SECURITY COUNCIL REPORT
UPDATE REPORT

16 June 2006 No. 3

Strengthening International Law: Rule of Law and the Maintenance of International Peace and Security

The Security Council Open Debate on 22 June 2006

An open debate in the Security Council on Strengthening International Law: Rule of Law and the Maintenance of International Peace and Security is currently scheduled for 22 June.

The debate, which has been initiated by Denmark in its capacity as president of the Council in June, will be presided over by the Foreign Minister of Denmark.

In its preparation for the debate Denmark as circulated an informal discussion paper setting out various suggested themes and questions for discussion. An Arria formula meeting organised by Argentina will be held on 20 June.

Participation by Non Council Members

It has been decided by Council members, in the context of agreeing to the programme of work for the month of June that this will be an open debate. This means that all members of the United Nations can request an invitation to participate. The procedure for securing such an invitation, in practice, is for members wishing to participate to make a formal written request to the president of the Council.

The debate is expected to result in a presidential statement. Based on past experience in similar cases, this statement is likely to restate some of the key themes which emerge in the debate. In this sense members of the General Assembly who participate in the debate do have an opportunity to help shape the outcome. Moreover, it is worth recalling that under rule 37 of the Provisional Rules of Procedure of the Security Council, members of the General Assembly participating in the debate also have the right to submit specific proposals for Council action.

However, non-Council members wishing to make suggestions or proposals would be wise to bring these to the attention of the president informally in the lead up to the debate since Council experts are likely to already have begun informal discussions on a possible statement.

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Options
Options which seem likely to be discussed for inclusion in a presidential statement include:

- a reaffirmation of the Council's commitment to international law in the context of peaceful settlement of disputes;
- the importance of the rule of law in post conflict situations;
- emphasis on the need to fight impunity; and
- the need for due process in the application of targeted sanctions.

Political Dynamics
It seems that Denmark has been sensitive to the wider political concerns in the General Assembly that the Security Council should not encroach upon the role of the General Assembly for the codification and development of international law. Their discussion paper, circulated in preparation for the debate, reflects this point. In particular, their paper suggests that the debate should focus on the specific role the Security Council is or could be playing in specific conflict situations where international law, and the legal tools that the Council has at its disposal, can play an important role in boosting the Council's efforts to maintain international peace and security.

Proposed Themes for Discussion
Under the broad title proposed for the debate, Denmark suggests addressing three related yet distinct themes, each critically important for the promotion of the rule of law and human rights.

1. The promotion of rule of law in conflict and post-conflict situations.
2. Ending impunity for international crimes.
3. Enhancing efficiency and credibility of UN sanctions regimes.

Background and History to Past Council Discussion of this Issue
Over the past decade and a half, the Council has repeatedly acknowledged that for its conflict resolution efforts to have lasting effect, it needed to address, in a comprehensive manner, the root causes of armed conflicts and that it also needed to take into account these causes when designing solutions for the transition period for states emerging from conflict.

After decades of, in practice, excluding governance, rule of law, human rights and justice issues from the purview of the Council action, in 1991, in resolution 688 on Iraq the Council declared that repression against civilian population within a state had consequences that could "threaten international peace and security in the region." Gradually, rule of law and justice issues have gained prominence in the Council's thinking and discussions about long term solutions as well as in the design of its operations in the field and are now part of mainstream Council discussion and action.

In past years, the Council has held two retreats human rights and justice issues, respectively in 2001, a retreat on human rights and peacekeeping and in 2004, a retreat on justice issues in transitional situations. With the Peacebuilding Commission soon to become operational, there is likely to be an increased momentum for discussing these issues and a need for more focused analysis and specific recommendations. As such, the open debate planned for 22 June seems especially timely.

Rule of Law in Conflict and Post-Conflict Situations
The Council held its last debate on the theme of "Justice and the Rule of Law: the United Nations Role" in October 2004, under the presidency of the United Kingdom. It was a follow up to two earlier debates on this subject: a ministerial level Council meeting on 24 September 2003 and an open debate on 30 September 2003.

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The 2004 meeting discussed the Secretary-General's report on *The rule of law and transitional justice in conflict and post-conflict societies* which took stock of the existing UN practices, experience, and expertise and put forward a series of recommendations both for the Council and, more specifically, the UN system. In the presidential statement adopted at that meeting on 6 October 2004, the Council asked the Secretariat to provide a report with proposals about the implementation of the Secretary-General's recommendations with respect to the UN system, with particular emphasis on those measures that could be implemented rapidly. It also expressed its intention to consider the matter of justice and the rule of law in conflict and post-conflict societies within six months.

