding the quality of the references to issues that fall under the rubric of the rule of law. Thus, in considering whether the Council has integrated the rule of law into its decisions, both in its international and national dimensions, consideration was given to the situation addressed by the Council and the context of the situation. A decision may contain minimal language addressing a rule of law-related issue, such as ending impunity, yet if the vast majority of relevant issues—such as human rights, judicial reform and establishing state authority—were ignored, the resolution was not considered as meeting the test. For example, a reference to the Secretary-General’s “zero tolerance approach” to sexual abuse and exploitation by peacekeepers, important as it may be, was not considered a substantial reference to the rule of law in a situation that carries with it many other relevant aspects. Besides determining whether the Council integrated the rule of law in its decisions where relevant, the analysis also examined the prevalence of the ‘rule of law’ term itself in Council decisions and the appearance of human rights (and the rights of specific groups, such as women and children) as an aspect of the rule of law.

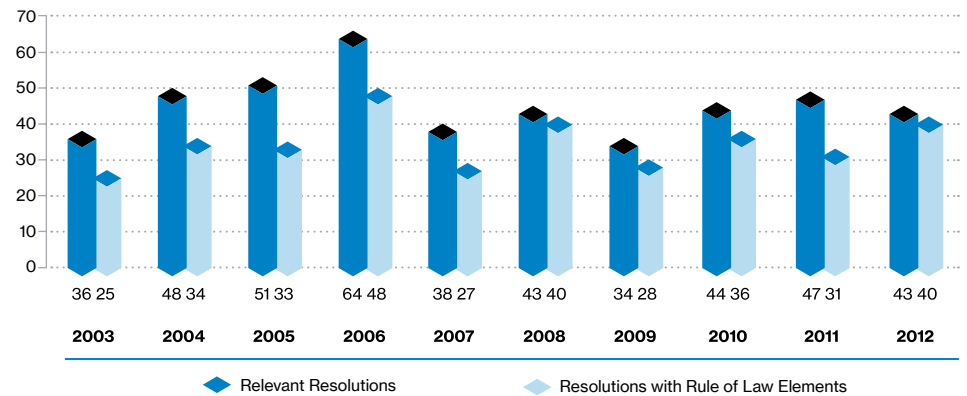
The reports of the Secretary-General were also examined to determine whether rule of law issues were reported on, where one could reasonably expect such content,

in relevant thematic topics and country-specific situations. The analysis explores the reference to rule of law issues in terms of content, and whether observations and recommendations pertaining to the rule of law are offered by the reports. Reports

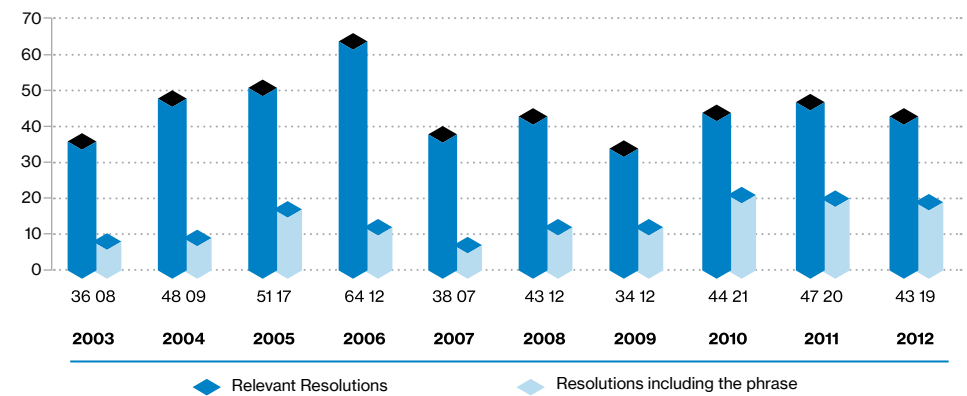
on children and armed conflict in country-specific situations were considered thematic reports.

In our analysis we categorised the following as thematic issues: UN peace operations (including the relationship between

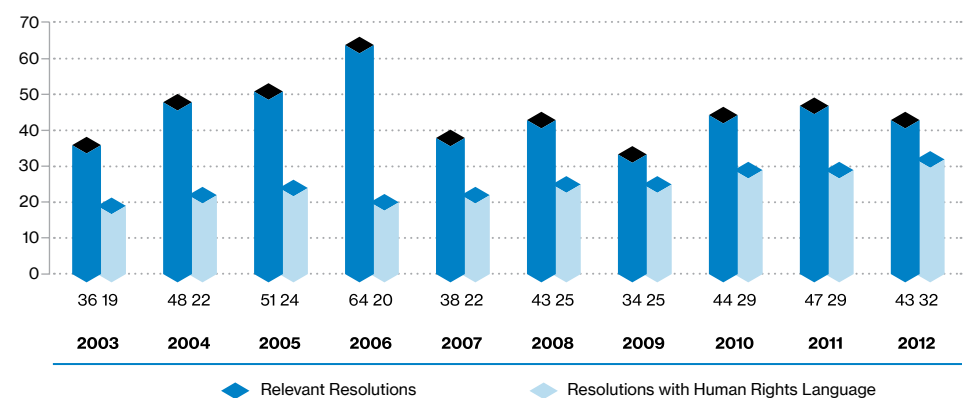
Resolutions with Rule of Law Elements



Resolutions Including the Phrase “Rule of Law”



Resolutions with Human Right Language



## Statistical Analysis On The Rule Of Law (con't)

the Security Council and troop-contributing countries), conflict prevention/mediation, the Security Council's relationship with regional organisations, protection of civilians, international criminal tribunals, illicit flows, counter-terrorism, small arms and light weapons, children and armed conflict and non-proliferation.

### Resolutions

Our previous report showed a gradual increase in the integration of rule of law elements in relevant Council resolutions, from about 69 percent in 2003 to 82 percent both in 2009 and in 2010. The trend did not continue in 2011, when only 66 percent of relevant resolutions contained rule of law elements. However, in 2012, 93 percent of resolutions integrated rule of law elements. Despite the interruption in 2011, it would seem that the integration of rule of law elements into Council resolutions is continuing and increasing.

As for the term 'rule of law', 2011 and 2012 show a slight decline in its use in resolutions, after an increase from 2008 to 2010 (48 percent). The term was used in 43 percent of relevant resolutions in 2011 and 44 percent in 2012. References to human rights in 2011 continued the decline relative to 2010 (66 percent), with 29 of 47 relevant resolutions (62 percent) including human rights language (after a peak of 74 percent in 2009). Notably, 32 of 43 relevant resolutions (74 percent) adopted in 2012 contain human rights language.

The divergent trends to the integration of rule of law elements between 2011 and 2012 may be related to the change in the composition in the Council, or to the diversion of its attention span due to the Arab "awakening" in 2011.

### Presidential Statements

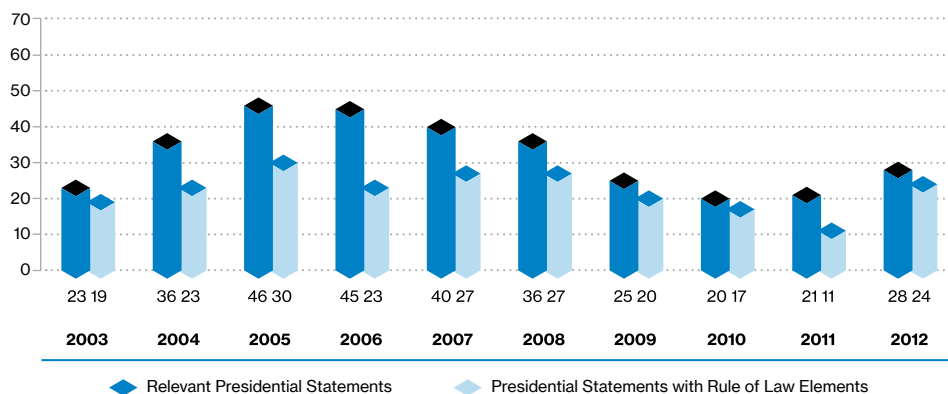
Relevant presidential statements in 2009 and 2010 showed a remarkably high integration of rule of law elements, with 80 percent and 85 percent respectively. This trend did not continue in 2011, with 11 of 21 presidential statements containing such elements (52 percent). Previously, only 2006 displayed a lower figure since the rule of law has been on the Council's agenda. As with resolutions, 2012 stands in contrast to 2011 with 24 of the 28 relevant presidential

statements (86 percent) integrating rule of law elements.

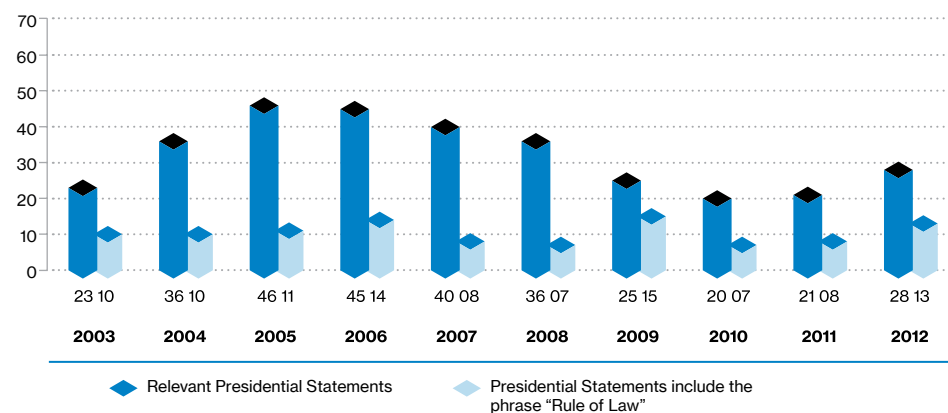
With respect to human rights language, 50 percent of the relevant presidential statements in 2012 have included such references,

considerably higher than the 38 percent registered in 2011. This constitutes a change in the declining trend in references to human rights, from 60 percent in 2009 to 55 percent in 2010.

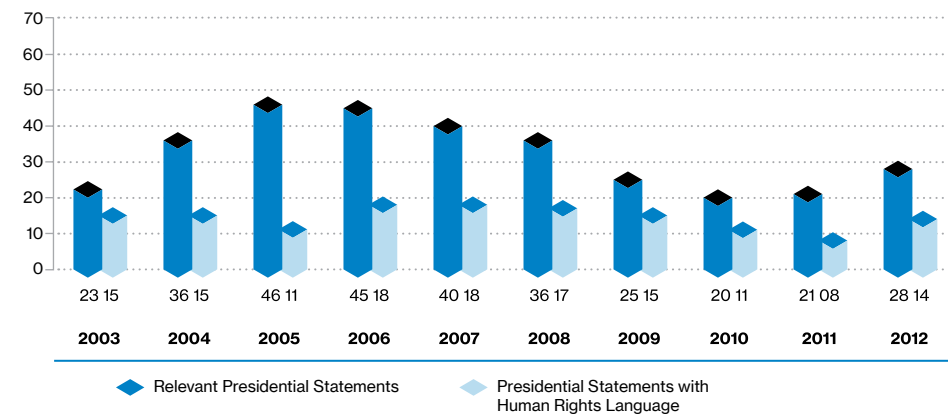
Presidential Statements with Rule of Law Elements



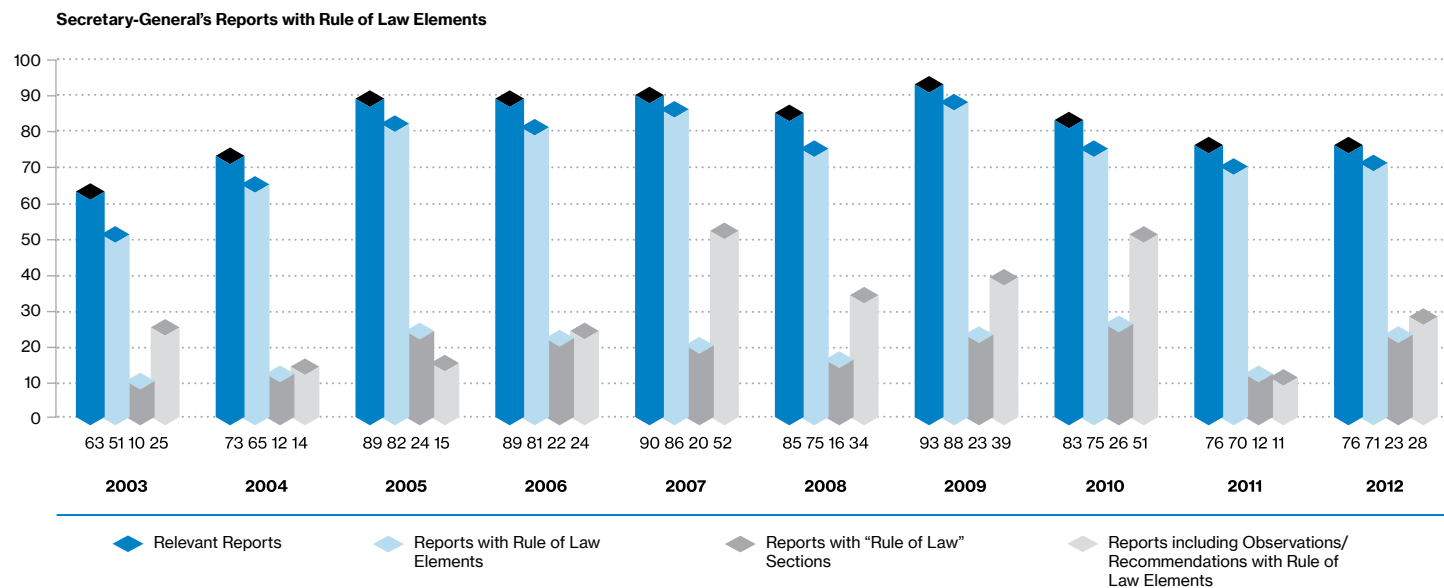
Presidential Statements Including the Phrase "Rule of Law"



Presidential Statements with Human Rights Language



## Statistical Analysis On The Rule Of Law (con't)



### Reports of the Secretary-General

The inclusion of rule of law elements in the Secretary-General's reports since 2003 continues to be high. Since 2005, more than 90

percent of these reports have included references to rule of law issues annually, with the exception of 2008 (about 88 percent). In 2011, rule of law elements were included in 92

percent of the reports, just slightly under the 93 percent registered in 2012. Notably, since 2006, all relevant thematic reports, with no exception, have addressed rule of law issues. •

## Accountability and International Crimes

Modern international law has developed in parallel to the rise of the nation state. As such, states were traditionally the main subjects of international law, i.e., those possessing rights and obligations under the law. Under this arrangement, international law was concerned with individual rights and obligations only inasmuch as they derived from the rights of their state of nationality. Though international law is still, arguably, primarily concerned with state relations, today the rights of individuals (and to a certain extent their obligations) are recognised in various contexts. Three closely interrelated, and at times, overlapping subsets of international law are particularly focused on the protection of the individual: international humanitarian law, international human rights law and international criminal law.

International humanitarian law, which began as reciprocal laws regulating the wartime conduct of states (*jus in bello*) several centuries ago, has developed into a body of law primarily focused on the protection of those affected by conflict. The culmination

of this process was the elaboration of the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, providing protection to individuals at risk, such as civilians, the wounded and prisoners. And, while the 'Geneva Law' deals mostly with international armed conflicts between states, customary international law in recent decades has developed in the direction of providing protection to individuals in non-international armed conflict as well.

While the development of protection of the rights of individuals at wartime has spanned several centuries, international human rights law as a body of law has mainly been a post-World War II development, taking place—in large part—under the auspices of the UN. The adoption of the Universal Declaration of Human Rights by the General Assembly in 1948 started a UN process which produced the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1966, and seven more human rights treaties open to universal ratification to this

date. Though developed to protect human rights at times of peace, human rights are nowadays recognised to apply, in principle, at times of war as well. Furthermore, it is not by coincidence that the international human rights law developed in the immediate aftermath of and response to World War II.

Not only individual rights and their protection by the state have developed under international law, but also obligations on individuals, and in particular their accountability for their criminal actions. The first international criminal offence to be recognised by states was piracy. This was done mainly to preserve state interests, as pirates were not acting on behalf of any state (at least not officially) and operated on the high seas, outside of state jurisdiction. On the national level, some states developed codes and laws that prescribed criminal liability for violations of the law of war, dating back to the 15th century. In the wake of World War I, the Treaty of Versailles included provisions for the establishment of an Allied Military Tribunal to try Kaiser Wilhelm II for a "supreme



## Accountability and International Crimes (con't)

offence against international morality and the sanctity of treaties”, and other individuals for violations of the laws of war. Yet the Kaiser was never tried and not much materialised from the few trials held in German courts under Allied pressure, instead of by the Allies themselves.

The real awakening in the move towards individual accountability for international crimes came after War World II with the establishment of the International Military Tribunal (IMT) by the Allied forces to try Third Reich leaders in Nuremberg, and later on the International Military Tribunal for the Far East in Tokyo to try Japanese leaders. From November 1945 to October 1946, 24 Nazi defendants were tried for war crimes, crimes against humanity related to the war, and for crimes against the peace (today known as the crime of aggression). The Allied forces in control of Germany also tried lower ranked Third Reich officials in military courts established in Germany, and trials for Nazi war criminals were also conducted under domestic law in various European countries.

This rationale for individual accountability was eloquently stated by the Nuremberg Tribunal:

“Individuals have international duties which transcend the national obligations of obedience imposed by the individual State... crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

While the development of international bodies to enforce international crimes was hindered by the Cold War, the period saw developments in the normative framework. Under the Geneva Conventions of 1949, states are obliged to criminalise certain actions (such as wilful killing, torture or inhuman treatment) which qualify as “grave breaches” of the conventions, and prosecute the offenders regardless of their position or status. The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 confirmed genocide as a crime under international law and undertook to prevent it and to punish its perpetrators. Other conventions, while not defining an act as an international crime, oblige states to criminalise certain actions in their domestic legislation, and oblige them to persecute or extradite the

offenders to stand trial elsewhere. A prime example is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

In institutional terms, a significant breakthrough occurred following the Cold War, when the dissolution of the Iron Curtain allowed for certain convergences between East and West, including between the permanent members of the Security Council. As the magnitude and nature of the atrocities in the war in the Balkans were becoming more apparent, the Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) on 25 May 1993, seated in The Hague. Adopted under Chapter VII, resolution 827 (1993) established the ICTY as a subsidiary body of the Council, included its Statute, and obliged states to cooperate with it. The jurisdiction of the Tribunal extended to war crimes, crimes against humanity and genocide. Its Statute contained also a “supremacy clause”, allowing the ICTY to order states to defer to it any criminal proceedings taking place in their domestic jurisdiction. Following the genocide in Rwanda, the Council adopted resolution 955 (1994) establishing the International Criminal Tribunal for Rwanda (ICTR) on 8 November 1994. The ICTR was given jurisdiction over crimes against humanity, genocide and war crimes applicable to a non-international armed conflict.

The approach taken by the international community in Nuremberg, Tokyo, the former Yugoslavia and Rwanda was not without its critics. The trials conducted by the Allies were dubbed by some as “winners’ justice” and criticised for applying legal standards that were unclear at the time. The establishment of the two ad-hoc tribunals by the Council still raised concerns over the clarity of the applicable law and questions of selective justice, as many other crimes and atrocities were left untouched by the Council and the international community at large.

The adoption of the Rome Statute establishing the International Criminal Court (ICC) in 1998 addressed these issues, among others. As of 31 December 2012, there were 121 states parties to the Rome Statute, though several influential states such as China, Russia and the US have not joined the Court. The ICC was given jurisdiction over the crimes of genocide, war crimes, crimes

against humanity and aggression, while elaborating on the specifics of each category of offences. Under contemporary international law, these crimes are all undisputedly recognised as international crimes, even by non-signatories to the ICC. Unlike the ad hoc tribunals established by the Council, the Rome Statute introduced the concept of “complementarity”, with the ICC exercising its jurisdiction when a national court is “unwilling or unable” to prosecute a case by itself. The Rome Statute gives the Council a unique and important role with respect to its jurisdiction to try crimes, as it can refer certain situations to the jurisdiction of the Court (acting under Chapter VII of the Charter).

In recent years, several other quasi-international courts and tribunals were established to address individual accountability for atrocities committed, all with a varying degree of international and national components. Examples include the Special Court for Sierra Leone (SCSL), the Special Tribunal for Lebanon (STL) and the Khmer Rouge Tribunal (officially known as the Extraordinary Chambers in the Courts of Cambodia). These are widely referred to as mixed tribunals and have had varying degrees of success.

While the prosecution of perpetrators of international crimes has gained traction, in principle if less so in practice, other non-judicial responses to gross human rights violations also exist. One such response is amnesty laws though the legality of this tool is increasingly being challenged. Legal arguments against granting amnesties to offenders as part of a transitional justice scheme are based on human rights obligations of states or the idea that there is a duty to investigate and prosecute all international crimes. While these arguments seem to prevail in recent years, it appears that international law still allows for amnesties in principle. Similarly, international criminal law does not rule out Truth and Reconciliation Commissions (TRCs) as an alternative to criminal accountability as such. TRCs are state bodies which investigate past events and are meant to expose the truth of past atrocities based on testimonies of both the victims and the offenders. In order to do so effectively, they usually involve some form of amnesty to the latter. The effectiveness of this approach for reconciliation and justice is highly disputed amongst experts.

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## Accountability and International Crimes (con't)

Related to advancements in the field of international criminal law are two further issues. First, the jurisdictional basis for the prosecution of perpetrators of international crimes has expanded to include universal jurisdiction. Universal jurisdiction entails that a state may exercise its jurisdiction and try an individual for certain acts even if they took place outside of its territory and the persons involved (the perpetrator or the victim) are unrelated to that state. This principle reflects the fact that some crimes go to the very stability and vital interests of the

international community. Even if some disagreement continues as to what crimes are subject to this broad jurisdiction, the jurisdictional principle as well as its applicability to the core international crimes mentioned above are generally undisputed. Despite the general recognition of the concept of universal jurisdiction, states have been generally reluctant to prosecute offenders when their own interests are not in play.

Second, there is the issue of immunities for individuals who are state officials. Under customary international law, it is recognised

that there is a category of high-ranking officials who enjoy complete immunity from criminal procedures in other states—including international crimes—for the duration of their terms. Such officials include incumbent heads of state or government and foreign ministers, and may include other high-ranking officials as well. Thus, as the International Court of Justice (ICJ) has pointed out, these high-ranking officials can only be tried for international crimes after their terms have ended or by an international tribunal not bound by such immunities. •

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## Historical Context: The Security Council and Accountability

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The evolution of the rule of law as an important yet recent concept in the Security Council is addressed in detail in our 2011 *Cross-Cutting Report on the Rule of Law*. This report focuses on a particular aspect of the rule of law and the relevant practice of the Council with respect to individual accountability. As explained in our 2011 report, the understanding of what falls under international peace and security has evolved and expanded over time, in particular after the end of the Cold War. Identifying individual accountability for gross violations of human rights and international crimes, and ending impunity for such actions as falling under the mandate of the Council to maintain international peace and security, was part of that development.

Overtime, the Council has integrated individual accountability into its work in various ways. Some, like the establishment of the ad hoc tribunals, were considered independent of its dealings with the rule of law agenda. Others, like emphasis on judicial reform assistance within its peacekeeping mandates, are deeply imbedded in its rule-of-law agenda.

Individual accountability was considered by the Council as a key aspect of the rule of law at the very outset of the addition of the issue as a separate agenda item. The Council held its first thematic debate on “Justice and the Rule of Law: The United Nations Role” on 24 September 2003 (S/PV.4833) under the presidency of the UK. In the short presidential statement following the debate (S/PRST/2003/15), the Council highlighted

the relevance of the rule of law in its work, which manifests itself in areas such as protection of civilians, peacekeeping and international criminal justice. The statement also welcomed the preparation of a report by the Secretary-General on this topic.

On 23 August 2004, the Secretary-General submitted his report on “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies” (S/2004/616). The report included a working definition of the rule of law and recommendations for the future work of the Council. The report gave much attention to issues of accountability and transitional justice, from the necessity of ensuring an effective national judicial system, to international judicial procedures where necessary, and other alternative mechanisms to achieve accountability for past human rights violations, such as TRCs and independent human rights commissions. Among other things, the report recommended integrating rule-of-law and transitional justice considerations into the strategic and operational planning of peace operations.

On 6 October 2004, the Council held an open debate on the same agenda item (S/PV.5052 and Resumption 1). In the presidential statement following the debate (S/PRST/2004/34), the Council emphasised that ending the climate of impunity is essential if a society is to come to terms with past abuses and to prevent future abuses. The Council enumerated a range of transitional justice mechanisms that should be considered, including national, international and

mixed criminal tribunals, as well as TRCs.

Meanwhile, the Secretary-General’s report of 21 March 2005, entitled “In Larger Freedom: Towards Development, Security and Human Rights for All” (A/59/2005), though not addressing individual accountability per se, took the position that if the UN is to succeed in protecting mankind from the scourge of war, it must ensure respect for fundamental human rights, establish conditions under which justice and the rule of law could be maintained and promote better standards of life. As our first *Cross-Cutting Report* demonstrated, rule-of-law issues became increasingly relevant to the work of the Council, especially as peacekeeping missions were being mandated to carry out peacebuilding activities, and as the line between the former and the latter became less clear.

On 22 June 2006, under the presidency of Denmark, the Council held another open debate, this time on “Strengthening International Law: Rule of Law and Maintenance of International Peace and Security” (S/PV.5474). The concept note prepared by Denmark (S/2006/367) highlighted the importance of ending impunity for international crimes and enhancing the efficiency and credibility of sanctions regimes. In the presidential statement adopted after the debate (S/PRST/2006/28), the Council paraphrased the language it previously used to emphasise the importance of ending impunity and ensuring individual accountability in its work.

Following a debate on “The Promotion and Strengthening of the Rule of Law in

## Historical Context: The Security Council and Accountability (con't)

the Maintenance of International Peace and Security” (S/PV.6347) on 29 June 2010, the Council adopted a presidential statement (S/PRST/2010/11). It reaffirmed its stance on opposition to impunity for serious violations of international humanitarian law and human rights law, while emphasising states’ responsibility to thoroughly investigate and prosecute those responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law. Similar language was reiterated in a presidential statement of 19 January 2012 (S/PRST/2012/1), following a debate on the same agenda item (S/PV.6705 and Resumption 1).

Accountability has also appeared—at the very least rhetorically—as a prominent fixture in other cross-cutting issues on the agenda of the Council, such as women, peace and security; children and armed conflict; and protection of civilians in armed conflict. Resolution 1265 (1999), the first adopted by the Council on the protection of civilians, for example, emphasised the responsibility of states to end impunity for perpetrators of crimes of genocide, crimes against humanity and serious violations of humanitarian law. The issue of individual accountability continues to be addressed in the context of protection of civilians. Addressing the Council on 9 November 2011 during a debate on protection of civilians, the Secretary-General counted enhanced accountability as one of the key challenges the Council must address in protecting civilians (S/PV. 6650). Prior to the debate, Portugal and the Office for the Coordination of Humanitarian Affairs (OCHA) co-hosted a workshop on accountability for violations of international humanitarian law and human rights law, focusing on individual criminal responsibility, fact-finding mechanisms and reparations to victims.

Individual accountability had been deemed an appropriate tool for addressing conflict by the Council well before other rule-of-law elements were considered by it as relevant to peace and security. The prime example—to be discussed thoroughly in the following case studies—is the establishment of the ad hoc tribunals (ICTY and ICTR), both as subsidiary bodies of the Council. This precedent was followed by other instances in which the Council established or facilitated the establishment of internationalised justice mechanisms:

- In resolution 1315 (2000), it requested that the Secretary-General negotiate an agreement with Sierra Leone on the establishment of a Special Court to try those bearing the greatest responsibility for crimes against humanity and war crimes committed in the country.
- In resolution 1757 (2007), it established the Special Tribunal for Lebanon to try those responsible for the 14 February 2005 terrorist attack that killed former Prime Minister Rafiq Hariri and 22 others.
- Acting under Article 13(b) of the Rome Statute, the Council referred the situations in Darfur in resolution 1593 (2005) and in Libya in resolution 1970 (2011) to the ICC. On 17 October 2012, it held its first open debate on the ICC.

The UN Charter grants the Council investigative powers to assist it in addressing accountability for serious human rights violations. Article 34 of the Charter allows the Council to investigate any dispute, or any situation that is likely to endanger international peace and security. The Council first turned to Article 34 in resolution 15 (1946) establishing a Commission of Investigation into border incidents between Greece, Albania, Bulgaria and Yugoslavia. The Commission was invited to make proposals to the Council for further action to avoid repetition of these incidents and submitted its report on 27 May 1947 (S/360). While no action was taken by the Council based on the report, it did provide a platform for several Council meetings.

Another early use of these investigative powers was in the case of the armed conflict between The Netherlands and Indonesia. After the Council received complaints that the warring parties did not cease their fire in accordance with resolution 27 (1947), the Council established the Consular Commission at Batavia (now Jakarta) in resolution 30 (1947). The Council asked members of the Council with consular representatives in Batavia to provide it with information and guidance regarding the observance of the ceasefire and conditions in the areas under military occupation. The Commission provided two interim reports and a final report (S/2087) which were the basis for Council consideration of the issue.

Then in early 1948, as India and Pakistan were at war in Kashmir, the Council

established a Commission for India and Pakistan with resolution 39 (1948). The Commission was tasked with investigating the situation, mediating between the parties and reporting on the implementation of Council decisions.

The Council also acknowledged and considered at times reports on violations of international humanitarian law and human rights, even though it had not mandated those reports. For example, on his own initiative, the Secretary-General established several fact-finding missions during the Iran-Iraq war to investigate the use of chemical weapons. After the fifth report submitted to the Council by the Secretary-General on 25 April 1988 (S/19823) found that chemical weapons were used, on 9 May the Council unanimously adopted resolution 612 (1988), condemning the use of such weapons and calling on the parties to refrain from future use. The resolution stated that the Council had considered the report and expressed its dismay with its conclusions.

While various fact-finding or inquiry missions have been established or considered by the Council since the commencement of its operations, commissions of inquiry related to gross violations of human rights became an integral part of Council practice only following the Cold War. A prominent example is the International Commission of Inquiry on Darfur established by the Council on 18 September 2004 (resolution 1564) to investigate violations of humanitarian law and human rights law in Darfur and to determine whether acts of genocide occurred. The Commission recommended that the Council refer the situation in Darfur to the ICC (S/2005/60). Another recent case was the establishment on 7 April 2005 through resolution 1595 of the International Independent Investigation Commission to assist Lebanon in its investigation of the assassination of former Prime Minister Hariri and several others.

The evolution of the concept of “targeted sanctions” or “smart sanctions” and the shift away from comprehensive sanctions has also affected issues of individual accountability. Targeted sanctions can focus on specific individuals who hold decision-making powers or are personally suspected of bearing the greatest responsibility for serious violations of international law. Sanctions, as opposed to criminal liability, are in principle a tool

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## Historical Context: The Security Council and Accountability (con't)

to alter the behaviour of the targeted parties, not a form of punishment. However, targeted sanctions can be of use in holding individuals accountable for their alleged behaviour, in the sense that they entail that committing international crimes can lead to legal ramifications (for more on the development of targeted sanctions see our 2011 *Cross-Cutting Report on the Rule of Law*).

However, the Council has used individual sanctions to address gross violations of human rights and international humanitarian law in relatively few instances. In resolution 1572 (2004), the Council added serious violations of human rights and international humanitarian law to the designation criteria for the Côte d'Ivoire sanctions regime. Similarly, although scarcely applied, in resolution 1807 (2008) it added child recruitment or sexual abuse to

the designation criteria for the DRC sanctions regime. (For more on this see the case studies below on the DRC and Côte d'Ivoire.)

The issue of individual accountability has arisen quite regularly in Council mandates. As explained in our 2011 *Cross-Cutting Report on the Rule of Law*, the more expansive understanding of what contributes to and affects peace and security has led to the inclusion of rule-of-law elements in the Council's approach towards peacekeeping and peacebuilding. Reforming judicial institutions and encouraging transitional justice mechanisms have become integral to peacekeeping missions. As the case studies will show, however, the follow up and implementation of such mechanisms has been inconsistent and variant.

Finally, while this report is focused on the Council's approach towards individual

accountability in issues on its agenda, it is noteworthy to mention a matter that deserves separate consideration, that of the sexual misconduct by UN peacekeepers. On 31 May 2005, the Council adopted a presidential statement (S/PRST/2005/21) recognising the shared responsibility of the Secretary-General and member states to take every measure to prevent sexual exploitation and abuse by peacekeepers, and reiterating the importance of ensuring that sexual exploitation and abuse are properly investigated and appropriately punished. A "zero tolerance" provision for sexual misconduct of peacekeepers has been regularly inserted into Council mandates in recent years, but in practice the Council has not been involved in the matter and the issue has been left to the discretion of troop-contributing countries. •

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## Case Studies

### Yugoslavia and Rwanda (Ad Hoc Tribunals)

In 1993 and 1994, the Council established two ad hoc international criminal tribunals as subsidiary bodies to hold those responsible for mass atrocities in the former Yugoslavia and Rwanda accountable. The establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) came in the midst of a brutal armed conflict, and though much can be said for the success of the ICTY in holding the main perpetrators accountable, it is questionable if its establishment contributed in halting the conflict itself. The International Criminal Tribunal for Rwanda (ICTR) was established after the 1994 genocide and has met difficulties as well. The Council's follow-up and support for the operation of its own subsidiary bodies also raises various issues.

### ICTY

Shortly after the wars began within the former Yugoslavia in 1991, numerous reports pointed out to mass atrocities, including campaigns of what came to be known as "ethnic cleansing".

Lacking sufficient information on the events on the ground through formal channels, on the initiative of Ambassador Diego Arria (Venezuela), at the time President of the Council, an informal meeting with a visiting Croat priest was organised for Council members in March 1992 to hear an eyewitness account of developments. (These informal meetings of Council members with civil society actors, soon including NGOs and human rights rapporteurs, would thereafter be eponymously known as "Arria formula" briefings.)

Under mounting public pressure to intervene, the Council adopted resolution 752

on 15 May (1992) calling for adherence to international humanitarian law. The Council reiterated its call for compliance with international humanitarian law in resolution 764 of 13 July and also added that individuals should be held accountable for grave breaches of the Geneva Conventions. As the conflicts raged on, on 13 August the Council adopted resolution 770 expressing concern over reports of abuses against civilians imprisoned in camps, prisons and detention centres and resolution 771, invoking Chapter VII, threatening "further measures" against the warring parties. Resolution 771 also condemned violations of international humanitarian law, including those of "ethnic cleansing" and called on states and humanitarian organisations to provide the Council with information on violations of international humanitarian law in the former Yugoslavia. Amid continuing accounts of widespread

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**UN DOCUMENTS ON YUGOSLAVIA AND RWANDA (AD HOC TRIBUNALS)** Security Council Resolutions S/RES/2081 (17 December 2012) extended the ICTY judges terms and requested the tribunal provide a comprehensive plan for completion and timetable for pending cases by 15 April 2013. S/RES/1966 (22 December 2010) established the residual mechanism. S/RES/1995 (6 July 2011) concerned ICTR judges' terms. S/RES/1954 (14 December 2010) concerned ICTY judges' terms. S/RES/1504 and S/RES/1505 (4 September 2003) appointed Carla Del-Ponte as the ICTY Prosecutor and Hassan Bubacar Jallow as ICTR Prosecutor, respectively. S/RES/1503 (28 August 2003) endorsed completion strategies for the tribunals. S/RES/1034 (21 December 1995) condemned the violations of humanitarian law and human rights in Bosnia-Herzegovina and stated the need to investigate these violations rights. S/RES/955 (8 November 1994) established the ICTR. S/RES/935 (1 July 1994) requested the Secretary-General to establish a commission of experts to obtain information regarding grave violations of international law. S/RES/925 (8 June 1994) expressed outrage at crimes being committed in Rwanda. S/RES/918 (17 May 1994) referenced individual accountability for crimes committed in Rwanda. S/RES/912 (21 April 1994) scaled down UNAMIR. S/RES/872 (5 October 1993) established UNAMIR. S/RES/827 (25 May 1993) endorsed the Statute of the ICTY. S/RES/824 (6 May 1993) and S/RES/819 (16 April 1993) established "safe areas" in Bosnia and Herzegovina. S/RES/808 (22 February 1993) decided to establish a criminal tribunal. S/RES/780 (6 October 1992) called on the Secretary-General to establish an impartial Commission of Experts to provide conclusions on accounts of gross human rights violations. S/RES/771 (13 August 1992) threatened measures against the warring parties in the former Yugoslavia and asked for information from states and humanitarian organisations on violations of international humanitarian law in the region. S/RES/770 (13 August 1992) expressed concern over reports of abuses against civilians imprisoned in camps, prisons and detention centres and authorised states to act to ensure humanitarian access. S/RES/764 (13 July 1992) called for adherence to international humanitarian law in the former Yugoslavia. S/RES/752 (15 May 1992) called for adherence to international humanitarian law in the former Yugoslavia.

## Case Studies (con't)

violations of international humanitarian law and fundamental human rights, the Council passed resolution 780 on 6 October, calling on the Secretary-General to establish an impartial Commission of Experts to provide conclusions on these accounts.

On 9 February 1993, in its first interim report (S/25274), the Commission of Experts called for the establishment of an ad hoc international criminal tribunal to try the perpetrators of atrocities in the former Yugoslavia. In response, on 22 February, the Council adopted resolution 808 asking the Secretary-General to report to it on all aspects related to the establishment of such a tribunal. By 3 May, the Secretary-General submitted his report (S/25704) outlining a framework for a tribunal and a proposed statute. In resolution 827 of 25 May, adopted under Chapter VII, the Council unanimously approved the Statute of the ICTY, appended to the Secretary-General's report.

The Statute gave the ICTY jurisdiction over war crimes, genocide and crimes against humanity committed in the territory of the former Yugoslavia since 1 January 1991. One forceful feature of the Statute approved by the Council was the primacy of the tribunal over national courts with concurrent jurisdiction over these crimes. Unlike the principle of complementarity in the Rome Statute of the ICC, primacy allows the ICTY to formally request national courts to defer to its competence. Moreover, the Statute places a binding obligation on states to cooperate with the ICTY in its investigations and prosecutions.

The establishment of the ICTY, however, did not make up for the failure of the Council to effectively address the war in the Balkans for another two and a half years. For example, in the case of Srebrenica, Council-mandated "safe areas" set up through resolutions 819 of 16 April and 824 of 6 May 1993, meant to protect civilians from the forces of the self-styled Republika Srpska in eastern Bosnia and Herzegovina, were not adequately backed up by military capacity. In what would later be recognised by the ICTY and the ICJ as

an act of genocide, in July 1995 thousands of male civilians were forced out of the UN safe area in Srebrenica and taken away by the Bosnian-Serb forces, never to be seen again. In the aftermath of the events, the Council was quick to express its concern over this mass disappearance in a presidential statement issued on 14 July (S/PRST/1995/32). However, only in resolution 1034 adopted on 21 December 1995, after the signing of the Dayton Accords, did the Council fully condemn the humanitarian law and human rights violations that took place and affirm the need to investigate these violations.

### ICTR

As the conflict in the Balkans continued, the Council was faced with another massive tragedy that unfolded in 1994, the genocide in Rwanda. Rwanda was an elected member of the Council at the time of the events, which may explain some of the hesitation of the Council in responding. On 4 August 1993, the Arusha Accords were signed by then President Juvenal Habyarimana, a Hutu, and the rebel Rwandan Patriotic Front (RPF) leader, Paul Kagame, a Tutsi. The UN Assistance Mission for Rwanda (UNAMIR) was established through resolution 872 of 5 October 1993 to assist in the implementation of the accords. But not long after this temporary calm, genocide was sparked following the assassination of President Habyarimana when his plane was shot down above Kigali airport on 6 April 1994. With the assistance of the *Interahamwe* militias, Habyarimana regime hardliners orchestrated the mass slaughter of Tutsis and moderate Hutus. By the time the RPF seized Kigali on 4 July, an estimated 800,000 had been slaughtered. Thereafter, mass numbers of Hutus fled the country as acts of retribution by the Tutsi forces were taking place.

On 20 April 1994, the Secretary-General reported to the Council that mass killings were taking place, to the number of possibly tens of thousands, and that UNAMIR, and the civilians it was trying to protect, were

coming under fire. The Secretary-General noted that UNAMIR needed reinforcements and warned against its withdrawal and the grave civilian casualties that were likely to result if the fighting was not stopped (S/1994/470). The Council, while recognising that thousands had already lost their lives, nevertheless scaled down UNAMIR on 21 April in adopting resolution 912.

On 30 April, the Council adopted a presidential statement (S/PRST/1994/21) stating that those in breach of international humanitarian law were personally accountable. Both this statement and resolution 918 of 17 May recalled "that the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constitutes a crime punishable under international law", though both failed to use the term 'genocide'. It was only on 8 June, in resolution 925, that the Council characterised the situation as a genocide, expressing its outrage over the impunity for the mass crimes in Rwanda.

The Secretary-General's report of 31 May (S/1994/640) noted that massacres and killings had continued in a systematic manner throughout Rwanda and further indicated that only a proper investigation could establish the facts in order to determine responsibility. Acting on this recommendation, in resolution 935 adopted on 1 July, the Council requested the Secretary-General to establish a Commission of Experts to obtain information regarding grave violations of international law in Rwanda. In its 10 October report (S/1994/1125), the Commission concluded that genocide may have been committed against the Tutsi population but also recommended expanding the jurisdiction of a prospective international tribunal to include mass atrocities committed by the RPF as it advanced on the ground. After the RPF seized control of Kigali on 4 July, Rwanda itself requested the Council to establish a criminal tribunal on 28 September (S/1994/1115).

In adopting resolution 955 on 8 November, the Council established the ICTR, with

**UN DOCUMENTS ON YUGOSLAVIA AND RWANDA (AD HOC TRIBUNALS) (con't)** **Security Council Presidential Statements S/PRST/2004/28** (4 August 2004) addressed the lack of cooperation with the ICTY and the ICTR. **S/PRST/2002/39** (18 December 2002) recalled the obligation of Rwanda to fully cooperate with the ICTR. **S/PRST/2002/21** (23 July 2002) endorsed a completion strategy for the ICTY. **S/PRST/1995/32** (14 July 1995) expressed concern over mass disappearance in Srebrenica. **Security Council Meeting Records S/PV.6880** (5 December 2012) was the biannual debate on the tribunals. **Secretary-General's Reports S/1995/134** (13 February 1995) was on the establishment of the ICTR. **S/1994/640** (31 May 1994) noted that massacres and killings have continued in a systematic manner throughout Rwanda and noted the need for investigation. **S/1994/470** (20 April 1994) was the report on the situation in Rwanda. **S/25704** (3 May 1993) was the Secretary-General's report containing the Statute of the ICTY. **Letters S/2002/847** (26 July 2002) was on lack of Rwandan cooperation with the ICTR. **S/2012/845** (14 November 2012) transmitted the request from the ICTY to extend judges' terms. **S/2004/420** (24 May 2004) was a report from the ICTY. **S/2004/353** (6 May 2004) was from the president of the ICTY on Serbian non-cooperation. **S/2002/938** (14 August 2002) was from the ICTR prosecutor on lack of Rwandan cooperation. **S/2002/842** (26 July 2002) was Rwanda's response to allegations of non-cooperation. **S/1994/1115** (28 September 1994) was the request of Rwanda to establish a tribunal. **S/1994/1125** (1 October 1994) was the report of the Commission of Experts on crimes committed in Rwanda. **S/25274** (9 February 1993) was an interim report of the Commission of Experts, with preliminary conclusions. **Other ICTY press release, JJJ/PI.S./709-e** (29 October 2002) was the address of the prosecutor to the Council. **ICTY press release, CC/PIU/344-E** (9 September 1998) was a call from the prosecutor for the Council to take action regarding state non-cooperation with the Tribunal.

## Case Studies (con't)

its Statute annexed to the resolution. The ICTR was to adjudicate crimes committed in Rwanda and Rwandan citizens responsible for crimes committed in the territory of neighbouring states, between 1 January and 31 December 1994. It would be seated in the region and would share a prosecutor with the ICTY. Rwanda, however, voted against the resolution, objecting to the setting up of the ICTR elsewhere rather than Rwanda, the exclusion of events prior to 1 January 1994 from its jurisdiction, its primacy over Rwandan national courts, and the absence of the death penalty.

The Secretary-General further noted in his 13 February 1995 report (S/1995/134) that the Tribunal should be located in Arusha, Tanzania, to ensure “not only the reality but also the appearance of complete impartiality and objectivity in the prosecution of persons responsible for crimes committed by both sides to the conflict. Justice and fairness, therefore, require that trial proceedings be held in a neutral territory”.

### *The Council and the Ad Hoc Tribunals*

Though it would seem that the Council was united in its firm stance on the establishment of the ad hoc tribunals and the obligation of states to cooperate with these newly established subsidiary bodies, cracks between Council members soon followed, weakening the resolve to back the tribunals.

From the very start of the process, following the establishment of the Commission of Inquiry set up to accumulate evidence on crimes committed in the former Yugoslavia, a pattern of half-hearted support was evident. The Commission was not only heavily underfunded but was met with indifference by several Council members. The two tribunals, at first, were not highly active, due to lack of suspects in custody, and the fact that a considerable number of those tried during the first few years were not considered “high profile” individuals. The Council was not proactive in ensuring their effectiveness or in assisting with the arrest warrants. Later on, as the tribunals overextended their originally envisaged existence due to pending proceedings, more attention was given to their financial burden than their eventual success.

Despite the obligation to cooperate with the tribunals resulting from the invocation of Chapter VII, the Council in reality took very

little action when faced with non-cooperation with its subsidiary bodies. For example, the Council heard time and time again about the lack of cooperation with the ICTY on the part of several former Yugoslav republics, most notably the Federal Republic of Yugoslavia. Media reported that in 1997 the Prosecutor accused France and Russia of not handing over suspects to the ICTY when they had the opportunity to do so. In 1998, the Prosecutor further complained about the Council’s muted reaction to the lack of cooperation with the ICTY, while being vocal about other cases (such as those wanted for the Lockerbie bombing incident).

The situation regarding ICTR was no better. For example, on 23 July 2002, the Prosecutor informed the Council that the absence of cooperation by Rwanda had hindered the appearance of prosecution witnesses in Arusha. The Prosecutor added that “powerful elements within Rwanda strongly oppose the investigation by the Prosecutor, in the execution of the Tribunal mandate, of crimes allegedly committed by members of the Rwandan Patriotic Army [formerly the RPF] in 1994” (S/2002/938).

On 26 July 2002, the ICTR President informed the Council that three trials had to be prematurely adjourned due to the inability to conduct trials without material witnesses as a result of non-cooperation by Rwanda (S/2002/847). Rwanda, for its part, denied the accusations and accused the ICTR of corruption and mismanagement (S/2002/842). On 29 October, while addressing the Council, the Prosecutor stated that with its continued non-cooperation on several fronts, Rwanda was placing itself above international law. It was only on 18 December that the Council adopted a response in a presidential statement (S/PRST/2002/39) recalling the obligation of Rwanda to fully cooperate with the ICTR. Further action was not taken though lack of cooperation continued to be a problem.

In pushing for the trial of alleged crimes committed by the RPF, the Prosecutor reportedly relied—among other things—upon a report prepared by Robert Gersony, a consultant that led a UNHCR assessment mission on the repatriation of refugees to post-conflict Rwanda in August-September 1994. The mission visited locations in Rwanda, and Rwandan refugees in Burundi, Tanzania and

Zaire (nowadays the DRC). The team found that beginning in April 1994, RPF forces carried out “systematic and sustained killing and persecution” of Hutu civilian populations, in areas that came under their control during the conflict. UNAMIR officials were made aware of the report and notified the Secretary-General. However, the report was never made public by the Secretariat.

On 23 July 2002, the Council endorsed a completion strategy for the ad hoc tribunals to end their work in a presidential statement (S/PRST/2002/21). Resolution 1503, adopted on 28 August 2003, called on states and other actors to cooperate with the tribunals in order to assist them in completing their work and created a separate position for an ICTR Prosecutor. Subsequently, on 4 September, Hassan Bubacar Jallow was appointed to the ICTR while the incumbent Prosecutor, Carla Del-Ponte, was appointed to the ICTY. However, on 4 May 2004, the ICTY President submitted a report by the Prosecutor that complained that Serbia and Montenegro persisted in failing to cooperate with the tribunal, in particular in implementing arrest warrants, infringing on the ability of the ICTY to meet its completion strategy deadline. The President reiterated this point in his 21 May report (S/2004/420), listing non-cooperation as a key factor impeding its completion strategy. The Council adopted a presidential statement on 4 August (S/PRST/2004/28), reminding states that their cooperation with the tribunals was mandatory under previous Council resolutions. While the Council used language on cooperation repeatedly, the matter was not followed by further measures. And while it paid homage to cooperation, the Council, for financial reasons, continued to press for completion thus casting doubt on its resolve to address issues of non-cooperation.