Nineteen months later, the report from the Secretariat is still pending. The debate planned for 22 June is the first open meeting in which the Council will be addressing these issues since the 2004 open debate.

The upcoming debate may bring the issue of the rule of law and justice back into Council focus. It may also prompt the Secretariat to finalise and publish the report requested by the 2004 presidential statement.

During the rule of law debates Council members as well as other member states focused on the importance of ensuring the rule of law in conflict and post conflict situations, its significance in building confidence of the populations affected by or emerging from conflict in both the international community and in new local institutions, and on the role the Council could play in these issues by incorporating rule of law components into its operations. Numerous speakers discussed the experience the UN has accumulated in these matters over the past years and analysed the lessons learned.

Several speakers in these debates also highlighted the need for societies emerging from conflict to include mechanisms for reparations for victims of the previous regimes and for an apparatus that would ensure that perpetrators are not allowed to remain in positions of power. These comments seem to support the logic in the Danish concept paper prepared for the 22 June meeting that the issue of impunity should be included as a sub-theme of the upcoming debate.

Ending Impunity for International Crimes

The need for ending impunity for international crimes was mentioned in the context of Council discussions on the rule of law. But for years this issue has figured as a practical problem in the Council's work and thinking on a range of country-specific situations.

Faced with the enormity of humanitarian and human rights violations in the Balkans in early the 1990s, the Council sought to devise a mechanism to bring individual responsibility for the most egregious acts into the set of measures being progressively implemented to address the situation in the former Yugoslavia. It initially asked the Secretary-General to appoint an international commission that would examine available information and, based on the commission's report, to provide the Council with recommendations. Subsequently in May 1993, with the situation in both Croatia and Bosnia continuing to deteriorate, the Council decided to establish an international criminal tribunal to try those accused of the gravest crimes.

In 1994, responding after the event of the Rwandan genocide, the Council established an international criminal tribunal for Rwanda.

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More recently, mostly out of concern about the costliness of the international tribunals it had established, but also in an effort to contribute to the building of the indigenous justice systems, the Council has also devised what became to be known as mixed tribunals. This combination of international and national justice has been applied in two variations so far:

- a freestanding tribunal, such as the one in Sierra Leone; and
- a panel set up within a country's existing legal system, such as the Special Panels for Serious Crimes in East Timor.

Possible tribunals are being discussed in two other cases currently on the Council agenda: for Burundi and in response to the request from Lebanon regarding assistance for the trial of individuals involved in the Hariri assassination.

In addition to pursuing the international justice route in combating impunity, the Council has repeatedly signalled its concerns in numerous resolutions and statements. In particular, the Council has highlighted this matter in several resolutions and some presidential statements regarding the DRC, Côte d'Ivoire, Sudan, Haiti and Burundi, often making the connection that human rights monitoring can be a means for working towards ending impunity. In some cases it requested the Secretary-General to include information on steps being taken to combat impunity in his periodic reports on specific situations. And in its latest resolution on the protection of civilians in armed conflict, the Council emphasised the responsibility of states to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law.

In two open debates on post-conflict national reconciliation on 26 January and 22 June 2004 and held under, respectively, the Chilean and Philippines presidencies, several speakers stressed the need to avoid impunity as an element of national reconciliation.

Yet, despite relatively frequent reference to the need to end what the Council has termed the climate of impunity, in several cases, the Council itself has not followed up on its earlier decisions regarding impunity related issues by not making public reports it had requested or received or by not insisting that the Secretariat comply with deadlines on related Council requests. For example, a December 2004 report on human rights violations in Côte d'Ivoire requested by a presidential statement in May of that year has not been made public by the Council. Similarly, and also on Côte d'Ivoire, a December 2005 report by the Secretary-General's Special Adviser on the Prevention of Genocide has not seen the light of day. And a report requested from the Secretariat by the Council in September 2005 on proposals for addressing cases of serious crimes committed in Timor-Leste has not been submitted yet. (See also the Aide-Memoire published since March in our *Monthly Forecast*.)