Over the years, the Council has shown little interest in the apprehension of fugitives wanted by the ICTY. When they were eventually captured, for the most part, economic pressure and incentives from the EU and the US were the catalyst for their capture and transfer to the ICTY. Regarding the ICTR, lack of cooperation came first and foremost from Rwanda itself with the Council failing to take steps to address this situation. Yet, as the work of the tribunals winds down, the Council can still take a more aggressive

## Case Studies (con't)

stance with respect to states in which the remaining nine ICTR fugitives are believed to be present.

### *Conclusions and Analysis*

The establishment of the ICTY and the ICTR was a ground-breaking step to ensure peace and security through measures of individual accountability. The ad hoc tribunals and their case law have also contributed, and continue to contribute, to the development of international criminal law, as well as other fields of international law.

While the ICTY was established in the midst of conflict, it is questionable if it contributed to the end of the conflict in the Balkans. Many would say that it was adopted as a desperate measure by the Council, in light of its failure to stop the violence itself. As a former Assistant Secretary General for Legal Affairs put it, “the reality is that the ICTY and the [ICTR] were established more as acts of political contrition, because of egregious failures to swiftly confront the situations in the former Yugoslavia and Rwanda, than as part of a deliberate policy [of] promoting international justice”.

While individual accountability for atrocious crimes is a key component of peace and security, it cannot replace other forms of necessary response. Nor can it be entirely successful when justice is perceived as one-sided rather than impartial. The Council, while taking a leap forward by establishing the tribunals, did not follow up to ensure cooperation with them, so as to achieve justice for all those affected. And while the ICTR was instrumental as part of the post-conflict efforts in Rwanda, it may have achieved more had it enjoyed more cooperation from those concerned due to stronger Council enforcement of its decisions.

While aware of repeated instances of non-cooperation, the Council did not take forceful measures, and its rhetoric concerning cooperation was lacklustre and non-committal. Although in theory, as a matter of judicial independence, the less the Council intervenes in the work of the tribunals the better, when political factors placed justice in jeopardy, the Council was noticeably passive. When the Council did in fact react, it did so in a very ambivalent manner. Though certain states addressed these issues bilaterally, the Council did not take meaningful action to ensure that the ad hoc tribunals enjoy full cooperation as dictated by their Statutes adopted under Chapter VII, acquiescing to disobedience towards the Council itself.

### *Future options*

After the establishment of the ICC, and considering the financial costs incurred by member states for the operations of the ICTY and ICTR, it is likely that the establishment of any future ad-hoc criminal tribunals by the Council will be controversial. Nonetheless, the need to follow through with Council decisions and ensure cooperation with international criminal proceedings will be highly relevant as the ad hoc tribunals strive to wind down and in the case of other bodies such as the STL or the ICC.

### **Afghanistan**

For more than three decades, Afghanistan has been a country torn by war. A nation of multiple ethnic communities—Pashtuns in the south and east, Tajiks and Uzbeks in the north and Hazaras in the central region—it became a major front in the Cold War when Soviet troops invaded the country on 24 December 1979. The Soviet occupation, in support of the ruling communist coalition,

was soon met with a growing opposition known as the *mujahedin* and joined by Muslim radicals from other countries, eager to fight in the name of Islam. During the occupation, both sides of the conflict committed serious human rights abuses, with attacks aimed at civilians, leading to an outflow of up to five million refugees.

Although the Soviets withdrew by 15 February 1989, the civil war continued between the government and the *mujahedin* factions until the latter seized Kabul on 17 April 1992. But opposition to the new regime rose, most notably from a group referred to as the Taliban, an Islamic fundamentalist militant movement consisting mostly of Pash-tun tribesmen, backed by Pakistan, where many received their religious education at the time of the Soviet occupation. Criticising the Uzbek and Tajik leaders for their corruption, the Taliban gained momentum and overtook Kabul on 27 September 1996. They then enforced a strict version of Islamic law in the country including severe punishments on the population, particularly on women.

On 22 October 1996, the Council adopted resolution 1076, calling for a ceasefire and dialogue between the parties and denouncing acts of discrimination against girls and women and other violations of human rights and international humanitarian law. Yet the violence in the country persisted to devastating effect. In his report of 14 November 1997 (S/1997/894), the Secretary-General noted that “Afghanistan’s civil war has continued to exact a staggering toll in terms of human lives and suffering as well as material destruction. What we are witnessing is a seemingly endless tragedy of epic proportions”. The report also mentioned that UN access to Mazar-i-Sharif, in northern Afghanistan, was seriously disrupted, where NGOs had reported

**UN DOCUMENTS ON AFGHANISTAN** **Security Council Resolutions** S/RES/2041 (22 March 2012) renewed UNAMA’s mandate for a year. S/RES/1988 and S/RES/1989 (17 June 2011) split the Al-Qaida sanctions regime from that of the Taliban and extended the mandate of the Ombudsperson. S/RES/1510 (13 October 2003) expanded ISAF to the whole of Afghanistan. S/RES/1401 (28 March 2002) created UNAMA. S/RES/1390 (16 January 2002) created the consolidated list of individuals and entities related to Al-Qaida and the Taliban. S/RES/1386 (20 December 2001) established ISAF to secure the Kabul area. S/RES/1383 (6 December 2001) endorsed the Bonn Agreement. S/RES/1378 (14 November 2001) stated that the UN is to play a key role in the establishment of a new Afghan administration. S/RES/1373 (28 September 2001) addressed the financing of terrorism. S/RES/1368 (12 September 2001) recognised the US right to self-defence. S/RES/1333 (19 December 2000) imposed an arms embargo on Afghanistan. S/RES/1267 (15 October 1999) imposed sanctions on the Taliban regime. S/RES/1214 (8 December 1998) requested the Secretary-General to follow up on the investigation of mass human rights abuses. S/RES/1193 (13 August 1998) recalled that perpetrators of war crimes should be held accountable and asked the Secretary-General to investigate allegations of mass human rights violations. S/RES/1076 (22 October 1996) called for a ceasefire and recognised acts of discrimination against girls and women and other violations of human rights and international humanitarian law in Afghanistan. **Security Council Presidential Statement** S/PRST/1997/55 (16 December 1997) expressed concern about the reports of mass killings of prisoners of war and civilians in Afghanistan and supported the Secretary-General’s intention to continue to investigate. **Secretary-General’s Reports** S/2012/703 (13 September 2012) was on the situation in Afghanistan. S/2012/462 (20 June 2012) was on the situation in Afghanistan, reporting a sharp decrease in civilian casualties. S/2011/590 (21 September 2011) was on the situation in Afghanistan. S/2011/381 (23 June 2011) was on the situation in Afghanistan. S/2002/278 (18 March 2002) presented the “light footprint” approach. S/2001/1154 (5 December 2001) contained the Bonn Agreement. S/1997/894 (14 November 1997) was on the situation in Afghanistan. **Security Council Meeting Records** S/PV.6840 (20 September 2012) was on the situation in Afghanistan. S/PV.6793 (27 June 2012) was on the situation in Afghanistan. S/PV.4414 (13 November 2001) was the debate in which Brahimi outlined a political transition process for Afghanistan. S/PV.4039 and Resumption 1 (27 August 1999) was a debate during which the Under-Secretary-General for Political Affairs reported on human rights abuses. **Other E/CN.4/1999/40** (24 March 1999) was a report by the Special Rapporteur of the Commission of Human Rights on Afghanistan. “**Treatment of Conflict-Related Detainees in Afghan Custody**” (October 2011) was a UNAMA and OHCHR report documenting detailed evidence of torture and abuse of detainees in numerous detention facilities across Afghanistan. “**A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan**” (November 2011) was a UNAMA and OHCHR report regarding the lack of implementation of the law concerning elimination of violence against women.

## Case Studies (con't)

that during the summer of 1997 a presumed 2,000 Taliban prisoners were executed by the armed opposition known as the Northern Alliance. In response, the Council adopted a presidential statement on 16 December 1997 (S/PRST/1997/55), in which it expressed concern about the reported mass killings of prisoners of war and civilians in Afghanistan and supported the Secretary-General's intention to continue to investigate fully such reports.

As fighting continued, the Council adopted resolution 1193 on 13 August 1998 reminding all parties to the conflict of their obligations under international humanitarian law and in particular the Geneva Conventions of 1949. It furthermore supported the efforts of the Special Envoy of the Secretary-General for Afghanistan, Lakhdar Brahimi, "in facilitating the political process towards the goals of national reconciliation and a lasting political settlement". It also asked the Secretary-General "to continue investigations into alleged mass killings of prisoners of war and civilians as well as ethnically-based forced displacement of large groups of the population and other forms of mass persecution in Afghanistan, and to submit the reports to the General Assembly and the Security Council as soon as they became available".

The Secretary-General continued to report back on human rights violations as did the Special Rapporteur of the UN Commission on Human Rights to his appointing body, noting that any future solution to the situation in Afghanistan would need to address the widespread human rights violations. Afghanistan, however, received relatively little attention from the Council at the time. This changed when it became increasingly clear that the Taliban provided safe haven to Osama bin Laden to operate terrorist training camps and to use Afghanistan as a base from which to run international terrorist operations. In resolution 1267 of 15 October 1999, the Council imposed sanctions on the Taliban and demanded that they turn over bin Laden.

The 11 September 2001 terrorist attacks against the US brought about a completely new focus on Afghanistan. The Council promptly condemned the attacks and recognised the inherent right to self-defence of the US in resolution 1368 of 12 September. This was followed by resolution 1373 on 28 September, which, under Chapter VII,

decided that all member states shall implement certain measures intended to enhance their legal and institutional ability to counter terrorist activities. On 7 October, after the Taliban refused to extradite bin Laden, a US-led coalition attacked Afghanistan.

Brahimi was appointed as the Secretary-General's Special Representative on 3 October 2001 to facilitate talks between the different factions, other than the Taliban who were barred from the negotiations. In his efforts to achieve a negotiated solution, Brahimi excluded individual accountability for past transgressions. The Council, in resolution 1378 of 14 November, endorsed the approach referring to the 13 November statement in the Council in which the Special Representative proposed a political transition culminating in a constitutional government (S/PV.4414). Beyond stating that the UN was to play a key role in supporting a new multi-ethnic Afghan administration that respects human rights and respects its international obligations, the resolution was otherwise silent on issues of justice, reconciliation or accountability.

The talks resulted in the Bonn Agreement of 5 December 2001 (S/2001/1154), which established an Interim Administration led by Chairman Hamid Karzai, and later a transitional administration chosen by a Loya Jirga (a traditional assembly of tribes) until full elections were held. It also outlined in the annexes the way in which the international community would support the peace process in Afghanistan. The Bonn Agreement, however, was likewise silent on issues of accountability for past crimes as well as on the reintegration of the defeated parties into Afghan society.

In 2005, Afghanistan enacted a general amnesty stipulating that all those who were engaged in armed conflict before the formation of the Interim Administration, as well as all reconciled combatants, "shall enjoy all their legal rights and shall not be prosecuted." The amnesty was adopted despite the results of a January 2005 survey conducted by the Afghan Independent Human Rights Commission (AIHRC), set up in accordance with the Bonn Agreement, which showed that 94 percent of the Afghan people found justice for past crimes to be either "very important" (75.9 percent) or "important" (18.5 percent). Almost half believed that war criminals should be brought to justice "now".

The persistence of impunity for mass

human rights violations and international crimes was made particularly evident with the events surrounding an investigation of human rights abuses in Afghanistan from 1978 to 2001 by the AIHRC. On 22 July 2012, news media reported that the AIHRC mapping exercise to find mass graves throughout the country was suppressed by the Karzai administration as the study threatened to expose details of 180 mass graves and name more than 500 responsible individuals. Furthermore, some of those identified in the report were prominent figures in the government or leaders of ethnic groups, including First Vice President Mohammad Fahim, Second Vice President Karim Khalili, Governor of Balkhash province General Atta Mohammed Noor, and Chief of Staff to the Supreme Commander of the Afghan Armed Forces and former Defence Minister General Abdul Rashid Dostum.

In an effort to promote reconciliation with the insurgency, including the Taliban, the government established the High Peace Council in 2010. Recognising that sanctions can change behaviour and could play a part in the Afghan-led reconciliation processes, the Council adopted resolution 1988 on 17 June 2011 splitting the 1267 Al-Qaeda/Taliban sanctions regime in two. (After the initial flight ban and assets freeze imposed on the Taliban in resolution 1267, the sanctions were expanded and altered in nature and scope. First, on 19 December 2000, the Council adopted resolution 1333, imposing an arms embargo on Afghanistan. The resolution also urged states to minimise diplomatic ties with Afghanistan and broadened the previous flight restrictions on Taliban operated flights, to flights to and from Taliban controlled areas. In resolution 1390 of 16 January 2002, the Council added a worldwide travel ban on members of Al-Qaida and the Taliban and those individuals, groups, undertakings and entities associated with them, establishing the "consolidated list" of individuals and entities suspected of terrorist links to the aforementioned organisations.) Resolution 1988 refashioned the Taliban sanctions regime into a country-specific one for Afghanistan allowing for delisting of reconciled individuals as well as re-listing criteria for those who resume activities proscribed by the sanctions regime. On 19 July 2012, the 1988 Sanctions Committee approved



## Case Studies (con't)

the delisting of the former Taliban Minister of Finance, Abdul Wasay Mu'tasim Agha. At press time, a total of 20 individuals had been delisted since 17 June 2011.

Not only has the violent past been left unaddressed, but human rights violations constitute a major concern in contemporary Afghanistan. The October 2011 report by UNAMA and the Office of the High Commissioner for Human Rights (OHCHR) documented widespread torture of detainees by the Afghan National Police and the National Directorate of Security in numerous detention facilities across Afghanistan. The November 2011 report by UNAMA and OHCHR argued that the law regarding the elimination of violence against women has not been widely implemented. This was consistent with a 1 December AIHRC statement that there had been a persistent increase in violence against women and a 13 February 2012 warning, also by the AIHRC, that the government had not acted to stop widespread violence against women in the country, including executions by the Taliban for "moral crimes" such as adultery.

Beyond the various Afghan parties fighting in Afghanistan, several Council members, first and foremost Russia, have raised the issue of the accountability of the International Security Assistance Force (ISAF) for civilian casualties. Russia has argued regularly, for example during a debate on Afghanistan on 27 June 2012 (S/PV.6793), that blatant war crimes are being committed by foreign troops and that accidental civilian deaths caused by erroneous airstrikes have fuelled instability in Afghanistan.

At the outset of the war in 2001, the US and its allies reportedly used carpet bombings and cluster munitions. With mounting international pressure, the North Atlantic Treaty Organization (NATO) has drastically changed its recourse to air power, with less fire power being used and other methods, such as drones, collecting more information before force is used. While the shift reflects adaptation to Taliban tactics, it also reflects a better appreciation for proportionality and restraint. Although the issue of civilian casualties due to air strikes continues to be contentious, it does seem that the change in NATO conduct is not without its effect. In a briefing to the Council on 27 June 2012, Ladsous noted that the number of civilian

casualties attributable to pro-government forces continues to decline, a trend that was confirmed by the 13 September UNAMA report (S/2012/703). In a debate on 20 September, Pakistan, often critical of NATO forces, noted that "civilian deaths and injuries caused by air strikes, night raids and other military operations have decreased significantly" (S/PV.6840).

Another front on which accountability has been wanting in Afghanistan is on the conduct of elections. President Karzai declared himself victorious after the 20 August 2009 presidential election, although it was soon evident that the process had been tainted by massive fraud. Parliamentary elections for the lower house of the Parliament on 18 September 2010 were also tainted by ballot-box stuffing and armed intimidation of voters. Many candidates appealed to the Independent Election Commission (IEC). Karzai then attempted to change the makeup of the Parliament by undermining the IEC through the creation of a special court, which he later dissolved under international pressure. After months of intense political pressure, in mid-August 2011, the IEC revised the results of the parliamentary elections, removing nine members of Parliament and restoring nine others.

Taking account of the rampant corruption that has tarnished the Karzai administration, an international conference on Afghanistan was held in Tokyo on 8 July 2012 which pledged more than \$16 billion in civilian assistance through 2015 contingent on a "mutual accountability framework" through which Afghanistan affirmed its commitment to the rule of law, human rights, effective financial management and good governance.

### Conclusions and Analysis

During the years prior to the 11 September 2001 terrorist attacks, the Council regularly received information regarding massive human rights abuses committed by all warring parties in the country. While condemning the violence and the abuses, in particular against women, the Council did not engage with the issue of accountability.

After September 2001, when the Council's intense engagement with Afghanistan began, accountability was still left unaddressed under the "light footprint" approach advocated by Brahimi, as the focus of the Council was primarily on issues of counter-terrorism.

Yet this approach has apparently backfired, since impunity for past transgressors, many of whom are in positions of power, has undermined the legitimacy of the government in the eyes of the population. Unsurprisingly, those who have not answered for their crimes in the past continue to demonstrate little respect for the rule of law.

### Future Options

The "light footprint" approach has not proven successful in Afghanistan, where ignoring justice and individual accountability has undermined a long-term solution. Although unlikely, upholding individual accountability could still be pursued if the Council was willing to concede that without it, long-term stabilisation and reconciliation might prove elusive. A litmus test for advancements in good governance and rule of law will be the presidential and parliamentary elections scheduled for 2014 and 2015 respectively.

### Democratic Republic of the Congo

Our 2011 *Cross-Cutting Report on the Rule of Law* addressed at length the various rule-of-law aspects of Council practice regarding the DRC. Though many of these aspects are interrelated, the following case study will focus strictly on matters related to individual accountability.

Since the mid-1990s, the DRC has experienced continuous instability and two civil wars that took an extremely heavy toll on the civilian population. Today, the DRC continues to face instability and a relatively weak state presence in its eastern provinces, resulting in the abuse of the civilian population. Since the establishment of the UN Organisation Mission in the DRC (MONUC) on 30 November 1999 through resolution 1279, the Council has been confronted with various issues of individual accountability as part of the conflict in the DRC. Between 2000 and 2010 it also visited the DRC annually, and the rule of law figured prominently in most of these visits.

During its April-May 2002 visit to the DRC, the Council was exposed to what it termed in its mission report "the serious violations of human rights and the appalling humanitarian situation of much of the population in the Democratic Republic of the Congo" (S/2002/537). After receiving

## Case Studies (con't)

reports of large-scale atrocities—such as the 16 July 2002 report of the OHCHR on the situation in Kisangani (S/2002/764) or the 13 February 2003 report on the situation in Ituri (S/2003/216)—the Council called in resolution 1468 (2003) for the military officers named in these reports to be brought to justice through credible processes and encouraged the establishment of a truth and reconciliation commission to determine responsibility for human rights violations. Resolution 1468 went on to ask the Secretary-General to enlarge the human rights component of MONUC to assist in the investigation of human rights violations and in particular to increase the number of human rights personnel and military observers in Ituri.

The Council first mandated sanctions against the DRC on 28 July 2003 in resolution 1493, imposing an arms embargo on all non-state entities in the country. The DRC Sanctions Committee was created on 12 March 2004 in resolution 1533 to oversee the implementation of the sanctions.

Nevertheless, violence and lawlessness continued on the ground. In his 16 August 2004 report (S/2004/650), the Secretary-General painted a bleak picture highlighting the lack of progress in the DRC and escalating violence and tensions, including within the army, the *Forces Armées de la République Démocratique du Congo* (FARDC). The report followed the seizure of Bukavu on 2 June 2004 by the dissident forces led by General Laurent Nkunda, later leader of the *Congrès National pour la Défense du Peuple* (CNDP). In response, on 1 October 2004, the Council adopted resolution 1565, strengthening the human rights component within MONUC to include the promotion and protection of human rights, while working to ensure that those responsible for human rights violations were brought to justice.

As part of its 4-11 November 2005 mission to Central Africa, the Council visited the DRC to evaluate the extension of state authority, security sector reform, and the rule of law in the country. The Council found that impunity, with respect to human rights and economic crimes, was prevalent in the DRC. Shortly after the mission, on 27 January 2006, the Council adopted resolution 1653 addressing the Great Lakes region more broadly, encouraging countries, including the DRC, to strengthen and institutionalise respect for human rights, good governance and the rule of law and to bring perpetrators of grave violations of human rights to justice.

The fighting in Goma between the FARDC and the CNDP at the end of 2008 resulted in hundreds of civilian casualties and approximately 250,000 displaced persons. On 22 December 2008, in resolution 1856, the DRC was called upon to establish a vetting mechanism to screen out candidates for official positions with a record of violating human rights and international humanitarian law. This was of importance taking into account that a considerable number of those integrated into the FARDC and government were former rebel leaders with track records of human rights abuses and continuing conflicting alliances.

In January 2009, Bosco Ntaganda—CNDP's second-in-command, for whom there has been a standing ICC arrest warrant since 7 August 2006—denounced Nkunda as leader of the CNDP. (Nkunda, who operated in the border areas between the DRC and Rwanda, was placed under house arrest in an undisclosed location by Rwanda on 22 January 2009, where media reports suggest he remains, while his trial or extradition process to the DRC has yet to commence.) On 23 March, Bosco (generally better known by his first name rather than surname) agreed

to integrate the CNDP forces into those of the FARDC, and the government committed to legislate a reconciliation mechanism and a law of amnesty for CNDP members “in accordance with international law” (which could mean that amnesty would not be provided for international crimes) and to give precedence to security sector reform. (The Amnesty Law was adopted on 7 May, covering acts of war committed since 2003 but not war crimes.)

The Council visited eastern DRC and Kinshasa from 18-19 May 2009. Initially, individual responsibility, even though mentioned in its terms of reference, was not meant to feature prominently in the interaction with the authorities on the ground. However, after a visit to a hospital for rape victims in Goma and shaken by the lack of accountability for such crimes, members of the visiting mission decided on the spur of the moment to raise the names of five alleged perpetrators of sexual violence, all high-ranking officers within the FARDC, in meetings with President Joseph Kabila and Prime Minister Adolphe Muzito the next day.

Within weeks all five officers were ordered to be relieved of their posts and judicial proceedings were initiated against three. (One was acquitted by a military court for lack of evidence, another presumably fled the country and the third, for whom there had already been an arrest warrant due to a rape conviction in Bukavu, continued commanding a battalion in Equateur province, where the commanding officer refused to transfer him to the military prosecutor.) On 5 July, President Kabila announced a “zero-tolerance policy” within the FARDC with respect to lack of discipline and human rights violations, including sexual and gender based violence.

Several new military offensives were launched in 2009 by the FARDC with

**UN DOCUMENTS ON THE DRC** **Security Council Resolutions** S/RES/2078 (28 November 2012) renewed the sanctions regime and mandate of the DRC GoE until 1 February 2014. S/RES/2076 (20 November 2012) condemned the M23 actions in Goma and requested the Secretary-General to provide information on possible rearrangement and adjustments of MONUSCO's mandate to address the situation. S/RES/2053 (27 June 2012) renewed MONUSCO's mandate. S/RES/2021 (29 November 2011) extended the DRC sanctions and the mandate of the GoE to 30 November 2012. S/RES/1991 (28 June 2011) renewed MONUSCO's mandate and urged the DRC government to investigate the events of summer 2010 in Walikale. S/RES/1925 (28 May 2010) established MONUSCO. S/RES/1906 (23 December 2009) urged the DRC to fully implement its “zero tolerance policy” with respect to human rights violations within the FARDC. S/RES/1856 (22 December 2008) called on the DRC to establish a vetting mechanism to screen out candidates for official positions with a record of violating human rights. S/RES/1807 (31 March 2008) expanded sanctions in the DRC to include perpetrators of human rights violations against women, including sexual violence. S/RES/1794 (21 December 2007) called on the DRC to support the mapping exercise. S/RES/1698 (31 July 2006) strengthened sanctions in the DRC to include child recruiters and those committing serious violations of international law involving children. S/RES/1653 (27 January 2006) called on countries in the Great Lakes region to strengthen and institutionalise respect for human rights, good governance and the rule of law. S/RES/1596 (18 April 2005) expanded sanctions on the DRC to include a travel ban and assets freeze. S/RES/1565 (1 October 2004) authorised MONUC to use all necessary means throughout the DRC to protect human rights. S/RES/1533 (12 March 2004) imposed sanctions on the DRC. S/RES/1493 (28 July 2003) imposed an arms embargo on all non-state entities in the DRC. S/RES/1468 (20 March 2003) called for military officers identified as human rights abusers to be brought to justice. S/RES/1279 (30 November 1999) established MONUC. **Security Council Presidential Statements** S/PRST/2012/22 (19 October 2012) was on the unrest caused by the M23 in the DRC. S/PRST/2011/11 (18 May 2011) was on stabilisation in the DRC and urged the DRC government to investigate the events of summer 2010 in Walikale. S/PRST/2010/17 (17 September 2010) was on the situation in the DRC regarding mass rape in late July and early August of that year. **Security Council Meeting Record** S/PV.6785 (12 June 2012) was on the DRC. **Press Statements** SC/10819 (17 November 2012) condemned attacks by the M23 rebel group and called for the cessation of all outside support to M23. SC/10736 (2 August 2012) condemned attacks by the M23 rebel group and called for the cessation of all outside support to M23. SC/10709 (16 July 2012) condemned all outside support to all armed groups in the DRC. SC/10702 (6 July 2012) condemned recent attacks by the M23 group. SC/10675 (15 June 2012) condemned recent attacks by the M23 group. SC/10016 (26 August 2010) was a press statement expressing outrage at the mass rapes committed in Walikale.

## Case Studies (con't)

support from neighbouring countries and in some cases also with assistance from MONUC. Though a degree of military success was achieved, the offensives led to retaliation by armed groups against civilians and were accompanied by actions by undisciplined and recently integrated FARDC elements, resulting in reported mass human rights violations. Although human rights groups raised concerns about the role played by known human rights abusers in the military operations supported by UN peacekeepers, in particular Bosco, the DRC refused to arrest him.

On 4 December 2009, the Secretary-General reported that MONUC had developed a policy paper specifying that it would not participate in or support operations with FARDC units if there were substantial grounds for believing that there was a real risk that such units would violate human rights law (S/2009/623). The Council then adopted resolution 1906 on 23 December, urging the DRC to fully implement its “zero-tolerance policy” with respect to human rights violations within the army and reiterating that MONUC support for FARDC operations would be conditioned on the latter’s compliance with international law. (For a more detailed analysis of resolution 1906, please see our *Special Research Report* on Resolution 1906 published on 12 April 2010.)

On 30 March 2010, the Secretary-General reported the conclusions of his technical-assessment mission on the future of MONUC to the Council (S/2010/164). While there was some progress, the overall integration of the CNDP into the FARDC pursuant to the 23 March 2009 agreement remained slow and CNDP elements had maintained and established new parallel administrations and tax-collection posts in parts of North Kivu. Meanwhile, armed groups—in particular the *Forces Démocratiques de Libération du Rwanda* (FDLR) and the Lord’s Resistance Army (LRA), as well as elements of

the FARDC, the National Police, and also actors specifically entrusted with protecting the population—continued to commit serious human rights violations. Overall, the technical assessment mission noted that though some soldiers had been prosecuted for human rights violations, enforcement of the “zero-tolerance policy” with regard to indiscipline within the FARDC remained limited. MONUC informed the Council of its intention to establish prosecution support cells to assist and advise the DRC military justice authorities in combating grave human rights violations, including sexual violence.

On 4 January 2010, as the country was preparing for the 50th anniversary of its independence, President Kabila stated that the security situation warranted the complete drawdown of MONUC by mid-year. The government was of the view that the urgent tasks enumerated by the assessment mission should not serve as preconditions, but rather accelerators that should help to spur the drawdown process. With the position of the DRC government aired publicly, Council members planned to visit the DRC from 17-19 April 2010 to underline their view that a withdrawal based on the achievement of critical tasks, rather than a fixed timetable, was essential. However, due to the volcanic ash cloud emanating from Iceland that paralysed flights all over the globe, the trip was postponed to 13-16 May.

During what was essentially a two-day visit, members of the Council met mostly with DRC officials and did not leave the vicinity of Kinshasa, hearing from President Kabila and other officials that the situation in the DRC was calm, that major institutional reforms were underway, and that MONUC should begin its drawdown (S/2010/288). The visiting mission did not produce any recommendations, and the Council refrained from challenging the position of the DRC regarding the situation on the ground.

The Council also declined to discuss a study commissioned by the Secretary-General (S/2006/390), which it had previously acknowledged in resolution 1794 (2007), which called on the DRC to fully support the conduct of the study. Moreover, OHCHR conducted a comprehensive “mapping exercise” documenting a decade (1993 to 2003) of past human rights violations in then Zaire and the DRC. The report, completed in August 2010, contained allegations of genocide committed by Rwandan forces—with others—against people of Hutu ethnicity in 1996 and other grave breaches of human rights and international humanitarian law committed by various government forces and groups. Aside from the DRC, Angola, Burundi, Rwanda and Uganda also objected to the findings and conclusions of the mapping exercise, with Rwanda even threatening to pull all of its troops out of UN peacekeeping missions if actions were taken based on the exercise. Following press leaks, the report was eventually officially released on 1 October 2010, yet the Council never discussed it.

Finally, in light of the position of the government, the Council overhauled MONUC on 28 May 2010 in resolution 1925, transforming the mission into the UN Stabilisation Mission in the DRC (MONUSCO). While authorising a drawdown of 2,000 troops, the Council, as suggested by the Secretary-General, decided that future reconfiguration would depend on the completion of military operations, the protection of civilians and the establishment of state authority and the rule of law.

Just weeks after the establishment of MONUSCO, recurring violations in Walikale, North Kivu, stood out for their scale and lack of adequate response: between 30 July and 2 August, 387 civilians, including 300 women, 23 men, 55 girls and nine boys, were raped by rebels. One of the affected villages was reportedly 30 kilometres from a MONUSCO

**UN DOCUMENTS ON THE DRC (con't)** [Security Council Visiting Mission Reports S/2010/288](#) (30 June 2010) was the Council’s visit to the DRC, before transforming MONUC into MONUSCO. [S/2009/303](#) (11 June 2009) was the Council’s visit to the DRC. [S/2005/716](#) (14 November 2005) was the Council’s visit to Central Africa, including the DRC. [S/2002/537](#) (13 May 2002) exposed the Council to the grave humanitarian situation in the DRC. [Secretary-General’s Reports S/2010/164](#) (30 March 2010) was on the conclusions of the Secretary-General’s technical assessment mission on the future of the Council’s mandate in the DRC. [S/2009/623](#) (4 December 2009) reported on successes in FARDC operations against the FDLR in the Kivus, accompanied by continued human rights violations. [S/2006/390](#) (13 June 2006) was on MONUC and commissioned a study on human rights violations in the DRC in the years 1993-2003. [S/2004/650](#) (16 August 2004) noted the continued violence and lack of rule of law in the DRC. [Letters S/2012/843](#) (12 November 2012) contained the 12 October annual report of the GoE accusing Uganda and Rwanda of assisting the M23. [S/2012/834](#) (23 October 2012) was the letter from Uganda refuting the allegations of the GoE concerning Uganda’s assistance to the M23. [S/2012/348](#) (21 June 2012) and [S/2012/348/Add.1](#) (26 June 2012) contained the GoE report on the Rwanda’s involvement with the M23. [S/2008/43](#) (11 February 2008) contained the DRC GoE report of 23 January 2008. [Other SC/10876](#) (31 December 2012) was on the listing of the FDLR, the M23 and two M23 leaders on the DRC sanctions list. [SC/10842](#) (30 November 2012) added two M23 rebel group leaders, Baudoin Ngaruye and Innocent Kaina, to the DRC sanctions list. [SC/10812](#) (12 November 2012) added an M23 leader, Col. Sultani Makenga, to the DRC sanctions list. [A/C.5/66/17](#) (12 June 2012) was a note by the Secretary-General to the General Assembly on the financing of peacekeeping operations, including MONUSCO. [OHCHR](#) report (August 2010) was a mapping of the most serious human rights violations in the DRC from 1993-2003. [S/2009/243](#) (12 May 2009) was the terms of reference for the Council’s visit to the DRC. [SC/9608](#) (3 March 2009) announced the addition of four individuals to the DRC sanctions list. [S/2003/216](#) (24 February 2003) was a note transmitting a report of the joint fact-finding mission on the situation in Ituri presented to the Council by the High Commissioner for Human Rights. [S/2002/764](#) (16 July 2002) was a note transmitting a report of the joint fact-finding mission on the situation in Kisangani presented to the Council by the High Commissioner for Human Rights.

## Case Studies (con't)

forward operating base, where 80 military personnel were stationed yet remained unaware of the events as they unfolded, a fact for which MONUSCO received much criticism. The first public reports on the events came out on 21-22 August, and the Council was only officially informed through the UN spokesperson on 23 August. In a press statement on 26 August (SC/10016), Council members expressed their outrage at the mass rape. The Council was subsequently briefed on the events by Margot Wallström, then-UN Special Representative of the Secretary-General on Sexual Violence in Conflict, and then-Assistant Secretary-General for Peacekeeping Atul Khare on 7 September. Khare, among other things, recommended that the Council impose sanctions on the alleged perpetrators of the events.

The Council adopted a presidential statement on 17 September 2010 (S/PRST/2010/17), calling on the DRC to bring to justice those responsible for gross human rights violations. The lack of substantial progress brought the Council to urge the DRC to uphold accountability for these events in its presidential statement of 18 May 2011 (S/PRST/2011/11) and in resolution 1991 of 28 June. On 28 November, the 1533 DRC Sanctions Committee added Ntabo Ntaberi Sheka, leader of the Mayi-Mayi Sheka armed group, to its travel ban and assets freeze list as a suspect in the Walikale events (SC/10461).

The incident and the initial call for investigations were also mentioned during the open debate on women, peace and security on 23 February 2012. The Council has continued to receive regular reporting on the lack of progress concerning the investigations, most recently in the 15 November 2012 final report submitted by the Group of Experts assisting the 1533 Sanctions Committee (S/2012/843).

At press time, there continued to be little progress on investigating these events. Captain Sadoke Kikunda Mayele, a FARDC deserter and the sole individual arrested regarding these incidents, died due to illness in a Goma central prison on 14 August 2012. After several failed attempts to pursue suspects, FARDC Major Alphonse Karangwa was arrested in Goma on 21 September 2012 in the context of the investigation.

There have been a few signs of improvement on individual accountability in other

cases. On 21 February 2011, for example, a military court in South Kivu sentenced Lt. Col. Kibibi Mutware and three subordinate officers to 20 years imprisonment for their role in a 1 January 2011 mass rape of at least 60 women in the town of Fizi, South Kivu. Five other soldiers received sentences of between ten and 15 years.

Elections were held in the DRC on 28 November 2011, with the Independent National Electoral Commission declaring incumbent President Kabila the winner of the presidential election, notwithstanding the allegations of fraud by the opposition. International and national observers, including the EU observer mission and the Carter Center, reported irregularities in the vote count as well as the loss of significant numbers of ballots. MONUSCO, which observed significant irregularities in the election process as well, called on all parties to settle election disputes by peaceful means through established institutions and to desist from incitement to violence.

Notwithstanding these calls, violence and protests broke out in Kinshasa and other areas of the DRC. A March 2012 report of the UN Joint Human Rights Office (UNJHRO) in the DRC showed that due to the post-electoral violence in Kinshasa at least 33 people were killed by security forces, 83 were wounded and 16 were missing. More than 265 people were arrested, the majority of whom were arbitrarily detained in various detention facilities in Kinshasa. There was also consistent, corroborated testimony of torture in detention. (The UNJHRO, established in February 2008, comprises the Human Rights Division of MONUSCO and OHCHR in the DRC.) These human rights abuses further undermined the legitimacy of the elections.

In its most recent renewal of MONUSCO in resolution 2053, adopted on 27 June 2012, the Council called on the government to investigate these human rights violations and to prosecute those responsible. Furthermore, it reiterated the need for all perpetrators of international crimes, in particular Bosco, to be arrested and brought to justice.

As the post-election violence subsided, several senior military and former members of the CNDP, led by ICC indictee Bosco Ntaganda, defected from the FARDC and regrouped as the M23 rebel group, seizing control of parts

of North Kivu on 29 April. (On 11 April, President Kabila had reportedly called for the arrest of Bosco in a significant departure from previous assertions that his cooperation was essential in keeping the peace in the eastern DRC. On 14 May, then ICC Prosecutor Luis Moreno Ocampo requested that the Court expand the arrest warrant against Bosco to include crimes against humanity and additional counts of war crimes.) The M23 alleged to be dissatisfied with the implementation of the 23 March 2009 agreements on the reintegration of the CNDP to the FARDC. By 20 November 2012, they had taken over the provincial capital, Goma, established a parallel administration in vast parts of the province, caused scores of deaths and displaced over 300,000 people.

Since the establishment of the 1533 Sanctions Committee, the Council has occasionally used targeted sanctions as a tool in addressing individual responsibility for egregious human rights violations in the DRC. Resolution 1596 of 18 April 2005 expanded the regime to include an assets freeze and travel ban on those designated by the 1533 Committee. On 31 July 2006, in resolution 1698, the Council further expanded the sanctions regime to apply measures to individuals listed for recruiting child soldiers and those committing serious violations of international law involving children. In resolution 1807, adopted 31 March 2008, it added additional designation criteria to include violations of human rights against women, including sexual violence. But it was not until 3 March 2009, following the 23 February 2008 report (S/2008/43) by its Group of Experts (GoE), that the 1533 Committee actually decided to place four individuals on its travel ban and assets freeze list, citing the abduction and sexual abuse of girls and the recruitment and use of child soldiers as the reasons for three of the listings (SC/9608). On 1 December 2010, the Committee added four more people to the list of individuals and entities subject to the assets freeze and travel ban (SC/10099), including FARDC Lt. Col. Innocent Zimurinda, who was listed for several human rights violations, including violations of international law regarding children. Even though the overall structure for sanctioning individuals and entities has been put in place, the use of sanctions in the DRC by the Council and the 1533 Committee has

## Case Studies (con't)

been sporadic, inconsistent and untimely. For example, while the recent M23 rebellion started on 29 April 2012, the first new listing in response to it occurred on 12 November.

Moreover, soon after the M23 outbreak in eastern DRC, the Council received an advance copy of the 21 June interim report (S/2012/348) by the GoE. Among other things, it recommended updating the sanctions list and called on the Council to strongly condemn the practice of child recruitment in the DRC. On 13 June, the GoE informed the 1533 Committee that it had prepared an addendum to the interim report addressing the M23 rebellion and providing evidence of Rwandan support to it. In an unusual move, the GoE stated it would not release the addendum unless the Committee provided assurances that it would be published. On 15 June, the Council released a press statement (SC/10675) expressing concern about developments in the DRC. The statement strongly condemned the recent mutiny and called upon the countries in the region to actively cooperate with the authorities of the DRC in demobilising the M23 and all other armed groups as well as preventing them from receiving outside support in contravention of the sanctions regime. The Council also urged the full investigation of credible reports of outside support to the armed groups, though no specific country was named.

On 27 June 2012, the addendum was published as a Council document (S/2012/348/Add.1). In response, Rwanda released a document questioning the working methods of the GoE and refuting the allegations and accusations in the report. The DRC for its part, pleaded with Council members to apply sanctions against those involved in the rebellion, including foreign officials. On 28 August, the 1533 Committee met with representatives of the DRC and the Foreign Minister of Rwanda, Louise Mushikiwabo, who argued that the GoE Coordinator, Steven Hege (US), had shown a bias against Rwanda in previous writings. (Hege was present in the meeting to respond.) The next day, Council members held an informal interactive dialogue with Mushikiwabo and DRC representatives.

Following a series of briefings and press statements (SC/10702, SC/10709, SC/10736, SC/10819) in which Council members called for the end to any outside support to the

M23, without mentioning any countries, on 19 October 2012, the Council adopted a presidential statement (S/PRST/2012/22) demanding again that all support to armed groups cease immediately and expressing deep concern at reports indicating that such support continued to be provided to the M23 by neighbouring countries. It also expressed its intention to apply targeted sanctions against the leadership of the M23 and those acting in violation of the sanctions regime. The statement stressed the urgency of constructive engagement and dialogue between the DRC and its neighbours, especially Rwanda.

The presidential statement also welcomed the work of the GoE, though it did not address its latest annual report (S/2012/843), which was circulated to the 1533 Committee on 12 October and released publicly on 15 November, after it was leaked to the press. The report asserts that the Rwandan Defence Minister, Gen. James Kabarebe, is the de facto head of the chain of command of the M23 and that Rwanda and Uganda have both funnelled weapons and troops to the rebels. Both Kampala and Kigali denied the accusations. The Council requested the Secretary-General to prepare a special report on possible options, and their implications, for reinforcing the ability of MONUSCO to implement its mandate, including to protect civilians and to report on flows of arms and related material across the DRC border. The GoE met with the 1533 Committee on 12 November to discuss its report and provided the Committee with a confidential file containing 35 individuals that the GoE suggest should be added to the sanctions list. As indicated earlier, on 12 November, one M23 leader, Col. Sultani Makenga, was added to the sanctions list after his name was put forward by France and the US (SC/10812). Since, media reports indicate that Germany, the Netherlands, Sweden, the UK, and the US have cut financial support to Rwanda as a result.

Uganda reacted very strongly to the report. In a 23 October unpublished letter from Ugandan Prime Minister Patrick Amama Mbabazi to the Secretary-General, Uganda denied the allegations that it provides any support to the M23 and threatened to withdraw its troops from the AU Mission in Somalia (AMISOM), unless the Council withdrew its support of the GoE and more

emphasis was placed on the regional actors. In a letter sent to the Council and the Secretary-General on 12 November 2012, Uganda denied the allegations again and stated that the report should be rejected and erased from UN records (S/2012/834). Uganda then held bilateral meetings with some Council members, raising the issue of the publication of the report as an official UN document. Despite this diplomatic effort, no Committee member expressed its objection to the publication of the report on 15 November. Some Council members, sensitive to Rwanda and Uganda's positions, took the view that while the report should be published as part of the regular reporting process, publication did not necessarily entail Council agreement with its contents.

On 20 November 2012, when the M23 seized Goma, the Council responded by adopting resolution 2076. The resolution expressed the intention of the Council to consider sanctions against the M23 leadership and those providing external support to it, and called on all member states to submit, as a matter of urgency, listing proposals to the 1533 Committee. While the original draft resolution contained the names of two M23 leaders to be sanctioned, the adopted text referred the issue to the Committee, which added them to the list on 30 November 2012 (SC/10842). Furthermore, while the Council expressed its concern over "reports and allegations" that outside support for the M23 continued, the resolution failed to express support or make reference to the GoE at all. On 28 November, however, in adopting resolution 2078, the Council renewed the mandate of the GoE expressing its support for their work, although only "taking note" of their reports.

On 31 December 2012, a day before Rwanda joined the Council, the DRC sanctions Committee listed the FDLR and the M23 rebel groups for, among other things, serious violations of international law including the targeting of women and children in armed conflict in the DRC, including killing and maiming, sexual violence, and forced displacement (SC/10876). Notably, the press statement specifically states that the M23 had been receiving assistance from the Rwandan Defence Forces (RDF). Two M23 leaders were also listed, one of whom (Eric Badesge) for serious violations of international law which involved the indiscriminate killing of

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## Case Studies (con't)

civilians, including women and children.

The M23 pulled out of Goma on 1 December 2012 in accordance with a deal brokered by the International Conference on the Great Lakes Region (ICGLR). (In its declaration of 24 November, the ICGLR called on the M23 to pull out of Goma, for the creation of a buffer zone around Goma between the FARDC and M23, and for negotiations between the M23 and the DRC government, which was “to listen, evaluate and resolve the legitimate grievances of M23”.) At present, the negotiations are still ongoing with little progress reported.

Also on 1 December, UNJHRO released preliminary findings on allegations of violations committed between 20–30 November in and around Minova, a town close to Goma, documenting at least 126 rapes and the killing of two civilians—one a minor—as FARDC troops were retreating. A parallel investigation by the FARDC has led to the arrest of nine FARDC soldiers, two in connection with the rapes, and seven in connection with lootings. According to the UN spokesperson, Martin Nesirky, MONUSCO is assisting the FARDC in ensuring that the perpetrators are identified and held accountable.

Media reports and NGOs have accused the M23 of killing and raping civilians and looting towns during the clashes. According to the UN Children’s Fund (UNICEF), almost 400 women and girls were sexually assaulted during the M23 advance on Goma, while the UNHCR estimated that 177,000 civilians were driven from their homes due to the M23 offensive.

### *Conclusions and Analysis*

In the DRC, holding human rights violators accountable has not followed peacekeeping achievements. As this case study suggests, lack of consistent focus and progress on rule of law efforts may lead to severe regression in the overall security situation, including the level of adherence to human rights.

Though the addition of sexual violence and protection of children as criteria for listing by the 1533 Sanctions Committee was noteworthy, it took the Committee years to make practical use of these provisions and, overall, this tool has remained underutilised. Sporadic prosecution of perpetrators of violence, accompanied by disregard of some ICC warrants, has contributed to an

atmosphere of impunity and lawlessness in large parts of the DRC.

Sanctions can be used as a tool to alter the behaviour of human rights offenders and deter potential offenders from obstructing rule-of-law efforts. Yet the lack of political will to hasten such action and the reluctance to sanction elements within the FARDC for political reasons hamper this tool as an effective mechanism in the DRC. Moreover, sanctions imposed several months or more after the relevant events took place are not likely to achieve the same deterrence as timely imposed sanctions that would be associated both by the perpetrators and the population at large with the specific behaviour or act that is targeted. They are also less likely to foster trust amongst the local population in the commitment of the Security Council to improve the situation in the DRC.

The Council has shown similar reluctance to apply timely sanctions against several of the M23 leaders (Bosco is already on the sanctions list), or foreign officials apparently connected to the mutiny. In fact, the reluctance of the Council (and some of its members) to apply real pressure on the DRC, or to utilise MONUSCO to apprehend Bosco, has proven to be a costly miscalculation, time and time again. What may have been a politically motivated decision to stabilise the DRC by maintaining the status quo, has given time and space for Bosco and those like him to destabilise the DRC, costing the UN more time and resources.

A timely response by the Council to events as they unfold or its focused intervention at the highest political level can make a difference in protecting civilians from mass violations of human rights and in prosecuting perpetrators. Hesitant responses can prove costly and might also undermine or even reverse any progress on rule of law and the establishment of state authority throughout the DRC in affected regions. The Council has proved in several instances that when it asserts itself, it can achieve results, as in the example of the five officers who were ordered to be removed from their FARDC positions after the Council raised their cases with the government during its 18–19 May 2009 visiting mission. At other times, the Council has failed to show consistency.

Although the Council has expressed its confidence in the GoE on numerous

occasions, it has often not followed its recommendations, or done so only with considerable delay. It has continued to release the GoE reports, including when politically sensitive, such as its recent 12 October 2012 final report. Yet, the Council has often refrained from taking action based on the reports, in particular against officials of countries implicated. In resolution 2076, the Council did not follow its usual practice and failed to express its support for the work of the GoE.

Although in April 2012 the Council started to request regular briefings from various UN officials, usually representatives of MONUSCO or the Department of Peacekeeping Operations (DPKO), on the crisis in North Kivu, these did not bring about concrete action by the Council until resolution 2076 was adopted on 20 November. By then, the M23 had progressively expanded its area of influence to at a certain point include Goma.

In its approach to the DRC, the Council has been characterised by changing levels of political engagement and attention. For over a decade, the Council was actively engaged and channelled huge resources into the peacekeeping operations in the DRC. MONUSCO is currently the largest UN peacekeeping operation, costing upwards of 1.4 billion dollars (for the period of 1 July 2012 to 30 June 2013 [A/C.5/66/17]) and accounting for 20 percent (23,504 total personnel) of Council mandated peacekeepers. The Council also manifested its interest in the DRC through regular annual visits for ten years in a row. This “hands on” approach offered some success on particular issues regarding accountability, as shown above. Yet, since its last visit from 13–16 May 2010, the Council appears to have paid less sustained attention to the DRC. Only major crises or instances of atrocities, such as the events in Walikale in 2010, brought the DRC into sharp focus. On such occasions, the Council would include the issue of individual accountability in its overall approach, but not necessarily follow through on the implementation of its decisions. In 2012, this loss of focus was evidenced by its failure to schedule a visiting mission to the DRC despite the brewing instability in the east following the M23 rebellion and the anticipated election of Rwanda to the Security Council on 18

## Case Studies (con't)

October 2012. With Rwanda having joined the Council on 1 January 2013, decisive action by the Council and the 1533 Sanctions Committee, which operates by consensus, may become more complicated.

### Future Options

There are several courses of action available to the Council to attempt to improve the situation in the DRC that are accountability related, including:

- emphasising the utter importance of ensuring individual accountability as ignoring the actions of persistent perpetrators of human rights violations and international crimes has played into the hands of those interested in destabilisation (a prime example is that of Bosco, where lack of real pressure on the government to turn him over to the ICC in the name of stability has backfired, as he continues to be a source of instability in the eastern DRC);
- considering ways to utilise MONUSCO more effectively to address the causes of the humanitarian situation in North Kivu, including specific action against rebel groups if needed;
- considering sending a stronger public message (with harsher language) to those countries identified by the GoE and other sources as supporting the M23 and in violation of sanctions; or
- imposing sanctions against violators of the DRC sanctions regime, including foreign officials.