The issue of impunity tends to be raised in the context of peace negotiations when parties responsible for serious crimes suggest amnesties before they are willing to sign a peace deal. Both Council members and the UN at large have been faced with this dilemma on a number of occasions. At times such situations have raised questions about the possible need to choose between justice and peace or at least the best way of sequencing the handling of issues relating to peace and justice. In his 2004 report on *The rule of law and transitional justice in conflict and post-conflict societies* the Secretary-General recommended to the Council that when it considers negotiations, peace agreements and mandates that its resolutions:

> "reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court."

An example of an occasion in which the Council specifically heeded this advice and called on the country's legislation to "take into account the principles of justice and fight against impunity" was in resolution 1580 on Guinea-Bissau in 2004 addressing the issue of amnesty for those involved in military interventions since 1980. In other situations, most recently Timor-Leste, the Council has tended to equivocate. For details, please refer to our 19 January *Update Report* on Timor-Leste as well as to our December 2005 and May 2006 *Monthly Forecasts*.

Enhancing Efficiency and Credibility of UN Sanctions Regimes

The effectiveness of Security Council sanctions regimes has been a topic of numerous debates, both within and without the Council. In the past decade, the Council has grown to rely on sanctions as one of the indispensable tools in conflict management, in addressing the most rampant violations of humanitarian and human rights law and in the fight against terrorism. At the same time, however, numerous concerns have been raised about sanctions' effectiveness on one side, and their impact on populations on the other side. Critics had pointed out that comprehensive economic sanctions were extremely difficult to enforce and as such rarely had the desired impact on the governments in question. Yet, at the same time, such sanctions inflicted undue harm on the target states' general population, and particularly the most vulnerable sections of society.

Starting in mid-1990s with Jonas Savimbi in Angola, several initiatives were undertaken to design enforceable sanctions regimes that would target specific individuals responsible for particular policy decisions or crimes with a range of measures such as assets freezes, travel bans, as well as targeting governments with narrowly designed sanctions such as arms embargoes, diamond and other commodity embargoes or aviation bans that would be primarily felt by the targeted countries' leaders and not their populations.

In a series of meetings referred to as the Interlaken and Bonn/Berlin processes, representatives of governments, private sector and civil society came up with a series of recommendations, contained in two manuals and presented them to the Council in October 2001. The Interlaken process, sponsored by the government of Switzerland produced a booklet titled *Targeted Financial Sanctions*, published by the Watson Institute at Brown University. The Bonn/Berlin process, sponsored by the German government, resulted in the publication of *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions*, by the Bonn International Center for Conversion. These were followed by the so-called Stockholm process on the implementation of targeted sanctions, sponsored by the government of Sweden whose results were presented to the Council in February 2003 in a booklet *Making Targeted Sanctions Effective—Guidelines for the Implementation of UN Policy Options*. (For Council references to this booklet please see press releases SC/7672, SC/7673 and Council meeting record S.PV 4394 and Resumption 1.)

The Council itself has had a series of its own initiatives, including the establishment of the Working Group on General Issues Related to Sanctions in 2000. Due to a lack of consensus among P5 members, the Working Group has been unable to reach any conclusions, and while it is still technically in existence, it has been dormant. For more details on this matter please refer to our January 2006 *Monthly Forecast*.

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When initially conceived of, targeted sanctions were meant to affect leaders and other individuals known to have taken specific actions that sanctions were supposed to change and/or punish. Targets of the sanctions were usually well known and their numbers, under each of the Council resolutions were in the one or low two digits range. In short, targets were usually members of the elite and far from being anonymous. Things changed when in the aftermath of the 11 September 2001 terrorist attacks in the United States. In resolution 1390 the Security Council made measures under resolution 1267—which had been initially of limited application, both geographically and in terms of targeted individuals—applicable worldwide and to a loosely defined category of individuals and entities. The number of targets under resolution 1267 went up very quickly, reaching nearly five hundred. Very soon, governments as well as members of the civil society began raising concerns about cases of mistaken identity, the lack of transparent procedures for being placed on a list and the lack of a possibility to appeal a listing decision. The 1267 Sanctions Committee responded by adopting guidelines that addressed some of these concerns but overall the listing and delisting procedures issue has proven to be very contentious. Several states have also expressed frustration with the Committee's lack of transparency in the way it conducts its work exacerbating the concerns about the lack of due process in the procedures employed by the Committee in the listing process. Over fifty states have signalled concerns about the Committee's failure to address these issues when raised by them.