### Côte d'Ivoire

Consideration of the situation in Côte d'Ivoire by the Council has been uneven, with the issue of accountability squarely at the centre of this inconsistency. In response to events in Côte d'Ivoire following the 28 November 2010 second round elections, the Council used extensive language calling for accountability for serious violations of human rights, both in resolutions and presidential statements. However, there was a considerable time lag between the outbreak of violence and the response of the Council.

The UN Mission in Côte d'Ivoire (MINUCI) was established by resolution 1479 (2003), with a mandate to facilitate the implementation of the Linas-Marcoussis peace agreement signed by rival parties

on 23 January 2003, following a civil war which started on 19 September 2002. On 27 February 2004, the Council established the UN Operation in Côte d'Ivoire (UNOCI) by resolution 1528, requesting the Secretary-General to transfer authority from MINUCI and the Economic Community of West African States (ECOWAS) forces to UNOCI.

Responding to the human rights violations and violence committed during the conflict, the Council, in a presidential statement adopted on 25 May 2004 (S/PRST/2004/17), asked the Secretary-General to establish an international commission of inquiry to investigate all human rights violations committed in Côte d'Ivoire since 19 September 2002. The report of the commission was submitted to the Council in December 2004 but was never considered by the Council, nor was it ever made public.

Throughout 2005 the country experienced serious insecurity accompanied by human rights violations. The Secretary-General's then-Special Adviser on the Prevention of Genocide, Juan Méndez, visited Côte d'Ivoire between 29 November and 3 December, warning of a risk of massive human rights violations based on ethnicity, national origin or religion. However, his December 2005 report was never made public.

The Council, while not addressing these reports, did take other action. On 15 November 2004, it adopted resolution 1572, which established an arms embargo and the possibility of sanctions against individuals found to be obstructing the peace process, violating human rights, publicly inciting hatred and violence and violating the embargo. However, the Council was reluctant to impose asset freezes and travel sanctions on specific individuals implicated in serious rights abuses, or to push for measures to hold abusers accountable. The first individuals were targeted only on 7 February 2006 (SC/8631).

Presidential elections were to be a key element of a process agreed upon under the 6 April 2005 Pretoria Agreement meant to return the country to peace and democracy. The elections were repeatedly postponed due to delays caused by the parties, and in particular by incumbent President Laurent Gbagbo in an effort to remain in power. They were finally held on 31 October 2010. As no candidate received the requisite majority

of the votes in the first round, Gbagbo and former Prime Minister Alassane Ouattara contested the second round elections on 28 November 2010. Official results were announced on 2 December by the Independent Electoral Commission (IEC)—Ouattara had won the presidential run-off with 54.1 percent of the vote, and 45.9 percent of the vote went to Gbagbo.

The then-Secretary-General's Special Representative for Côte d'Ivoire, Choi Young-Jin, certified the results announced by the IEC on 3 December 2010 in accordance with the mandate contained in resolution 1765 (2007). (Resolution 1765 stated that the Special Representative "shall certify that all stages of the electoral process provide all the necessary guarantees for the holding of open, free, fair and transparent presidential and legislative elections in accordance with international standards".) That same day the Secretary-General supported the certification of the results through a statement. Most Council members were in favour of a statement expressing united support for the certification of the election result, but Russia and China were hesitant and worried about the "precedent setting" nature of such action, arguing that the issue was an internal matter for Côte d'Ivoire.

The Council was briefed by Choi on 7 December, and on the following day adopted its first statement following the second round of the presidential election (SC/10105), expressing support for the Special Representative and calling on all stakeholders to respect the outcome of the election. In the statement, the Council also expressed its readiness "to impose targeted measures against persons who attempt to threaten the peace process, obstruct the work of UNOCI and other international actors, or commit serious violations of human rights and international humanitarian law".

Meanwhile, the Constitutional Council of Côte d'Ivoire disputed the outcome of the results, stating on 3 December that Gbagbo had won. The following day, both Ouattara and Gbagbo took oaths of office. As Gbagbo refused to cede office, both ECOWAS and the AU Peace and Security Council (PSC), respectively on 7 and 9 December, recognised Ouattara as the winner of the polls and suspended Côte d'Ivoire's membership in their organisations.

## Case Studies (con't)

The situation quickly deteriorated with the dissemination of hate messages through the state broadcasting outlets, and violent clashes between Gbagbo forces and Ouattara supporters. Both sides used heavy weapons resulting in considerable civilian casualties and serious violations of human rights and humanitarian law were committed. Both ECOWAS and the AU undertook regional mediation efforts early on in the crisis which were continuously supported by the Council but failed to find a timely resolution to the crisis. Post-election violence left about 3,000 people dead and 500,000 displaced.

Clashes between opposition supporters and security forces created a climate of fear. By 10 December, the UN High Commissioner for Refugees (UNHCR) indicated that 2,000 people had already fled from Côte d'Ivoire to Liberia. With violence erupting and displacement on the rise, the Council issued its first press statement (SC/10124) explicitly referring to accountability for crimes perpetrated in Côte d'Ivoire on 16 December, warning that all stakeholders would be held accountable for attacks against civilians and would be brought to justice, in accordance with international law and international humanitarian law. Nonetheless, between 16-19 December, 50 people were killed and 200 wounded.

On 20 December, in resolution 1962, the Council renewed the mandate of UNOCI for six months and authorised a temporary redeployment of troops from the UN Mission in Liberia (UNMIL) to UNOCI as well as a temporary deployment of additional military personnel to UNOCI. It reiterated that perpetrators must be brought to justice and reaffirmed its readiness to impose measures, including targeted sanctions against persons who threatened the peace process or committed serious violations of human rights and international humanitarian law. On the same day the Council issued a press statement (SC/10135) in which it stated that

those responsible for attacks against civilians and peacekeepers should be brought to justice in accordance with international law and international humanitarian law. Late that month, UN human rights experts expressed concern about reports of enforced disappearances, arbitrary detentions, summary executions and acts of sexual violence.

The then-Under-Secretary-General for Peacekeeping Operations, Alain Le Roy, briefed the Council on 5 January 2011 on the situation in Côte d'Ivoire in consultations, and the Secretary-General sent a letter to the President of the Council on 7 January (S/2011/5) requesting the reinforcement of UNOCI in light of the ongoing crisis in the country. Referring to the restrictions on UNOCI's movement, the Secretary-General noted that "access to the affected areas is essential both to prevent the reported violations to the extent possible, and to conduct investigations so that those responsible can be held accountable." In a press statement issued on 10 January (SC/10149), the Council condemned deliberate attempts to impede UNOCI from, among other things, investigating reported atrocities, stressed once again that perpetrators of crimes against UN personnel and civilians must be held accountable, and reiterated its readiness to impose targeted sanctions.

France circulated a draft resolution on 12 January 2011 endorsing the recommendations of the Secretary-General. However, while some Council members wanted to address substantive issues, including a reference to the continued violence and human rights violations, others, in particular Russia and China, preferred to adopt a simple technical resolution authorising an increase in the size of UNOCI, especially in light of the fact that the Council had recently issued a press statement making similar political points. The Council finally adopted resolution 1967 on 19 January authorising the deployment of an additional 2,000 military personnel to

UNOCI until 30 June and extending once again the temporary deployment of troops from UNMIL. The resolution included similar language on accountability for human rights violations and on targeted sanctions as resolution 1962, although accountability was only included in the preamble as opposed to resolution 1962 where it was part of operative paragraph 9.

As violent clashes between rival political factions continued, the Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect expressed concern about the possibility of genocide, crimes against humanity, war crimes and ethnic cleansing. Choi briefed the Council on 4 February and while there was no agreement on a press statement, Brazil, the President of the Council that month, subsequently indicated to the press that members remained deeply concerned about the continued violence and human rights violations. On 3 and 11 March 2011, the Council issued two press statements (SC/10191 and SC/10196) which included the usual language on targeted sanctions, respectively condemning obstructions and acts of violence by the Gbagbo forces against UNOCI and welcoming an AU PSC initiative.

The situation steadily deteriorated later in March with a sharp increase in inter-communal and inter-ethnic confrontations. On 17 March, mortars fired into a market area by forces loyal to Gbagbo in Abidjan killed at least 25 civilians and wounded more than 40. On 21 March, in a statement read to the press by the Council President, Council members expressed "indignation" over the attack and reiterated their readiness to impose targeted sanctions. By the end of the month UNHCR reported of up to a million displaced persons with some 100,000 Ivorian refugees in Liberia.

On 30 March 2011, nearly four months after the outbreak of violence and against the background of resolutions 1970 and

**UN DOCUMENTS ON CÔTE D'IVOIRE** **Security Council Resolutions S/RES/2062** (26 July 2012) renewed the mandate of UNOCI until 31 July 2013, emphasised the importance of accountability and impartial justice, encouraged the government to cooperate with the ICC and urged the government to bring to justice all those responsible of serious human rights abuses. **S/RES/2045** (26 April 2012) renewed the Côte d'Ivoire sanctions regime for 12 months, renewed the mandate of the GoE and stressed that perpetrators must be brought to justice whether in domestic or international courts. **S/RES/2000** (27 July 2011) renewed the mandate of UNOCI at its current force levels (including the earlier ad hoc increases) until 31 July 2012, took note of the ICC prosecutor's request of authorisation to open an investigation into war crimes and crimes against humanity in Côte d'Ivoire, and called for accountability of perpetrators of human rights violations. **S/RES/1980** (28 April 2011) extended the sanctions regime on Côte d'Ivoire and the mandate of the GoE for one year and reiterated its readiness to impose targeted sanctions. **S/RES/1975** (30 March 2011) imposed sanctions on Gbagbo and his circle, called all parties to cooperate with the international commission of inquiry established by the Human Right Council, and noted that the ICC may decide on its jurisdiction over the situation in Côte d'Ivoire. **S/RES/1968** (16 February 2011) extended for up to three months the temporary redeployment from UNMIL to UNOCI. **S/RES/1967** (19 January 2011) authorised an increase of 2,000 troops in the overall strength of UNOCI military personnel, extended the mandate of troops temporarily deployed from the UNMIL to UNOCI and reiterated its readiness to impose targeted sanctions. **S/RES/1962** (20 December 2010) renewed UNOCI mandate for six months, reiterated that perpetrators must be brought to justice and reaffirmed its readiness to impose targeted sanctions against persons who threaten the peace process or commit serious violations of human rights and international humanitarian law. **S/RES/1572** (15 November 2004) added serious violations of human rights and international humanitarian law to the designation criteria for the sanctions regime. **Security Council Presidential Statement S/PRST/2004/17** (25 May 2004) asked the Secretary-General to establish an international commission of inquiry to investigate all human rights violations committed in Côte d'Ivoire since 19 September 2002.



## Case Studies (con't)

1973 on Libya, the Council adopted resolution 1975. While considering a draft introduced by France and Nigeria, divergences emerged during the negotiations, including reservations by China, India and Russia, on the wording of references to the ICC and on the status of Côte d'Ivoire's acceptance of its jurisdiction. (Although not a state party of the Rome Statute, Côte d'Ivoire accepted the jurisdiction of the ICC on 18 April 2003, a decision that was reconfirmed by President Ouattara on 14 December 2011.) Ultimately, resolution 1975 included very comprehensive language on accountability, both in the preamble and in the operative paragraphs:

- welcoming the Human Rights Council (HRC) decision to dispatch an independent international commission of inquiry to investigate the allegations of serious violations of human rights and calling on all parties to cooperate with the commission;
- requesting the Secretary-General to transmit the commission's report to the Council and other relevant international bodies;
- stressing the importance of bringing perpetrators of human rights violations to justice and Côte d'Ivoire's responsibility in this respect;
- noting that attacks taking place in Côte d'Ivoire could amount to crimes against humanity and that the ICC may decide on its jurisdiction over the situation; and
- imposing targeted sanctions consisting of a travel ban and assets freeze against Gbagbo and his wife Simone Gbagbo, Désiré Tagro, Pascal Affi N'Guessan and Alcide Djédjé, in line with the recommendations contained in the 17 March report (S/2011/272) of the GoE that assist the 1572 Côte d'Ivoire Sanctions Committee (officially released on 27 April).

On 4 April 2011, in response to a request by the Secretary-General the previous day,

France agreed to provide military support to UNOCI. That same day, the Council was briefed by Le Roy on this decision and on 8 April he briefed the Council again on developments on the ground. On 11 April, Gbagbo was captured following military operations conducted by UNOCI and France and forces loyal to Ouattara.

On 12 April, the UN High Commissioner for Human Rights, Navi Pillay, indicated that 530 people had been killed in western Côte d'Ivoire since the end of March 2011. That same day the President of the HRC appointed three members of an international commission of inquiry, and on 4 May the commission arrived in Côte d'Ivoire. The Council was briefed on 13 April by Choi, Pillay, the Under-Secretary-General for Humanitarian Affairs, Valerie Amos, and Ambassador Yousoufou Bamba (Côte d'Ivoire). A press statement (SC/10224) followed, reaffirming that perpetrators of human rights violations must be held accountable "regardless of their affiliation". It also welcomed Ouattara's call for justice and reconciliation and the decision to establish what would later become the Truth, Reconciliation and Dialogue Commission (CDVR). It also encouraged the government to cooperate with the HRC commission of inquiry. When extending the sanctions regime in resolution 1980 on 28 April, the Council reiterated its language on accountability and its readiness to impose further targeted sanctions.

The security situation began to improve in May and June 2011 although acts of violence continued to occur. Ouattara announced on 1 May that the CDVR would be headed by former Ivorian Prime Minister Charles Konan Banny, and on 3 May he asked the ICC Prosecutor to investigate serious crimes committed since the elections. (President Ouattara was inaugurated on 21 May after

the Côte d'Ivoire Constitutional Council ruled in his favour on 5 May.)

The international commission of inquiry submitted a report (A/HRC/17/48) to the HRC on 14 June in which it found that serious violations had been committed by both sides. The ICC Prosecutor requested ICC Pre-Trial Chamber III on 23 June to authorise an investigation into crimes committed following the election.

The CDVR was formally established by a presidential decree on 13 July, and a national commission of inquiry (CNE) was established on 20 July in order to investigate crimes committed from 31 October 2010 to 15 May 2011. (Subsequently, on 8 August 2012, the CNE revealed that among the 3,248 victims registered many were summarily executed for apparent political and/or ethnic reasons.)

Choi briefed the Council on 18 July 2011. Resolution 2000, adopted on 27 July 2011, renewed the mandate of UNOCI until 31 July and included extensive language on accountability, welcomed the establishment of the CDVR, acknowledged the request by the ICC Prosecutor to open investigations, stressed the importance to investigate human right abuses and pursue accountability and took note of the report and recommendations of the international commission of inquiry. The resolution also mandated UNOCI to help investigate and support national and international efforts to bring perpetrators to justice as well as to bring to the attention of the Council "all individuals identified as perpetrators of serious human rights violations" while keeping the 1572 Sanctions Committee "informed of developments in this regard."

While violence continued, transitional justice started to take root as the office of the Côte d'Ivoire prosecutor charged 12 allies of Gbagbo with crimes related to the

**UN DOCUMENTS ON CÔTE D'IVOIRE (con't)** **Press Statements** SC/10668 (8 June 2012) condemned the attack by unknown militia fighters, which killed seven peacekeepers from Niger and eleven others in the southwest of Côte d'Ivoire near the Liberian border. SC/10224 (13 April 2011) commended Ouattara's decision to establish a truth and reconciliation commission and reaffirmed that those responsible of human rights violations must be held accountable, regardless of their affiliation. SC/10196 (11 March 2011) welcomed the AU Peace and Security Council decision to recognise Ouattara as President of Côte d'Ivoire and reiterated its readiness to impose targeted sanctions. SC/10191 (3 March 2011) expressed concern about the recent escalation of violence in Côte d'Ivoire and reiterated its readiness to impose targeted sanctions. SC/10149 (10 January 2011) condemned deliberate attempts to impede UNOCI to, among other things, investigate reported atrocities and stressed once again that those perpetrators of crimes against the UN personnel and civilians must be held accountable. SC/10135 (20 December 2010) condemned the acts of violence against UNOCI and warned all stakeholders that those responsible for attacks against civilians and peacekeepers will be brought to justice in accordance with international law and international humanitarian law. SC/10124 (16 December 2010) expressed concern about violence in Côte d'Ivoire and warned all stakeholders that they would be held accountable for attacks against civilians and would be brought to justice. SC/10105 (8 December 2010) called on all Ivorian stakeholders to respect the outcome of the election and reiterated the readiness of the Council to impose targeted measures against persons who attempt to threaten the peace process, obstruct the work of UNOCI and other international actors, or commit serious violations of human rights and international humanitarian law. **Letters** S/2012/766 (15 October 2012) transmitted the midterm report of the GoE on Côte d'Ivoire. S/2012/344 (18 May 2012) contained the terms of reference for the Security Council mission to West Africa, from 18 to 24 May 2012. S/2012/196 (11 April 2012) transmitted the final report of the GoE on Côte d'Ivoire. S/2011/221 (4 April 2012) was from the Secretary-General informing the Council about his decision to authorise UNOCI to take necessary measures to prevent the use of heavy weapons against the civilian population, with the support of the French forces. S/2011/808 (29 December 2011) was the annual report of the 1572 sanctions committee. S/2011/272 (20 April 2011) transmitted the final report of the GoE on Côte d'Ivoire. S/2011/5 (7 January 2011) included the recommendation by the Secretary-General to the Council for additional military capacity to be authorised for UNOCI. **Other** S/2011/808 (29 December 2011) was the annual report of the 1572 Sanctions Committee. A/HRC/17/48 (14 June 2011) was the report of the International Commission of Inquiry on Côte d'Ivoire. A/HRC/RES/16/25 (25 March 2011) established the Human Rights Council's International Commission of Inquiry on Côte d'Ivoire.

## Case Studies (con't)

post-election violence on 10 August. The CDVR was launched on 28 September.

On 3 October 2011, ICC Pre-Trial Chamber III granted the request to open investigations, and on 23 November issued an arrest warrant against Gbagbo for four counts of crimes against humanity as an indirect co-perpetrator of murder, rape, persecution and other inhuman acts. Gbagbo was transferred to The Hague on 30 November after the 1572 Sanctions Committee decided to lift the travel ban against him on 29 November, pursuant to paragraph 10 of resolution 1572 (2004), which provides that a travel ban shall not apply where the Committee “concludes that an exemption would further the objectives of the Council’s resolutions, for peace and national reconciliation in Côte d’Ivoire and stability in the region”. Trial hearings started on 5 December and on 15 December. Prime Minister Guillaume Soro announced that Côte d’Ivoire would ratify the Rome Statute and that he was ready to face trial before the ICC if charged. (At press time, Côte d’Ivoire has not yet ratified the Rome Statute but the government approved and submitted to parliament two bills on 26 September 2012, the first amending its constitution to enable the country to ratify, the second bill authorising the head of state to ratify the Rome Statute.) Pre-Trial Chamber III on 22 February 2012 decided to expand its authorisation for the investigation into events in Côte d’Ivoire to include crimes within the jurisdiction of the Court allegedly committed since 19 September 2002.

On 26 April, resolution 2045 renewed the 1572 sanctions regime, in which the Council also encouraged the CDVR to make further progress to promote national reconciliation, stressed the need of accountability “whether in domestic or international courts,” welcomed the close cooperation of the government with the ICC and reiterated its commitment to impose targeted measures. On 20-22 May, Council members undertook a visit to Côte d’Ivoire. One of the objectives, articulated in the terms of reference for the visit, was to call on the government “to fight impunity and ensure impartial justice.”

Violence and lack of accountability continued to be a concern. Attacks on civilians along the Liberian border, and a series of attacks on military installations in August and September resulted in at least 50 casualties, according to

a report by Human Rights Watch. According to several sources, the government retaliated with a crackdown on the pro-Gbagbo forces it blames for these incidents, during which its military committed a myriad of human rights abuses in responding to these attacks, including mass arbitrary arrests, illegal detention, extortion, cruel and inhuman treatment, and, in some cases, torture. Many soldiers and commanders identified as human rights abusers were also responsible for similar acts during the civil war. In a response to these accusations, the government stressed the gravity of the security threat the country is facing, but also pledged to look into the accusations and prosecute those found for torture or inhumane treatment.

The Council last renewed the mandate of UNOCI on 26 July 2012 in resolution 2062, which was the most comprehensive in terms of accountability on Côte d’Ivoire. In the resolution, the Council took note of the decisions to authorise the ICC Prosecutor to investigate crimes committed since 19 September 2002; encouraged support to the CDVR; emphasised the importance of accountability and impartial justice, including through the work of the CNE; urged the government to ensure accountability for perpetrators of serious human rights and humanitarian violations “irrespective of their status or political affiliation”; and called the government to continue its cooperation with the ICC. Lastly, the Council called on UNOCI to support national and international efforts of accountability.

### *Conclusions and Analysis*

Since the adoption of resolution 1975 (2011), the Council has displayed a broad unity in focusing on issues of reconciliation and accountability for past crimes. However, this stance came after years of indifference towards accountability in Côte d’Ivoire.

Some of the events that took place following the November 2010 elections may perhaps have been avoided if the Council had reacted in a timely fashion. The Council had years earlier received information of grave violations of human rights and warning of persisting violence, including through two reports which were not made public. The post-election civil war was far from a surprising turn of events, in light of the 2004 report of the international commission of

inquiry and the 2005 report of the Secretary-General’s Special Adviser on the Prevention of Genocide. Moreover, by keeping silent despite reports on human rights violations and calls for individual accountability, the Council had, over the years, sent a message of indifference towards such conduct.

The Council tolerated numerous postponements of the election on the part of Gbagbo, to the point that his reluctance to cede power in 2010 should not have come as a surprise. The Council was also slow to give its support to Choi’s certification of the results of the elections, while in the meantime Gbagbo declared himself victorious. The Council waited until 30 March 2011 (resolution 1975) to adopt more forceful language on the issue of accountability. Its willingness then to take more robust action, was at least in part due to its assertive stance on Libya, including with respect to accountability.

It is worth noting, however, that once the Council moved to take action, it formulated some of its strongest and most comprehensive decisions on the issue of accountability in resolutions 1975 (2011), 2000 (2011) and 2062 (2012).

The Council also repeatedly expressed its support for international mechanisms, such as the HRC international commission of inquiry and the ICC. It supported the ICC when it called for the government to continue its cooperation with the Court in resolutions 2045 (2012) and 2062 (2012), or when the 1572 Sanctions Committee lifted the travel ban against Gbagbo in order to allow for his transfer to The Hague.

In resolution 1975, the Council was careful not to intervene in the ongoing judicial process when it noted that the ICC “may decide on its jurisdiction over the situation in Côte d’Ivoire on the basis of article 12, paragraph 3 of the Rome Statute.” On the other hand, the Council could have used stronger language than merely “noting” the ICC actions regarding the situation in Côte d’Ivoire and could have included more references to the ICC in operative paragraphs, rather than in the preamble. The Council stopped short of welcoming the activities of the ICC or of expressing support for the Court.

The use of targeted sanctions by the Council as a tool of accountability deserves a close look, in particular its approach to reports on violations of sanctions. The

## Case Studies (con't)

GoE, for example, mentioned in its 14 April 2012 report (S/2012/196) that Charles Blé Goudé, one of the individuals subject to sanctions, was in Ghana in late February and early March 2012, in violation of the travel ban. It also noted that he may have been receiving royalties from the publishing group L'Harmattan for the publication of a book, which constitutes a violation of the asset freeze. Yet the Council has not taken any actions or included any language regarding this issue in its subsequent decisions.

Early on, the Council took little advantage of the existing sanctions criteria to manage the ongoing conflict in Côte d'Ivoire. Perpetrating serious violations of human rights and international humanitarian law has been among the criteria for individual targeted sanctions since 2004. The Council failed, however, to impose sanctions against individuals for serious violations of human rights and international humanitarian law in the post 2010 election crisis, even though the GoE recommended doing so against Gen. Georges Guai Bi Poin in its 2011 report.

The Council's reluctance to impose individual sanctions after the 2010 elections is consistent with its past practice on this issue. Indeed, while the Council set up the Côte d'Ivoire sanctions regime in 2004, sanctions were not applied against specific individuals until 2006, as China and Russia were of the view that they could impair the peace process, a position that was shared at the time by the AU mediator. On 7 February 2006, the 1572 Sanctions Committee finally subjected three Ivorian nationals to the travel ban and assets freeze (SC/8631).

Implementing accountability-related measures outlined in Council decisions in the context of truth and reconciliation processes has, at times, posed certain challenges. Encouraging judicial procedures while at the same time supporting a TRC can be considered complementary, but can also appear contradictory with respect to accountability. TRCs are part of a healing process during which past wrongdoers are identified yet accountability is not systematically pursued, as punishment for the perpetrator is not at the heart of the process. The key goal here is reconciliation and reintegration of perpetrators into society. While, in principle, a TRC does not exclude the possibility of national trials once its work is completed, amnesty

for past violations is sometimes granted to encourage complete honesty on behalf of witnesses and perpetrators. In the case of Côte d'Ivoire, the question of a grant of amnesty was not clear when the CDVR was established. Therefore, the Council could have signalled its objection to amnesties, so as to maintain consistency and coherence on accountability.

Furthermore, the promotion of both a TRC at the national level and trials at the international level appears to be problematic. Revealing the truth in a national setting could have an impact on prosecutions before the ICC, as the findings of the CDVR could eventually be used to charge an individual. This has come to a fore in Côte d'Ivoire as one of the reasons that the CDVR has encountered considerable difficulties has been that Gbagbo allies have been reluctant to cooperate with it so as not to risk standing trial before the ICC on the basis of information disclosed during the national reconciliation process.

Finally, the Council missed an opportunity to appear impartial in its call for accountability by not taking action when, on 3 August 2011, President Ouattara promoted Martin Kouakou Fofié, a military commander who is subject to targeted sanctions and has been accused by Human Rights Watch of perpetrating human rights abuses during the crisis. Instead of "noting President Alassane Ouattara's commitments" in holding accountable those responsible of human rights violations in resolution 2062 (2012), the Council could have appeared more impartial had it signalled its concern over Fofié.

### *Future Options*

Keeping the attention of the Council on Côte d'Ivoire, with a particular focus on accountability, may be a likely option given the lessons learnt over a decade. Indeed, decisions adopted since resolution 1975 (2011), have had strong language calling for the end of impunity and supporting national and international mechanisms of accountability. To maximise the impact of its decisions, the Council could resolve to consistently keep track of specific developments on the issue of accountability in Côte d'Ivoire, for example by considering this issue more systematically during briefings and consultations and inviting experts with knowledge of the issue to brief

it regularly. Informal meetings, such as "Arria formula" meetings focusing on accountability in Côte d'Ivoire, could also help the Council to keep its focus on this issue.

In response to the most recent upsurge in human rights violations and to the failure of the government to prevent and address them, the Council could strengthen the aspects of the UNOCI mandate dealing with national justice and security sector reform as well as human rights.

Additionally, the Council could use existing targeted sanctions more deliberately. It could also reinforce the effectiveness of the Côte d'Ivoire sanctions regime by taking action when its sanctions are violated by other states, through a range of measures from adoption of a press or presidential statement, the inclusion of a specific paragraph in a resolution condemning the violators, to adopting secondary sanctions against the violators.

### **Sudan**

As part of its response to the crisis in Darfur, the Council, for the first time, invoked Article 13(b) of the Rome Statute, referring the situation in Darfur to the ICC. As this case demonstrates, a referral is only the beginning of a process that necessitates continued involvement by the Council and support for the ICC in its exercise of jurisdiction. Lacking such consistency can have negative effects on upholding accountability with consequences on the situation on the ground.

Following the adoption of resolution 1593 on 31 March 2005, which referred the situation in Darfur to the ICC, the Court initiated proceedings against seven individuals. Three eventually appeared before the Court to stand trial, after agreeing to surrender themselves to its jurisdiction. Four arrest warrants were issued against indictees that remained at large, including against President Omar Hassan Al-Bashir of Sudan. The Council, however, while not inclined to temporarily defer the situation in Darfur pursuant to Article 16 of the Rome Statute despite political pressure to do so, has also demonstrated little inclination to follow through on resolution 1593 and ensure cooperation with the ICC. This approach is not, of course, in the interest of justice, and neither has it proven to be effective in terms of ensuring peace and security in Darfur, or, later on, between Sudan and South Sudan, as some of the indictees have

## Case Studies (con't)

been key players on both fronts.

Starting in 2003, UN humanitarian officials had been warning about an unfolding humanitarian crisis in Darfur. The matter first came up in the Council on 9 December 2003 when, during an open debate of the Security Council on protection of civilians in armed conflict, Jan Egeland, then the head of the Office for the Coordination of Humanitarian Affairs (OCHA), highlighted the 600,000 displaced in Darfur.

Reports in the media and in different UN settings continued to emerge in early 2004, pointing to very high levels of violence against civilians in Darfur perpetrated by the government and its allied militia, the *Janjaweed*. There were also reports of the destabilising impact of the Darfur situation on security in the region, particularly in Chad. The Council, however, was initially hesitant to take on the situation. At the time, the second civil war between northern and southern Sudan had been going on for some twenty years and for the first time, a political settlement appeared to be in sight. Member states involved in efforts to settle that conflict were reluctant to bring up any new grievances against the government, fearing that this might disturb the very tenuous dynamics of the negotiations. Some initially considered the then-UN Commission on Human Rights (CHR), as the body best placed to take the lead on the response to this matter. The CHR (which met once a year for a six-week session) was only able to agree on a very mildly worded resolution (2004/128) on 23 April, which failed to mention the main security threat and perpetrator of violence, the *Janjaweed*.

Following the end of the CHR's session, pressure mounted on the Security Council to address the situation. On 25 May 2004, several humanitarian and human rights organisations briefed Council members on the situation on the ground during a three-hour "Arria formula" meeting. The Council

subsequently adopted a presidential statement (PRST/2004/18) which condemned the violence, expressed concern at the government's impediments on the delivery of humanitarian assistance, and called for the deployment of monitors in Darfur.

With the crisis deepening over the next two months, the Council, acting under Chapter VII of the Charter, adopted resolution 1556 on 30 July, calling on the government to fulfil its earlier commitments to facilitate "international relief for the humanitarian disaster" and to advance an "independent investigation in cooperation with the United Nations of violations of human rights and international humanitarian law." The resolution also imposed limited sanctions, but the Council postponed the creation of a sanctions committee until 29 March 2005 when it adopted resolution 1591, which also added the possibility of imposing individually targeted measures. The PoE assisting the 1591 Sanctions Committee submitted to the Committee several names of individuals seen as key obstacles to stopping the violence and resolving the Darfur situation politically. But the Committee, which operates by consensus, was unable to move forward on listing individuals. (In a rare move, upon the initiative of the US, the Council circumvented the impasse and on 25 April 2006 adopted resolution 1672, identifying four individuals to be sanctioned. Though many reports of sanctions violations have since been produced by the PoE, and the chair of the Committee has briefed the Council regularly, at press time, no further action regarding sanctions has been taken.)

On 18 September 2004, the Council adopted resolution 1564 declaring that the government of Sudan had not met its commitments and expressing concern at helicopter attacks and assaults by the *Janjaweed* militia against villages in Darfur. It asked that the Secretary-General establish an international

commission of inquiry in order to immediately investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide had occurred, and to identify the perpetrators of such violations. It called on all parties to cooperate fully with the commission.

The report of the international commission of inquiry was submitted to the Secretary-General on 25 January 2005 (S/2005/60). It concluded that war crimes and crimes against humanity had been committed in Darfur, though it stopped short of labelling the policy of the government of Sudan as genocide. In light of the findings, the commission recommended that the Council refer the situation in Darfur to the ICC. On 31 March 2005, by a vote of 11 in favour, none against and four abstentions (Algeria, Brazil, China and the US), the Council adopted resolution 1593 referring the situation to the ICC. The Council decided also that the government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with the ICC Prosecutor, while urging other states and international organisations to do the same. The resolution subjected nationals, officials or personnel of states that are non-parties to the ICC to the exclusive jurisdiction of those states for all alleged acts or omissions related to operations in Sudan established or authorised by the Council or the AU. It invited the ICC Prosecutor to brief the Council in three months and then bi-annually and decreed that the ICC, not the UN, would incur all expenses stemming from the referral.

Starting in late 2005, the Council began discussing the deployment of a UN peace operation in Darfur. On 31 August 2006, as a massive assault by the government was already underway in Darfur, the Council adopted resolution 1706, envisaging a UN mission in Sudan to be deployed in Darfur.

**UN DOCUMENTS ON SUDAN** Security Council Resolutions S/RES/2035 (17 February 2012) extended the mandate of the PoE until 17 February 2013. S/RES/1828 (31 July 2008) renewed UNAMID. S/RES/1706 (31 August 2006) set a mandate for UNMIS in Darfur. S/RES/1593 (31 March 2005) referred the situation in Darfur to the ICC. S/RES/1591 (29 March 2005) created a committee and panel of experts on Sudan and additional individually targeting measures. S/RES/1590 (24 March 2005) established UNMIS. This was the first resolution to affirm zero tolerance of sexual exploitation in all UN peacekeeping missions. S/RES/1574 (19 November 2004) was adopted in Nairobi and expressed support for the Sudanese peace processes. S/RES/1564 (18 September 2004) established the International Commission of Inquiry for Darfur. S/RES/1556 (30 July 2004) expressed full support for the AU-led ceasefire commission and monitoring mission in Darfur and for the investigation of crimes allegedly committed in Darfur. **Security Council Presidential Statements** S/PRST/2008/21 (16 June 2008) was a statement on Sudan's cooperation with the ICC. S/PRST/2004/18 (25 May 2004) called for deployment of monitors in Darfur. **Security Council Meeting Records** S/PV.6778 (5 June 2012) was a briefing by the ICC Prosecutor on Sudan. S/PV.6688 (15 December 2011) was a briefing by the ICC Prosecutor on Sudan. S/PV.6548 (8 June 2011) was a briefing by the ICC Prosecutor on Sudan. S/PV.6478 (9 February 2011) were briefings to the Council on the occasion of the formal announcement of the results of the Southern Sudan referendum. S/PV.6440 (9 December 2010) was a briefing by the ICC Prosecutor on the progress of the Court's work in Sudan. S/PV.6336 (11 June 2010) was a briefing by the ICC Prosecutor on progress of the Court's work in Sudan, and Sudan's non-cooperation. S/PV.4877 (9 December 2003) was a briefing by Egeland on the humanitarian crisis in Darfur. **Letters** S/2009/148 (16 March 2009) contained the letter from the Arab League on a deferral of the situation in Sudan from the ICC. **Other** **The Twelfth Report of the Prosecutor of the ICC to the UN Security Council pursuant to resolution 1593** (10 December 2010) on Sudan. S/2009/259 (20 May 2009) contained the press statement from the 17-18 May consultative meeting between the Sudanese government and a delegation from the AU, the Arab League and the OIC. S/2009/144 (6 March 2009) was the AU PSC communiqué on the ICC arrest warrant for President Al-Bashir. S/2005/60 (25 January 2005) was the report of the International Commission of Inquiry on Darfur. **USEFUL ADDITIONAL RESOURCES** PSC/MIN/Comm(CXLI) Rev. 1 (21 July 2008) was an AU PSC communiqué on deferring ICC proceedings in Sudan.

## Case Studies (con't)

The resolution, however, was never implemented as Sudan refused consent to the deployment of the force. It was only on 31 July 2007, in resolution 1769, that—with the consent of Sudan—the Council established the joint AU–UN Hybrid Operation in Darfur (UNAMID), which was eventually authorised, though with huge difficulties. UNAMID was mandated to take the necessary action to support the Darfur Peace Agreement (DPA), prevent the disruption of its implementation and armed attacks, and protect civilians. At press time, the Liberation and Justice Movement (LJM) was the only major rebel group in Darfur to sign the Doha Document for Peace in Darfur, the latest of the peace processes in Darfur. Violent incidents have continued in the region and the internally displaced, currently estimated at 2,500,000, have not been able to return to their homes.

On 6 June 2005, the ICC Prosecutor officially opened an investigation into crimes committed in Darfur. Khartoum retorted that it would not cooperate with the ICC investigation, beginning a pattern of non-cooperation that has remained unchanged as of press time. On 27 April 2007, the ICC issued an arrest warrant for Ali Kushayb, a *Janjaweed* commander wanted for war crimes, and former Interior Minister Ahmed Haroun. Sudan announced that it would not surrender Kushayb or Haroun to the Court. (Indeed, Kushayb, who had been in government custody at the time, was released while Haroun was soon chosen as head of an official human rights commission of inquiry, and after that appointed Governor of South Kordofan state.)

On 14 July 2008, the ICC Prosecutor presented an application for a warrant of arrest against President Bashir alleging genocide, crimes against humanity and war crimes. Sudan launched a domestic and diplomatic campaign to counter the warrant request. On 21 July, the AU PSC issued a communiqué (PSC/MIN/Comm (CLXII) Rev. 1) appealing to the Security Council to defer the proceedings.

Meanwhile, ICC proceedings continued with the Pre-Trial Chamber issuing an arrest warrant against Bashir for war crimes and crimes against humanity in Darfur on 4 March 2009 (ICC-02/05-01/09). On the same day, the Council of the League of Arab

States expressed regret that the Council had not applied Article 16 of the Rome Statute to defer the ICC proceedings. On 5 March, the PSC issued a communiqué requesting a deferral, and a letter with the communiqué was sent to the Council on the following day. Also on 4 March, Sudan itself retaliated by expelling 13 international humanitarian organisations, alleging they cooperated with the ICC. The Secretary-General repeatedly called on Sudan to reverse its decision to expel the organisations and eventually some were allowed to return.

Some AU member states adhered to the decisions on non-cooperation with the ICC in the context of the Bashir indictment, allowing him to make visits to Chad, Kenya and Malawi, notwithstanding their obligations as states parties to the Rome Statute. The ICC formally complained to the Council about these visits and on 12 May 2012, informed the Council of an additional visit by Bashir to Djibouti. Meanwhile, Botswana and South Africa indicated that they would enforce the arrest warrant for Bashir.

The Council, while refusing to adopt an Article 16 deferral, was silent for the most part regarding the lack of cooperation by Sudan and other parties with the ICC. The ICC Prosecutor repeatedly asked the Council to assert cooperation with the Court, warning on 20 September 2007 that Khartoum was likely to interpret silence on justice issues as a weakening of international resolve and that, if justice was ignored, crimes would continue, affecting humanitarian and security operations. (At the time, Sudan had just appointed ICC indictee, Harun, as head of a human rights commission of inquiry.) While many Council members agreed with these sentiments, others such as China and Russia have been sympathetic to the government's preference for domestic processes. (In 2010, Sudan established the position of a Special Prosecutor to investigate alleged war crimes and crimes against humanity in Darfur; however, little progress on these prosecutions has been made as most officials have benefited from immunity.)

The Council went beyond silence, and on some occasions also signalled a certain leniency towards Sudan. For example, the first renewal of the UNAMID mandate on 31 July 2008 in resolution 1828 had been preceded by intense negotiations on a proposal

to include language suspending ICC proceedings under Article 16 of the Rome Statute. The majority resisted this proposal, but compromise was found in emphasising the need to bring the perpetrators of serious crimes to justice and also mentioning some Council members' concerns related to the request for an arrest warrant against Bashir. The resolution took note of those members' intention to consider these matters further. The US remained resolutely opposed to any compromise and abstained in the vote, signalling its opposition to reopening the ICC issue. Ambassador Alejandro Wolff (US) said that this would “send the wrong signal” to Bashir and “undermine efforts to bring him and others to justice.”

The Council was also noticeably silent in the face of the promotion of ICC indictees to official posts, including the 8 May 2009 appointment of Haroun as governor of South Kordofan state, a position he continues to hold at press time. In the same vein, the Council has not addressed the fact that since 1 March 2012, Defence Minister Abdelrahim Mohamed Hussein has been wanted by the ICC for crimes against humanity and war crimes allegedly committed between August 2003 and March 2004 in Darfur while serving as Interior Minister and Special Representative of the President in Darfur. One notable exception to the silence or ambivalence of the Council was an initiative by Costa Rica that, following difficult negotiations, led to the adoption of a presidential statement on 16 June 2008 (S/PRST/2008/21), which—invoking resolution 1593—urged Sudan and all other parties to cooperate with the Court.

The ICC Prosecutor has repeatedly argued that lack of implementation of arrest warrants manifests itself in negative developments on the ground. On 8 June 2011 the Council received a briefing in which Moreno Ocampo said crimes against humanity and genocide continued unabated in Darfur, citing attacks on the Fur, Massalit and Zaghawa ethnic groups. He added that the Governor of Southern Kordofan provided a chilling example of the consequences of ignoring information about serious crimes, saying that in the 1990s, Harun used local militia to attack civilians in the Nuba Mountains in Southern Kordofan and used the same tactics between 2003 and 2005 in Darfur.

While several non-permanent Council

## Case Studies (con't)

members have expressed opposition to a deferral in principle, behind the scenes France, the UK, and the US seemed willing at times to contemplate the conditions that would have to be accepted by Khartoum if the case against Bashir were to be suspended. These included cooperating with the ICC on the other existing warrants, removing all bureaucratic obstacles to UNAMID's deployment and functioning, making real steps towards a Darfur peace process, and stopping the proxy war with Chad. At press time, however, an Article 16 deferral seemed unlikely.

### *Conclusions and Analysis*

The Council, though failing to act to prevent a humanitarian disaster in Darfur, established a commission of inquiry after Sudan's failure to investigate atrocities. Even more so, it was quick to respond to and follow up on the recommendation to refer the situation to the ICC. The referral, however, included several problematic elements. It excluded certain nationals from ICC jurisdiction, and possibly excluded other states' courts from exercising universal jurisdiction over these individuals for alleged international crimes. It did not oblige states other than Sudan to cooperate with the ICC. These elements can be considered an impediment on the perceived fairness of the referral and consequently on the impartiality of the ICC itself. The ICC was also left with the burden of financing all related investigations and proceedings.

Refraining from imposing an obligation on states (other than Sudan) to cooperate with the Court most likely reflected the Council's limited commitment to the process it set in motion and hampered implementing the Court's jurisdiction. Without such an obligation, non-parties to the ICC are under no legal obligation to extradite indictees from their territory. Several states parties to the ICC, though obligated to cooperate with the Court as parties to the Rome Statute, preferred to adhere to other legal obligations imposed by regional organisations. As Article 103 of the UN Charter gives precedence to

binding Council resolutions over other treaties, had the Council included in resolution 1593 a Chapter VII obligation of cooperation for all UN members, these states would have been legally bound to extradite indictees to the Court, regardless of their other legal obligations.

Moreover, the Council has refrained from acting upon notifications that several states—some of them parties to the Rome Statute—have refused to cooperate with the Court. A resolution condemning such behaviour may have had a positive impact on the success of ICC proceedings. With the exception of one presidential statement, it has kept silent on the lack of cooperation by Sudan with the Court and its violation of resolution 1593, a Chapter VII resolution of binding nature. On the other hand, the Council has also refrained from acting upon requests to defer the situation in Darfur from the Court. For some, the Council's inaction is viewed as a de-facto deferral of the case from the Court, as it is clear that it is not adamant that the indictees face justice.

If meant to encourage Sudan to cooperate with the Council, the silence of the Council has produced no results in achieving smooth cooperation with UNAMID on the ground, let alone a final settlement of the conflict. To the contrary, the government has shown blatant disregard of binding Council resolutions. Individuals wanted for committing mass atrocities remain in, or in some cases have been promoted to, positions of power and responsibility with neither the Council nor the 1591 Sanctions Committee agreeing on imposing sanctions against the ICC indictees. It is also worth noting that support for the current proceedings before the ICC would not hamper in any way the ability of the Council to opt for a deferral in the future.

### *Future Options*

The Council could pursue a more consistent and robust approach towards Sudan and other countries that refuse to cooperate with the ICC, demanding compliance by those

parties that are clearly in violation of their obligations pursuant to resolution 1593.

Moreover, the Council could take a more forceful stance and obligate all UN member states to cooperate with the ICC in referral situations, similar to the approach the Council had taken with respect to the ICTR and ICTY.

Finally, the Council could refrain from the limitations on jurisdiction it has attached to its ICC referrals thus far, in order to ensure that the impartiality of ICC jurisprudence is maintained. One way to accomplish this would be to choose not to limit the ICC's—or national courts'—jurisdiction to certain nationals. This would enhance the legitimacy of Council action with respect to referrals.

### **Kenya**

The case of Kenya exemplifies that at times the Council may support accountability yet at the same time miss the opportunity to visibly strengthen individual accountability as a guiding principle within its work.

General elections were held in Kenya on 27 December 2007, with neck-to-neck competition between the Party of National Unity (PNU) of President Mwai Kibaki and the Orange Democratic Movement (ODM) of opposition leader Raila Odinga. As the tense tallying of votes proceeded, partial results indicated a lead by Odinga that was later reversed. This prompted allegations by the opposition of vote-rigging and corruption to benefit Kibaki and the PNU.

Following the elections and mutual allegations of electoral fraud on a large scale, Kenya plunged into a political crisis with large-scale humanitarian consequences, including an estimated 600,000 people displaced. Politically motivated violence quickly evolved into ethnic bloodshed—often with suspicions of orchestration—and laid bare conflicts over wealth and land.

The Security Council was briefed by then-Under Secretary-General B. Lynn Pascoe on 30 January 2008. He noted difficulties in getting the parties to publicly renounce violence,

**UN DOCUMENTS ON KENYA** [Security Council Presidential Statement S/PRST/2008/4](#) (6 February 2008) was on the Kenyan crisis. [Security Council Meeting Record S/PV.5845](#) (25 February 2008) was a humanitarian briefing by Under-Secretary-General John Holmes on his visit to Kenya. [Letter S/2011/201](#) (23 March 2011) was the letter sent by Kenya to the President of the Security Council requesting an open debate. **USEFUL ADDITIONAL RESOURCES** [ICC-01/09-01/11-336](#) and [ICC-01/09-02/11-342](#) (20 September 2011) was the dissenting opinion of Judge Anita Ušacka on the Appeals Chamber decision. [ICC-01/09-01/11-307](#) and [ICC-01/09-02/11-274](#) (30 August 2011) was the Appeals Chamber decision rejecting Kenya's appeal. [ICC-01/09-01/11-101](#) and [ICC-01/09-02/11-96](#) (30 May 2011) was the ICC Pre-Trial Chamber II decision to reject Kenya's application. [ICC-01/09-01/11-19](#) and [ICC-01/09-02/11-26](#) (31 March 2011) was the application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute. [ICC-01/09-02/11-01](#) (8 March 2011) was the ICC's Pre-trial Chamber II Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali. [ICC-01/09-01/11-01](#) (8 March 2011) was the ICC's Pre-Trial Chamber II Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. [Assembly/AU/Dec.334\(XVI\)](#) (31 January 2011) was the Assembly of the AU decision to support Kenya's position on a deferral of the ICC investigation, and requested the African members on the Security Council to place the issue on the Council's agenda. [Letter of the Prosecutor to the President of the ICC on his intention to submit a request for the authorisation of an investigation into the situation in Kenya](#) (5 November 2009)

## Case Studies (con't)

and concerns with the need for investigations into human rights abuses in Kenya. Council members agreed on an oral statement to the press calling “on Kenya’s leaders to do all that is in their power to bring the violence to an end and to restore calm.”

On 6 February 2008, the Council adopted a presidential statement (S/PRST/2008/4), under the agenda item “Peace and Security in Africa”, which emphasised the need for dialogue and recalled the need to avoid impunity. Then-Under-Secretary-General for Humanitarian Affairs John Holmes briefed the Council on 25 February (2008) on the humanitarian situation in Kenya and its regional implications. Council members expressed concern about the humanitarian, reconciliation and socioeconomic aspects and the importance of the return of those displaced, justice and protection of human rights.

Following difficult negotiations led by former Secretary-General Kofi Annan, a power-sharing agreement was signed between the parties on 28 February. The agreement included provisions for a commission of inquiry on post-election violence. The Commission, whose findings were published on 16 October, found that the violence was spontaneous in some areas and premeditated in other areas, often with the involvement of politicians and business leaders, and along ethnic divisions. It recommended the creation of a special tribunal with international components to try the offenders. It also stated that if the special tribunal was not established, a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed tribunal, would be forwarded to the ICC Prosecutor.

After the Parliament failed to establish the special tribunal, and with the lack of domestic prosecution in sight, on 5 November 2009, the Prosecutor of the ICC notified the President of the Court of his intention to begin an investigation into the situation in Kenya pursuant to article 15(3) of the Rome Statute, which allows the Prosecutor to commence an investigation on his or her own initiative. (Kenya deposited its instrument of ratification to the Rome Statute on 15 March 2005, and the Statute came into force for Kenya on 1 June of that year.)

On 8 March 2011, ICC Pre-Trial Chamber II decided to issue summons, as requested by the Prosecutor, for six individuals, all high-profile figures connected to the two rival parties, including three government ministers. In response, Kenya, and the AU through its members on the Council at the time (Gabon, Nigeria and South Africa), requested that the Council intervene through an Article 16 deferral of one year. Council members agreed to hold an informal interactive dialogue with Ambassador Macharia Kamau (Kenya) to discuss the ICC proceedings, with AU representatives also attending, on 18 March. During the interactive dialogue, Kenya argued that an Article 16 deferral would give it time to establish alternative domestic adjudicative mechanisms. Some Council members agreed that domestic adjudication was preferable under the complementarity principle of the Rome Statute, yet members were generally of the view that the situation in Kenya did not amount to a threat to international peace and security—and therefore was not an issue for the Council to decide upon—and that the preferable venue was the ICC itself where Kenya could challenge the admissibility of the case under Article 19 of the Rome Statute. Members of the Council were also aware of a petition circulated by ODM opposing any Article 16 deferral. At the end of the meeting, the AU representative expressed the hope that the Council would discuss the issue in informal consultations.

Kenya then sent a letter to the President of the Council on 23 March (S/2011/201), requesting that the Council hold an open debate in order to consider the request for a deferral. Messages coming from Kenya, however, were mixed. In the letter, Kenya noted a 22 March National Executive Council/Parliamentary Group of the ODM decision to support a deferral. However, Council members also received an additional letter from the ODM Secretary-General, Anyang Nyong’o, maintaining that the party position opposing the request for a deferral had not changed. On 31 March, Kenya filed an application before the ICC, challenging the admissibility of the cases against its nationals, pursuant to Article 19 of the Rome Statute. Kenya asserted that following the adoption of the new constitution and judicial reforms, it was capable of investigating the alleged

post-election crimes.

Council members met in consultations on 8 April to address the 23 March letter. During the meeting, members maintained the same positions as during the informal interactive dialogue on 18 March. Though some members had a distinctly neutral position on the issue, those expressing their views during the informal interactive dialogue—including some African members on the Council—were again of the view that since Kenya had raised issues of complementarity, the ICC continued to be the preferable venue. Some members argued that the Article 19 challenge to the jurisdiction of the ICC rendered Council action unnecessary, all the more so since Kenya was subject to the jurisdiction of the Court by virtue of its own sovereign ratification and not by a decision of the Council.

Following the consultations, Ambassador Néstor Osorio (Colombia), the President of the Council that month, made brief comments to the press saying that Council members had considered the issue fully and did not agree to grant the request. He also stated that no future meetings on the issue were planned. At press time, it was the last time the issue was considered by the Council.

Publicly, very little was said of the discussions that took place in the two meetings. The feeling among most Council members was that although the AU members on the Council were obliged to bring the issue before it, they themselves were not necessarily supportive of the request. On 30 May 2011, Pre-Trial Chamber II of the ICC rejected the Article 19 challenge finding that Kenya did not sufficiently show that procedures were ongoing against the suspects. The Appeals Chamber confirmed the decision on 30 August. Subsequently, the charges against four of the six were confirmed by the Pre-Trial Chamber and their trial is scheduled to commence in April 2013.

### *Conclusions and Analysis*

The majority of Council members were firm in their position that the Council should not intervene in ICC proceedings for two reasons of principle. First, that the Council has a primary responsibility for the maintenance of peace and security and is not an appropriate venue for judicial determinations. Second, ICC states parties on the Council and the US were also concerned with a matter of

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## Case Studies (con't)

law: that only a very loose reading of Article 16 would allow the Council to act upon the request for a deferral as Kenya did not present a convincing argument that the ICC trials would create a situation posing a threat to international peace and security. Given this, the Council followed through on its rhetoric in support of international proceedings to hold alleged criminals accountable for international crimes, though this was relatively easy to achieve as it required the Council to remain passive.

The principled reasons also coincided with political ones: a decision by the Council over judicial proceedings regarding a country that was no longer a threat to international peace and security would have seemed excessive. Furthermore, intervention could set a precedent for a similar decision regarding the indictment of President Bashir of Sudan, another deferral case backed by the AU. All the more when unlike the case of Sudan, Kenya is a state party to the Rome Statute and had not been initially referred to the Court by the Council.

Several Council members who were opposed to the request were nevertheless concerned with finding an appropriate venue for Kenya to air its concerns and for it to feel that the Council was attentive to its appeal. The interactive dialogue offered Council members an opportunity to hear Kenya out. Council members, however, said very little publicly about the matter, perhaps to appease Kenya and the AU or not to set a precedent for future Council treatment of similar situations. Despite not yielding to the deferral request, the Council as a body did not pronounce itself on its reasons or the significance of its decision. It therefore chose not to reaffirm its commitment to individual accountability even when it showed such commitment in practice.

### Future Options

The Council used a relatively new format to give Kenya the opportunity to address it in private. In future cases, although Council members may decide to revisit the informal

interactive dialogue format, allowing non-Council members to have a direct discussion with members of the Council, it need not result in the Council remaining silent on issues of accountability. While the specifics of the discussion with a country can be kept discreet, the Council and its members may decide to be more vocal about the end result of a dialogue process and the reasons behind its action or inaction.

### Libya

The Council has twice imposed sanctions on Libya, regarding two different situations, both related to individual accountability. The first, following the 21 December 1988 downing of Pan Am flight 103, that killed all 259 passengers and crew on-board and 11 people on the ground, and the 19 September 1989 downing of UTA flight 772, that killed 171 on-board, led the Council to adopt resolutions 731 (1992), 748 (1992), and 883 (1993) and impose a series of embargoes and sanctions on Libya. These were suspended by resolution 1192 (1998) and subsequently lifted by resolution 1506 (2003) as the concerned parties reached an agreement about judicial proceedings against the two Libyan suspects. On 26 February 2011, following a violent government crackdown on demonstrators in Benghazi on 15 February, the Council once again imposed sanctions on Libya and referred the situation to the ICC by unanimously adopting resolution 1970. In principle, in the latter case the Council showed assertiveness when it came to individual accountability in Libya. Yet a closer look reveals that the Council did not follow up on its commitment to accountability and its own resolutions on several occasions, casting doubt on its resolve to end impunity for crimes committed in Libya.

The Council was quick to react to events on the ground, issuing a press statement (SC/10180) on the situation in Libya on 22 February 2011. In the statement, the Council condemned the use of force against civilians, called on Libya to meet its responsibility to protect civilians and respect international

humanitarian law, and stressed the importance of accountability. The statement came on the same day as the then-Secretary-General's Special Advisers on the Prevention of Genocide, Francis Deng, and the Responsibility to Protect, Edward Luck, said in a joint statement that "widespread and systematic attacks against civilian populations by military forces, mercenaries, and aircraft are egregious violations of international human rights and humanitarian law...if the reported nature and scale of such attacks are confirmed, they may well constitute crimes against humanity, for which national authorities should be held accountable."

Four days later, resolution 1970 imposed sanctions on Libya, demanded an immediate end to the attacks against civilians, and called for steps to fulfil the legitimate demands of the people in Libya. Acting under Article 13(b) of the Rome Statute, it also referred the situation in Libya since 15 February 2011 to the ICC, marking the second such referral in Council history (resolution 1593 of 31 March 2005 on the situation in Darfur was the first). Libya, despite not being a party to the ICC, was obligated to cooperate with the Court under the terms of the referral. Other non-party states to the ICC, on the other hand, were urged to cooperate, though not obligated to do so under the resolution. The resolution furthermore added that officials of a non-party to the ICC would be exclusively subject to their own states' jurisdiction, for any actions taken related to the resolution. Finally, the ICC Prosecutor was invited to brief the Council in two months, and every six months thereafter.

The resolution also imposed an arms embargo and a travel ban on members of the regime and the Qaddafi family as well as an asset freeze on the latter. The 1970 Libya Sanctions Committee (chaired by Portugal in 2011 and 2012) was established to oversee the implementation of these measures.

On 5 March 2011, the interim Transitional National Council (NTC) in Benghazi (the anti-Qaddafi opposition movement formed on 27 February, which would

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**UN DOCUMENTS ON LIBYA** [Security Council Resolutions S/RES/2040](#) (12 March 2012) renewed the mandate of UNSMIL. [S/RES/2016](#) (27 October 2011) lifted the no-fly zone over Libya and the provisions for the use of force for the protection of civilians. [S/RES/2009](#) (16 September 2011) authorised the deployment of UNSMIL and partially lifted sanctions. [S/RES/1973](#) (17 March 2011) authorised all necessary measures to protect civilians in Libya and enforce the arms embargo, imposed a no-fly zone, strengthened the sanctions regime and established a PoE. [S/RES/1970](#) (26 February 2011) referred the situation in Libya to the ICC, imposed an arms embargo and targeted sanctions and established a sanctions committee. [Security Council Meeting Records S/PV.6707](#) (25 January 2012) was the briefing by Special Representative Ian Martin and High Commissioner for Human Rights Navi Pillay on Libya. [Letters S/2012/471](#) (20 June 2012) was a letter from the Permanent Representative of Libya concerning the arrest of an ICC delegation. [S/2012/440](#) (13 June 2012) was a letter from the Secretary-General conveying a letter from the President of the ICC to the President of the Security Council. [S/2011/578](#) (15 September 2011) was from the Secretary-General to the Council President forwarding the NTC's request for the UN's assistance in Libya. [Other A/HRC/19/68](#) (2 March 2012) was the report of the HRC's Commission of Inquiry on the events that took place in Libya. **USEFUL ADDITIONAL RESOURCES** [ICC-01/11-01/11-239](#) (7 December 2012) was the order by the ICC to Libya to provide information on Qaddafi's trial.



## Case Studies (con't)

subsequently be recognised by the international community) issued a statement declaring itself Libya's sole representative. The statement called for the international community to fulfil its obligation to protect the Libyan people "without any direct military intervention on Libyan soil."

On 17 March, the Council adopted resolution 1973, which in addition to authorising all necessary measures—excluding an occupation force—to protect civilians in Libya and enforce the arms embargo, also extended the sanctions regime. The resolution imposed a no-fly zone, strengthened the sanctions, established a Panel of Experts to support the 1970 Sanctions Committee and listed several additional individuals and entities. The Council stressed that those responsible for or complicit in attacks targeting the civilian population, including aerial and naval attacks, must be held accountable. Resolution 1973 was adopted by a vote, with ten members supporting the text (Bosnia and Herzegovina, Colombia, France, Gabon, Lebanon, Nigeria, Portugal, South Africa, the UK and the US) and five abstaining (Brazil, China, Germany, India and Russia).

Additional individuals and entities were proposed to the 1970 Committee for listing by France, Germany, the UK and the US in early April. Several of the proposed new listings were put on hold as China, India and Russia asked for more time to study the listings. (From a legal standpoint, some states do not agree to any listing they cannot apply domestically and therefore request to compile the requisite evidence on the individuals proposed for an assets freeze.) Some names on the list were "on hold" for several months, although two entities were added to the list on 17 March and two individuals on 24 June.

The ICC issued arrest warrants for Col. Muammar Qaddafi, his son Saif Al-Islam Qaddafi and intelligence chief Abdullah Al-Senussi on 27 June for alleged war crimes and crimes against humanity, including murder and persecution of civilians, recruitment of mercenaries and authorising attacks against protestors. On 8 September, the ICC Prosecutor requested that INTERPOL issue a red notice to arrest all three for alleged crimes against humanity. (An INTERPOL red notice seeks the provisional arrest of a wanted person with a view to extradite him or her to another jurisdiction or an international

court.)

On 23 August 2011, opposition forces entered Tripoli, toppling the regime and forcing the Qaddafi clique to flee the city. Intense fighting continued between the opposition forces and forces loyal to Qaddafi in Sirte and Bani Walid, while the whereabouts of all three ICC indictees remained unknown.

After the NTC officially requested UN assistance, and as the remaining Qaddafi forces were close to defeat, the Council adopted resolution 2009 on 16 September, lifting some of the sanctions and establishing the UN Support Mission in Libya (UNSMIL) to assist in the reconstruction of war-torn Libya. Qaddafi was captured by rebels on 20 October and killed later that day. On 23 October, the NTC formally declared national liberation in Benghazi and its Chairman, Mustafa Abdel Jalil, called for forgiveness and reconciliation. On 27 October, the Security Council adopted resolution 2016 terminating the provisions of resolution 1973 which had allowed for the use of force to protect civilians and the no-fly zone, effectively ending on 31 October the authorisation for the NATO military operation (*Unified Protector*) launched on 22 March.

Since the fall of the Qaddafi regime, several issues related to the security situation and accountability have been prominent. Targeted killings of prominent figures and of Qaddafi forces have been common as have attacks against internally displaced persons (IDPs). On 11 June 2012, a convoy carrying UK Ambassador Dominic Asquith was attacked with a rocket-propelled grenade, slightly injuring two close protection officers. On 11 September 2012, the US consulate in Benghazi was attacked, leaving four Americans dead, including Ambassador Christopher Stevens. At press time, sporadic acts of violence between rival factions continued.

On the ICC front, on 1 December 2011 a team from the Court arrived in Tripoli to conduct a preliminary investigation of alleged sexual violence against women committed by Qaddafi supporters. On 6 December, ICC Pre-Trial Chamber I submitted an urgent request to the NTC, asking when and where ICC officials could meet Saif Al-Islam Qaddafi, held in custody in Zintan since 19 November, and whether Libya had any plans for surrendering him to the ICC. Moreover, on 15 December, ICC Prosecutor

Luis Moreno Ocampo stated that the circumstances surrounding the demise of Col. Qaddafi raised suspicions that it amounted to a war crime and that the ICC was planning to investigate it.

On 10 January 2012, Pre-Trial Chamber I extended its earlier deadline for Libya to inform whether Saif Al-Islam Qaddafi would be surrendered to the Court by 23 January. (The ICC Registry had received a letter on 9 January from Libya stating that it was unable to meet the original deadline due to the poor security situation.) On 23 January, an ICC spokesman refuted claims made by the interim Minister of Justice, Ali Humaida Ashour, clarifying that the Court had not decided whether the younger Qaddafi should be tried in Libya.

On 31 January, EU High Representative Catherine Ashton issued a statement noting deep concern at the reports of torture and ill treatment of detainees in Misrata and urged the Libyan authorities to accelerate the process of bringing all detention facilities under their control. On the same day, Deputy Prime Minister Mustafa Abu Shagour told a joint EU-UN workshop in Tripoli that "any violations of human rights will be subject to investigations." The UN High Commissioner for Human Rights emphasised in a briefing to the Security Council on 25 January the urgency of ending the ongoing human rights abuses, "particularly those occurring in detention." This echoed an earlier point raised in the same briefing by Ian Martin, the then Special Representative of the Secretary-General and head of the UNSMIL, who said that only limited progress had been made with regards to the situation of detainees.

The 8 March 2012 report of the International Commission of Inquiry on Libya (A/HRC/19/68) established by the Human Rights Council (HRC) on 25 February 2011, stated that both pro and anti-Qaddafi forces had committed war crimes in Libya. The report noted concern at the failure to hold these individuals accountable and at the fact that some still continued to commit serious violations. The document concluded that NATO had "conducted a highly precise campaign" but recommended further investigation in instances where civilian casualties and strikes on non-military targets were reported. On 5 March, NATO Secretary-General, Anders Fogh Rasmussen, said

## Case Studies (con't)

that no statement could be made about civilian casualties as “it was unable to verify the figures.”

Civilian casualties as a result of the air operations were a recurring issue for some Council members. Russia, in particular, has called for a joint UN-NATO inquiry as it believes that the Council is obliged to investigate this matter given that resolution 1973 had authorised member states “to take all necessary measures” to protect civilians. Mindful that the situation in Libya remains fragile, other members have felt that the Council needs to focus on issues such as the role of the ICC in Libya and ongoing challenges to state authority. NATO members on the Council have been opposed to any such inquiry.

The Council adopted resolution 2040, renewing UNSMIL on 12 March 2012, and calling on Libya to comply with its obligations under international law, including international humanitarian law and human rights law, and for those responsible for serious violations of such law, including sexual violence, to be held accountable in accordance with international standards. It also urged all states to cooperate closely with Libya in its efforts to end impunity for such violations. The Council expressed its concern at continuing reports of reprisals, arbitrary detentions without access to due process, wrongful imprisonment, mistreatment, torture and extrajudicial executions and called on Libya to take all steps necessary to prevent such violations of human rights.

Xavier-Jean Keita, the ICC Defence Counsel, called on the Court on 12 April 2012 to make a formal complaint to the Council over the non-surrender of the younger Qaddafi to the ICC. On 1 May, Libya submitted to the ICC an application under Article 19 of the Statute, claiming that there is an ongoing investigation against Qaddafi in Libya, and therefore the ICC should dismiss its own procedures against him. Moreno Ocampo briefed the Council on 16 May, focusing on ICC activities relating to Qaddafi and on gender-related crimes and allegations of crimes committed by NATO forces, as well as by forces under the auspices of the NTC.

A four-person ICC-appointed defence team was detained by the Zintan militia holding Qaddafi on 7 June 2012, accusing Defence Counsel Melinda Taylor of

clandestinely passing Qaddafi a coded letter from a fugitive former aide, Mohammed Ismail. Council members issued a press statement (SC/10674) on 15 June, expressing serious concern over the detention of the ICC staff members and calling on Libya to abide by its legal obligation under resolution 1970 “to cooperate fully with and provide any necessary assistance to the ICC”.

On 22 June, an ICC statement issued after a meeting in The Hague between ICC President, Judge Sang-Hyun Song, and Libyan Prosecutor, General Abdelaziz al-Hassadi, said the Court would investigate allegations of wrongdoing by its staff in Libya. The four were finally released during a visit to Libya by Song on 2 July. On 6 July, Taylor said during a press conference that her actions in Libya were “consistent” with her legal obligations and that “these recent events have completely underscored that it will be impossible for Mr. Qaddafi to be tried in an independent and impartial manner in Libyan courts.”

On 31 July 2012, according to a filing by the defence, Qaddafi asked to be tried at the ICC instead of in Libya. Ahmed al-Jehani, the Libyan representative to the ICC, said on 20 August that the trial would begin in Libya in September. On 7 December, the ICC Pre-Trial Chamber I asked Libya for information on the status of the trial and requested evidence concerning the investigation by 23 January 2013.

In the meantime, several domestic legal developments took place in Libya. On 2 May 2012, the NTC, which changed its name to the General National Congress (GNC) on 7 July, adopted several new laws, including a law granting immunity to former rebels, saying “there is no punishment for acts made necessary by the February 17 revolution.” Another law, according to which “praising or glorifying Muammar Qaddafi, his regime, his ideas or his sons” was punishable by a prison sentence, was also passed on 2 May but revoked on 14 June by the Supreme Court.

### *Conclusions and Analysis*

From the outset, the Council was quick to act on issues of accountability, referring the situation in Libya to the ICC, only the second such referral in its history. Some aspects of resolution 1970 were problematic, however. The resolution places the financial burden of the investigation exclusively on the ICC,

contrary to the provisions of Article 115(b) of the Rome Statute and the financial prerogatives of the UN General Assembly (Fifth Committee). Furthermore, it excludes foreign officials from the jurisdiction of the ICC, and possibly precluding the theoretical possibility of trying these foreign officials under universal jurisdiction by other countries, even if they were to commit international crimes that allow for the exercise of such jurisdiction under international law. Additionally, as in the case of the Darfur referral, it does not obligate non-parties to the ICC to cooperate with the Court.

Furthermore, the Council has kept silent regarding the strained relations between the ICC and post-Qaddafi Libya, despite its role in referring the situation and following up on the obligations it imposed on Libya. ICC Pre-Trial Chamber I is currently seized of the challenge on admissibility filed by Libya and a ruling was expected at press time. If the Pre-Trial Chamber determines that the ICC has jurisdiction and that complementarity does not apply due to a finding under Article 17(2) or (3), and Libya refuses to acknowledge the ruling, the commitment of the Council to its own decisions may be tested even further.

While the Council was proactive in addressing the conflict, it has been far from adamant on following through on the implementation of binding resolutions. In contrast to its strong stance against the Qaddafi regime, the Council has been lenient on the post-Qaddafi regime when it comes to ensuring accountability for violations of human rights and the surrender of the ICC indictees. This position stands also in sharp contrast to the forceful stance of the Council following the downing of the Pan Am and UTA flights. Some Council members take into account the considerable challenges that the new authorities face, while others feel that the GNC, and previously the NTC, must do more to extend its authority over armed militias as well as prevent widespread violations of the human rights of prisoners and internally displaced persons. The Council’s stated commitment to ensuring accountability in Libya is further put in question by its silence on the issue of individual accountability of NATO personnel participating in Operation *Unified Protector* in Libya.

## Case Studies (con't)

### Future Options

The case of Libya offers some lessons learned for the Council that could be useful with respect to Libya itself, but also to future cases where individual accountability is critical to post-conflict peacebuilding efforts. Options to contemplate include:

- taking a more aggressive stance with Libya to ensure its full cooperation with the ICC and compliance with the relevant resolutions;
- using the regular briefings by the ICC Prosecutor to highlight its continued support for the referral; and
- making sure that the language of future ICC referrals is more precise on the rules of complementarity that apply in order to ensure the effectiveness and legitimacy of the Court, and of the referral process itself.

### Yemen

Yemen is an example that glaringly illustrates the inconsistency of the Security Council in its approach to rule of law issues. In response to the Arab “awakening” in Yemen starting on 27 January 2011, the Council largely opted for outsourcing the mediation effort to the Gulf Cooperation Council (GCC). A key feature of the approach to Yemen by the GCC was the granting of immunity to President Ali Abdullah Saleh and his close allies. This stood in obvious contradiction to the principled position expressed by the Council in numerous decisions regarding the need to hold those responsible for gross violations to account. This inconsistency manifested itself particularly strongly in resolution 2014, adopted on 21 October 2011, in which the Council expressed its support for the GCC initiative, while also condemning impunity for international crimes and gross human rights violations and stressing the need for accountability for these crimes.

Inspired by the uprisings in Tunisia and Egypt, protests against President Saleh erupted on 27 January 2011. Security forces cracked down, often violently, against the protesters, while a power struggle developed between rival factions loyal to Saleh. The events were also related to tribal rivalries

and sectarian violence that had troubled the country in the past, and were further complicated by the importance Yemen has acquired as a base of operations for the terrorist movement Al-Qaida in the Arabian Peninsula (AQAP).

The six states of the GCC (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates) were trying to persuade President Saleh to step down after holding on to power since unification in 1990 (previously serving as President of North Yemen from 1978-1990). The first GCC proposal was presented in March 2011, calling for a peaceful transition of power from President Saleh to Vice President Abdrabuh Mansour Hadi during an interim period leading up to elections. The proposal also granted immunity to President Saleh and his close relatives and associates. Although appearing to accept the GCC plan, Saleh repeatedly failed to sign it.

The Council was first briefed on Yemen by the then-Under-Secretary-General for Political Affairs, B. Lynn Pascoe, and the Special Adviser on Yemen, Jamal Benomar (Morocco), on 19 April 2011. (Yemen had previously been raised during the monthly “horizon scanning” DPA briefings on emerging issues and in consultations on the Middle East.)

As violence continued to spread throughout the country, on 3 June Saleh sustained bodily injuries while in the presidential compound in Sana’a as a result of the detonation of an explosive device, leaving for Saudi Arabia to undergo medical treatment.

Council members were again briefed by Benomar on 24 June 2011, and then issued a press statement (SC/10296) expressing grave concern about the deteriorating situation and welcoming the mediation efforts by the GCC. Benomar next briefed the Council on 9 August, after which, again in a press statement (SC/10357), Council members reiterated their concern at the serious deterioration of the situation and urged all parties to move forward while acknowledging the importance of the GCC initiative. Security Council members issued their next press statement on 24 September (SC/10394), urging all sides to

reject the violence that had erupted the day earlier upon the surprise return to Yemen of President Saleh after undergoing surgery and medical treatment in Saudi Arabia.

In parallel, on 16 September, a report (A/HRC/18/21) from a June-July visit to Yemen by the Office of the OHCHR was presented to the Human Rights Council (HRC). It found that excessive and disproportionate lethal force was used by the government against protesters, resulting in hundreds killed and thousands injured. Noting the lack of an independent judiciary in Yemen, the report called on the international community to ensure that international, independent and impartial investigations were conducted. On 18 October, a spokesperson for OHCHR echoed this request and stated that “those responsible for the hundreds of killings since the protest movement began in Yemen more than eight months ago must be prosecuted, regardless of rank or title.” In a resolution adopted on 14 October (A/HRC/RES/18/19), the HRC took note of the report, noted “the announcement of the Government of Yemen that it will launch transparent and independent investigations, which will adhere to international standards into credible documented allegations of human rights violations through an independent committee and in consultation with political parties”, and called upon all parties to cooperate with the investigation.

Despite repeated statements to the contrary, President Saleh continued to stall on signing the GCC initiative and relinquishing power. Meanwhile, anti-government protests and violence increased, including fighting between political factions and AQAP in the south. As turmoil prevailed, concerns were mounting that AQAP was taking advantage of the situation and increasing its strength and activities. On 21 October, the Council unanimously adopted resolution 2014 with key elements focusing on the GCC initiative for a transfer of power in Yemen, concern over the activities of AQAP and the need for humanitarian assistance. In a rare move, the Council took note of the 14 October HRC resolution and underlined the need for a comprehensive,

**UN DOCUMENTS ON YEMEN** Security Council Resolutions S/RES/2051 (12 June 2012) threatened actions under Article 41 against those who interfere in the transition process in Yemen. S/RES/2014 (21 October 2011) was on the GCC initiative for a transfer of power in Yemen. Security Council Presidential Statement S/PRST/2012/8 (29 March 2012) reiterated that all those responsible for human rights violations and abuses in Yemen, including acts of violence, should be held accountable. Security Council Meeting Records S/PV.6776 (29 May 2012) was a Security Council meeting on Yemen. S/PV.6744 (29 March 2012) was a Security Council meeting on Yemen. Press Statements SC/10529 (25 January 2012) welcomed the formation of the Government of National Unity in Yemen and reiterated that all those responsible for human rights violations and abuses, including acts of violence, must be held accountable. SC/10504 (22 December 2011) welcomed the progress that had been made in implementing the GCC initiative and reiterated that all those responsible for violence, human rights violations and abuses should be held accountable. SC/10394 (24 September 2011) urged all parties in Yemen to reject violence. SC/10357 (9 August 2011) expressed the Council’s concern at the serious deterioration of the security situation in Yemen. SC/10296 (24 June 2011) expressed grave concern at the deteriorating security and humanitarian situation in Yemen. Other A/HRC/RES/18/19 (29 September 2011) was a decision by the Human Rights Council taking note of the OHCHR report on Yemen. A/HRC/18/21 (16 September 2011) was a report by OHCHR calling for international, independent and impartial investigations into incidents in Yemen that resulted in hundreds killed and thousands injured.

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## Case Studies (con't)

independent and impartial investigation consistent with international standards into alleged human rights abuses and violations in Yemen, with a view to avoiding impunity and ensuring full accountability. In the operative paragraphs the Council stressed that all those responsible for violence, human rights violations and abuses should be held accountable. Then, notwithstanding the apparent contradiction, it called on all parties to commit to the implementation of a political settlement based upon the GCC initiative which granted immunity to Saleh and his close relatives and associates. President Saleh responded to resolution 2014 on 24 October by reiterating that he was ready to sit down with the opposition parties and their partners to discuss implementing the GCC initiative.

With his support in Yemen waning, Saleh finally signed the GCC initiative in Riyadh on 23 November, after negotiating an accompanying implementation mechanism initiating the transition of power to Vice President Hadi during an interim period leading up to elections. The initiative not only provided immunity to Saleh but also allowed him to remain as honorary President for three months. Hadi would be expected to become President as the consensus candidate agreed by all sides for the coming elections, and would also oversee national dialogue to consider proposals for constitutional reform.

After extensive travel within Yemen and in the region, Benomar briefed the Council on 28 November and 21 December. Council members issued a press statement on 22 December (SC/10504) welcoming the formation of the Government of National Unity while reiterating the call for the implementation of the GCC initiative and the implementation mechanism in a timely fashion. They also reiterated that all those responsible for violence, human rights violations and abuses should be held accountable.

Notwithstanding the transition, violence continued and the humanitarian situation in Yemen deteriorated. In a statement released on 6 January 2012, Navi Pillay, UN High Commissioner for Human Rights, urged decision-makers in Yemen to respect the prohibition in international law against amnesties for gross human rights violations. Nonetheless, on 8 January the government proceeded to approve a draft law granting President Saleh and his aides immunity from

prosecution for the deaths of protesters. The draft law was subsequently amended on 19 January to offer blanket immunity to Saleh but only shielding his aides in “political cases”, and was adopted on 21 January.

Despite these developments, in a press statement following another briefing by Benomar on 26 January 2012 (SC/10529), Council members reiterated that all those responsible for human rights violations and abuses, including acts of violence, must be held accountable, and emphasised their intention to monitor the implementation of resolution 2014. The statement also expressed concern at the deteriorating security and humanitarian situation and the increasing presence of Al-Qaida in Yemen.

Following the parliamentary approval of Hadi as the consensus presidential candidate, uncontested elections took place on 21 February 2012. Several people were reported killed or wounded in sporadic violence throughout Yemen, including attacks on polling stations. The security situation in Yemen continued to deteriorate following the elections, with hundreds killed in clashes between Al-Qaida and its affiliates, pro-government troops and other groups. Meanwhile, Saleh was not absent from political involvement reportedly threatening on 20 March to pull his loyalists from the unity government that was formed on 10 December 2011 under the terms of the GCC initiative.

On 23 March 2012, thousands of protesters across Yemen demanded the prosecution of Saleh. In a presidential statement adopted on 29 March (S/PRST/2012/8), the Council voiced its concern over the deteriorating situation since the transfer of power to President Hadi following the elections and stressed the need for all actors to remain committed to the political transition. It reiterated that all those responsible for human rights violations and abuses, including acts of violence, should be held accountable.

On 6 April, President Hadi dismissed two high-ranking relatives of Saleh, Air Force Gen. Mohammed Saleh al-Ahmar and Presidential Guard Gen. Tarek Mohamed Abdullah Saleh. He also issued a number of decrees concerning the restructuring of the security sector, changing the command structure of the Republican Guard and of several dissident army units, which were either incorporated into the Presidential Protection Force

or placed under other regional commands. Hadi also replaced some 20 other senior military officers who were Saleh stalwarts, leading forces loyal to the powerful al-Ahmar family to shut down the Sana'a airport and threaten to shoot down aircrafts on 7 April. In a statement issued that day, Benomar said that the decrees marked an important step towards creating “the necessary conditions and take the necessary steps to integrate the armed forces under unified, national and professional leadership in the context of the rule of law.”

In a 29 May 2012 briefing followed by consultations, Benomar presented an alarming picture, highlighting interference from former President Saleh and relatives in reforms undertaken by President Hadi as a key obstacle that could “derail Yemen’s fragile transition process.” Benomar also noted that the security and humanitarian situation remained a source of major concern. The Council responded on 12 June, unanimously adopting resolution 2051, expressing its “readiness to consider further measures, including under the Charter’s Article 41” should actions to undermine the political transition continue, hinting towards the use of sanctions against Saleh, should he continue to interfere. The Council yet again stated that all those responsible for human rights violations and abuses must be held accountable.

Benomar again briefed Council members on 17 July 2012, characterising interference from Saleh and his kinsmen as a key obstacle to stability. The ongoing interference from Saleh became apparent yet again on 14 August when loyalist Republican Guard troops attacked the Defence Ministry in Sana'a. On 15 December, 93 members of the Guard were sentenced by a military court to prison terms of between two to seven years.

A Council visit to Yemen, initially scheduled for October 2012, was at press time planned for late January 2013. Several Council members are interested in a public show of support for the transition process.

### *Conclusions and Analysis*

The Council did not address the situation in Yemen immediately after the outbreak of violence in early 2011, but rather started to discuss Yemen in a focused manner only after the GCC initiative—with its problematic stance on the individual accountability of Saleh and close relatives and associates—was already

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## Case Studies (con't)

in motion. The Council at that point chose to support and rely on the regional effort, despite the granting of immunity to Saleh, and against the stated positions of several Council members and the Council's rhetoric concerning accountability. Ironically, this contradiction did not stop the Council from expressing on several occasions its support for the GCC initiative while condemning impunity for international crimes and gross human rights violations in the same texts.

While the role of the Council as a body in supporting the GCC initiative was mostly rhetorical, its support proved politically influential for the signing of the initiative and its implementation mechanism as well as for the process of institutional reforms. Even though it was not interested in reopening the issue

of accountability in the GCC initiative, the Council could have signalled its disapproval of the immunity element of the initiative, or expressed a degree of uneasiness with it.

Council members are fully aware that Saleh still holds considerable influence as the head of one of the main political parties, with close relatives still holding key military positions despite the recent reshuffle, and may therefore be capable of derailing the whole governmental reform process. Despite the painfully obvious connection between the immunity granted to Saleh and his ongoing obstruction of national reforms, the Council did not react until 12 June 2012, when it first threatened action against such obstructions in resolution 2051.

At press time, the Council continued to

refrain from intervening in favour of accountability for alleged gross crimes, or any other solution that would completely remove Saleh from the political scene. Nor has it followed through on resolution 2051 and the threat to use sanctions despite his ongoing interference.

### *Future Options*

Depending on developments in Yemen, its initial support of the GCC initiative notwithstanding, in the future, the Council could choose to use both rhetorical and practical tools concerning individual accountability to further its response to the stability and security issues still confronting Yemen. The most obvious option at hand is following through on its threat to consider sanctions against spoilers as warned in resolution 2051. •

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## Conclusions

Security Council discourse and practice in the last two decades strongly suggest a general understanding that promoting accountability is an important tool at its disposal in discharging its primary responsibility for the maintenance of international peace and security and that, conversely, impunity and immunity can undermine international peace and security.

The Council has made great strides in recognising that accountability is integral to international peace and security and in advancing international criminal law. It has made accountability an integral feature of its work on country-specific issues and has regularly acknowledged the relevance of accountability to thematic issues other than the rule of law. It has also taken concrete steps to uphold individual accountability, such as ICC referrals and the establishment of ad hoc criminal tribunals, and imposing individual sanctions on perpetrators of human rights violations. Commissions of inquiry and fact finding missions have become a tool used by the Council on numerous occasions since 1993. In various situations, the Council has referenced a range of transitional justice mechanisms including national and mixed tribunals, as well as TRCs. Moreover, assisting in the establishment of transitional justice mechanisms has become a regular feature in

its peacekeeping missions' mandates.

The case studies show that the Council, at least rhetorically, considers individual accountability as integral to international peace and security. With the notable exception of Afghanistan (since September 2001), when addressing the situations examined in the present report, the Council has highlighted the importance of accountability. This has been in line with Council statements on the relevance of individual accountability to peace and security expressed in thematic debates and outcome documents on the rule of law. In fact, its consideration of accountability as relevant to international peace and security precedes its consideration of the rule of law as a thematic issue and also the consideration of other rule of law elements within its work.

Council reference to various elements that are related to the rule of law, including human rights, and to the concept of the rule of law itself, is no longer uncommon, as our last *Cross-Cutting Report* demonstrated. Taking into account Council decisions throughout 2011 and 2012, as well as the reports of the Secretary-General submitted to the Council during that period, the present report has additionally registered trends that are noteworthy.

Statistically, aside from a decline in 2011, the integration of rule of law elements in

Council decisions has been on the rise from 2003 to 2012, despite a slight decrease in the use of the term 'rule of law' in 2011 and 2012. Notably, references to human rights in the relevant resolutions were on the rise in 2012 (74 percent) after a decline in such references in 2010 and 2011 (62 percent). The contrast between 2011 and 2012 was also noticeable in references to human rights in presidential statements, which have been in steady decline since 2009, a trend that continued in 2011 with only 38 percent of relevant statements referring to human rights. In 2012, however, 50 percent of presidential statements referred to human rights, a possible end to this downward trend. Finally, with respect to the reports of the Secretary-General, one important trend is the fact that since 2006 all relevant thematic reports, with no exception, have addressed rule of law issues.

Yet, as much as Council discourse reflects this insight, its practice is far more ambiguous, if not contradictory at times. A period of intense political attention to a certain situation or development resulting in the establishment of a tribunal or an ICC referral has been followed by periods of nothing but routine actions and little focus on the implementation of earlier accountability-related decisions, without maximising their impact. Conversely, there have been examples when focused Council

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## Conclusions (con't)

attention has led to important accountability outcomes. The Council visiting mission to the DRC on 18-19 May 2009 is a case in point: having met with victims of sexual violence in Goma, in a meeting with the President and the Prime Minister in Kinshasa the next day, Council members insisted that the government take action against five alleged perpetrators of sexual violence holding official posts within the Congolese military, whose cases had been brought up with the authorities well over a year before, without any meaningful reaction. All individuals were ordered to be relieved from their posts and some were arrested (although not all were successfully brought to justice).

But while the Council has at times demonstrated its resolve to hold perpetrators accountable, it has often subsequently failed to follow through, or in some cases, it has shown indifference to impunity. This was evident in several case studies.

- Following the establishment of the ad hoc international tribunals, the Council was slow to ensure state cooperation.
- Following its Article 13(b) referrals of the situations in Darfur and Libya to the ICC, the Council has not followed through with consistent pressure on the relevant states to abide by their obligations to cooperate with the Court.
- In Côte d'Ivoire, the Council has so far failed to hold all sides accountable for their violations of human rights and international crimes.
- In the DRC, pressure to prosecute alleged perpetrators has been shown at times, but this has tended to fade away eventually, as was the case of the lacklustre follow up on the Walikale incidents in the summer of 2010.
- In Cote d'Ivoire, the DRC and Sudan, the Council has added human rights violations as a criterion for imposing targeted sanctions, yet this tool has rarely been used. On the rare occasion that the relevant sanctions committee has resorted to listing individuals for human rights violations, it has sometimes done so with a delay of several months or more after the relevant events unfolded on the ground. Such a delayed response undercuts the deterrence that such sanctions are meant to achieve.

Other practices examined in this report likewise demonstrate inconsistency:

- While the Council regularly inserts a

“zero-tolerance” provision for sexual misconduct of peacekeepers in its peacekeeping mandates, the implementation of the policy is at the hands of the troop contributing countries in each case.

- While setting up Groups or Panels of Experts to assist its sanctions committees, the Council does not regularly follow up on their recommendations. Lack of follow up does not only occur on the practical level, but rhetorically as well – at times the Council will only go as far as taking note of the recommendations, refraining from supporting or endorsing them. At other times, disagreement in the sanctions committees for political reasons leads to delays in the publication of the reports or even their suppression.

The Council's perceived short attention span in cases involving accountability could be attributed to several factors. First and foremost, the Council tends to deal with a demanding, revolving and increasing workload that in itself limits the attention span accorded to the various agenda items. Additionally, most decisions regarding accountability usually produce results relevant for the maintenance of international peace and security in the medium-term while requiring continued attention and sustained political will.

The fact that five of the 15 Council members are permanent could, in theory, assist the Council in achieving consistency, as the P5 serve as the Council's “political memory”. But this has not always been the case. In addition to the fact that governments revise their priorities, the P5 have not always seen eye-to-eye on accountability issues. Whatever the reasons, the result has been a considerable lack of resolve to consistently match Council discourse with practice on accountability.

At times, the Council has chosen to ignore issues of accountability altogether. What seems to be at play may be the belief that upholding accountability could be politically counter-productive in the short-term in the interest of peace. Although Council members are prompt to accept that peace and justice are complementary, in practice justice has at times been postponed or subordinated in the interest of peace. This appears to be the case with Afghanistan and the “light footprint” approach taken there, and also with Yemen, where the Council subscribed to a process granting immunity to former President Saleh

and his immediate circle.

This lack of consistency or attention regarding accountability may point to the fact that while paying homage to accountability rhetorically, the Council has not fully internalised the relationship between accountability and peace and security. When weighing political or financial considerations against accountability, it may often opt for ignoring accountability in favour of short-term political conciliation, short-term cessation of violence or cutting back on expenses. Or, it may simply take no action at all, even if accountability is a clear and important factor in the situation at hand.

At times, however, the Council has served the interest of accountability in deciding not to take action, as has been the case with the Article 16 requests regarding Sudan and Kenya. In the case of Sudan, the Council has resisted political pressure from the AU and the Arab League to defer the situation from ICC jurisdiction allowing the prosecution procedures to continue. In the case of Kenya, the Council chose not to act on the AU-backed request to defer jurisdiction from the ICC, again allowing the Court to continue to pursue the cases. Despite the positive end result, in both cases the Council has missed out on opportunities to clarify that it has not acted on these requests in the interest of accountability.

Yet a major concern remains that in many cases inaction, or inconsistent action, in addressing impunity produces dire results:

- In Afghanistan, ignoring accountability for past transgressions stands at the core of the failure of the country to truly move forward in terms of good governance.
- Procrastination as events unfolded after the elections in Côte d'Ivoire was followed by further bloodshed on the ground and an all-out civil war. The Council's delay in pronouncing itself on the events, despite members' awareness of the high possibility that Gbagbo would not step down without a fight and their familiarity with Gbagbo supporters' violent record, may have been crucial. The events of summer 2012 show that with time, the perpetrators of such crimes will resort to similar patterns if accountability is not addressed.
- In Yemen, the Council has voiced its support for accountability while simultaneously supporting a transition process that

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## Conclusions (con't)

provided immunity for former President Saleh and his close associates. Moreover, at press time, Saleh continued to interfere with the ongoing reforms without the Council following through on its threat to impose sanctions on spoilers.

- In the DRC, the Council studiously avoided acting on the ICC indictment against Bosco Ntaganda purportedly to preserve the fragile stability in eastern Congo. As the M23 uprising demonstrates, inaction regarding Bosco has in fact destabilised North Kivu, obliterating what progress had been achieved in the region through the maintenance of a costly Council-designed and mandated international effort.
- In the case of the ad hoc international tribunals, the focus on their closure in the name of financial expedience can potentially conflict with judicial independence and procedure.

The Council has apparently approached accountability in each case moved by an ad hoc political interest, rather than a principled understanding. In most of the cases studied, the Council was seemingly unmindful of its own rhetoric on accountability, opting for short-term decisions over long-term solutions that adequately balance the imperatives

of peace and justice. In hindsight, this has prolonged conflicts and increased costs, both in terms of lives lost and financial resources spent.

The case studies highlighted different options available to the Council. One future option that applies across the board is that addressing accountability is key to successful engagement in conflict and post-conflict situations, and the Council cannot afford to be inconsistent if it is to successfully address these situations. The Council could resolve to consistently keep track of specific developments on the issue of accountability in situations under its consideration, for example by deciding to consider accountability more systematically during briefings and consultations and inviting experts with knowledge of the issue to brief it regularly. Informal meetings, such as “Arria formula” meetings focusing on accountability, may also help the Council to keep its focus on this issue. Maintaining focus on the issue would then lead to consequent and appropriate action, applied in a consistent manner.

Such an approach could be considered even when short-term political difficulties emerge. For example, when states are reportedly violating Council sanctions or committing human rights abuses in another state on

the agenda of the Council, it does not need to shy away from “naming and shaming” or taking other actions, as appropriate, to hold those states accountable.

The case studies suggest that ignoring accountability in the name of peace often leads to the opposite results, as conflict thrives on impunity. This short sighted treatment of accountability not only denies justice to the population in a given conflict zone, but by delaying the establishment of lasting peace, it is also counterproductive to the interests of other states, including states in the region.

While the Council has considerably advanced its accountability agenda over the course of the last two decades, there is still ample room for it to strengthen its commitment to accountability for international crimes as an important and efficient tool in discharging its task of promoting and maintaining international peace and security.

The Council has the tools to assist in ushering in the “age of accountability”, described by the Secretary-General on 31 May 2010, in his opening statement to the Kampala Review Conference of the Rome Statute. It has yet to consistently and fully make use of its prerogatives and responsibilities in this regard to attain a more perfect balance between peace and justice. •

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## UN Documents and Useful Additional Resources

### Security Council Resolutions

[S/RES/2083](#) (17 December 2012) renewed for 30 months the mandates of the Ombudsperson and the Analytical Support and Sanctions Monitoring Team assisting the 1267/1989 Al-Qaida Sanctions Committee.

[S/RES/2071](#) (12 October 2012) was a resolution on Mali, which acknowledged the ICC.

[S/RES/2068](#) (19 December 2012) was a resolution on children and armed conflict, which acknowledged the ICC.

[S/RES/1988](#) and [S/RES/1989](#) (17 June 2011) split the Al-Qaida sanctions regime from that of the Taliban and extended the mandate of the ombudsperson.

[S/RES/1960](#) (16 December 2010) was a resolution on conflict-related sexual violence, which made reference to the ICC.

[S/RES/1757](#) (30 May 2007) established the Special Tribunal for Lebanon under Chapter VII.

[S/RES/1730](#) (19 December 2006) established “a focal point” within the UN Secretariat to process submissions for de-listing under Council resolutions involving targeted sanctions.

[S/RES/1315](#) (14 August 2000) called for the establishment of the Special Court for Sierra Leone.

[S/RES/1267](#) (15 October 1999) established the Al-Qaida and Taliban Committee and its sanctions mandate.

[S/RES/1265](#) (17 September 1999) was on the protection of civilians and emphasised accountability.

[S/RES/612](#) (9 May 1988) condemned the use of chemical weapons in the Iran-Iraq war.

[S/RES/39](#) (20 January 1948) established the Commission of India and Pakistan.

[S/RES/30](#) (25 August 1947) established the Consular Commission at Batavia.

[S/RES/27](#) (1 August 1947) called for a ceasefire between Indonesia and The Netherlands.

[S/RES/15](#) (19 December 1946) was the establishment of the Commission of Investigation on the Greek frontier incidents.

### Security Council Presidential Statements

[S/PRST/2012/1](#) (19 January 2012) was on elements of the rule of law.

[S/PRST/2010/11](#) (29 June 2010) requested a report on the implementation of the recommendations contained in the Secretary-General's report on the rule of law of 2004 (S/2004/616).

[S/PRST/2006/28](#) (22 June 2006) was on the rule of law.

[S/PRST/2005/21](#) (31 May 2005) was on the sexual misconduct of peacekeepers.

[S/PRST/2004/34](#) (6 October 2004) was on the rule of law and called for ending the climate of impunity.

[S/PRST/2003/15](#) (24 September 2003) was a statement on justice and the rule of law.

# UN Documents (con't)

## Security Council Meeting Records

[S/PV.6870](#) and [Resumption 1](#) (26 November 2012) was on Security Council working methods.

[S/PV.6849](#) and [Resumption 1](#) (17 October 2012) was an open debate on the rule of law and the ICC.

[S/PV.6722](#) and [Resumption 1](#) (23 February 2012) was on women, peace and security.

[S/PV.6705](#) and [Resumption 1](#) (19 January 2012) was on the rule of law.

[S/PV.6650](#) and [Resumption 1](#) (9 November 2011) was a debate on protection of civilians.

[S/PV.6347](#) (29 June 2010) was a debate on "The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security".

[S/PV.5474](#) (22 June 2006) was an open debate on "Strengthening International Law: Rule of Law and Maintenance of International Peace and Security".

[S/PV.5052](#) and [Resumption 1](#) (6 October 2004) was on the rule of law.

[S/PV.4833](#) (24 September 2003) was the Council's first debate on the rule of law.

## Security Council Press Statement

[SC/10700](#) (5 July 2012) welcomed the beginning of the tribunals' residual mechanism.

## Secretary-General's Reports

[A/66/749](#) (16 March 2012) was on the rule of law for a high-level event.

[A/59/2005](#) (21 March 2005) was the report entitled "In larger freedom: towards development, security and human rights for all".

[S/2004/616](#) (23 August 2004) was on the rule of law and transitional justice in conflict and post-conflict societies. The report included a working definition of the rule of law and recommendations for the Council's future work.

[S/19823](#) (25 April 1988) concluded that chemical weapons were used during the Iran-Iraq war.

## Letters

[S/2012/860](#) (20 November 2012) was a letter to the Council proposing the establishment of a body to systematically address questions arising from the relationship of the Council and the ICC, or to expand the mandate of its informal working group on international tribunals to this effect.

[S/586](#) (22 October 1947) was the final report of the Consular Commission at Batavia.

[S/360](#) (27 May 1947) was the report of the Commission of Inquiry on the Greek frontier incidents.

## Other

[S/2012/731](#) (1 October 2012) was the concept note prepared by Guatemala for the open debate on the ICC.

[A/67/L.1](#) (24 September 2012) was the declaration adopted at a high-level event on the rule of law.

[A/RES/66/102](#) (9 December 2011) was a General Assembly resolution requesting a report on the rule of law from the Secretary-General in preparation for a high-level event.

[S/2006/367](#) (7 June 2006) was a concept note prepared by Denmark for the rule of law debate.

## USEFUL ADDITIONAL RESOURCES

"A Long Way from Reconciliation" Abusive Military Crackdown in Response to Security Threats in Côte d'Ivoire (Human Rights Watch, 2012).

Lars Waldorf, "A Mere Pretense of Justice: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal", *Fordham International Law Journal* 1221 (2011).

Claus Kreß, "International Criminal Law", *Max Planck Encyclopedia of Public International Law*.

*New York Times*, *Afghanistan*, <http://topics.nytimes.com/top/news/international/countriesandterritories/afghanistan/index.html>.

*International Law* (Malcolm Evans, ed., Oxford University Press, 3rd ed., 2010).

*International Law: Norms, Actors, Process: A Problem-Oriented Approach* (Jeffrey L. Dunoff, Steven R. Ratner, David Wippman, ed., Aspen Publishers, 2nd ed., 2006).

*The UN Security Council: From the Cold War to the 21st Century* (David Malone, ed., Lynne Rienner Publishers, 2004).

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