This preoccupation was signalled by the world leaders during the September 2005 World Summit whose final document calls:

> "upon the Security Council with the support of the Secretary-General 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 humanitarian exemptions."

That September request for fair and clear procedures on listing and delisting on Council sanctions lists is still outstanding. A report by the Office of Legal Affairs is awaited. Interesting analysis of related issues and some useful recommendations on this matter can be found in a recent report *Strengthening Targeted Sanctions through Fair and Clear Procedures* published by Brown University's Watson Center and sponsored by the governments of Switzerland, Germany and Sweden.

Questions have been raised about the legitimacy of Council's targeted sanctions. A number of lawsuits have challenged the sanctions in individual states and before the European Court of Justice. In these proceedings litigants have invoked the rule of law argument and complained about the lack of due process for individuals and entities on the Consolidated List. For a more detailed discussion of issues related to the 1267 Sanctions Committee please refer to our 16 January 2006 *Update Report*.

Legal challenges based on arguments that Council resolutions are incompatible with fundamental human rights norms raise an entirely new set of issues. These concern not only the Council's credibility but also the effectiveness of the measures. It opens important questions about the hierarchy of legal norms within the overall framework of international law.

The open debate may generate some useful ideas that may move the Council toward a consensus on addressing these problems. It may also prompt the Council to either revive its now moribund Working Group on the General Issues Related to Sanctions or rationalise its disparate sanctions related subsidiary bodies in the context of its review of mandates—also relevant in the light of 2005 Summit Outcome decisions—and consider a comprehensive policy document on sanctions.

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UN Documents

Selected Security Council Resolutions

- S/RES/1674 (28 April 2006) on civilians in armed conflict in which the Council emphasised the need to end impunity and drew attention to the range of justice mechanisms to be considered, including national, international and mixed criminal courts and tribunals.
- S/RES/1580 (22 December 2004) extended the mandate of the UN Peacebuilding Support Office in Guinea-Bissau, the Council also called on the Country's National Assembly to take into account principles of justice and fight against impunity when considering amnesties.
- S/RES/1410 (17 May 2002) established the UN Mission of Support in East Timor and stressed the importance of ensuring that those who committed serious crimes should be brought to justice.
- S/RES/1390 (28 January 2002) made the measures of resolution 1267 applicable worldwide.
- S/RES/1315 (14 August 2000) requested the Secretary-General to negotiate an agreement to create the Special Court for Sierra Leone.
- S/RES/1267 (15 October 1999) imposed sanctions on the Taliban in Afghanistan.
- S/RES/955 (8 November 1994) established the International Criminal Tribunal for Rwanda.
- S/RES/827 (25 May 1993) established the International Criminal Tribunal for the former Yugoslavia.
- S/RES/780 (6 October 1992) asked the Secretary-General to appoint an international commission to provide recommendations on how to address the situation in the former Yugoslavia.
- S/RES/688 (5 April 1991) stated that repression against civilian population within a state had consequences that could "threaten international peace and security in the region."

Selected Presidential Statements

- S/PRST/2005/30 (12 July 2005) stressed the importance of justice and the rule of law in post conflict situations and the need for the end of impunity as a part of peace agreements.
- S/PRST/2004/34 (6 October 2004) expressed the Council's intention to consider the matter of justice and the rule of law in conflict and post-conflict societies within six months and asked the Secretary-General to make proposals for rapid implementation of the recommendations made in the Secretary-General's report of 23 August on strengthening United Nations support for transitional justice and the rule of law in conflict and post-conflict countries.
- 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, and determine responsibility.
- S/PRST/2004/2 (26 January 2004) on post-conflict national reconciliation asked the Secretary-General to give consideration to the views expressed in the 26 January open debate in the preparation of his report on justice and the rule of law.
- S/PRST/2003/15 (24 September 2003) the Council welcomed the offer by the Secretary-General to provide a report to guide further consultations on justice and the rule of law.

Secretary-General's Reports

- S/2004/616 (23 August 2004) the Secretary-General's report *The rule of law and transitional justice in conflict and post-conflict societies* assessed existing UN practices, experience, and expertise and put forward a series of recommendations for both the Council and the UN system.

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Selected Security Council Meeting Records
• S/PV.5293 and Corr.1 (26 October 2005) briefing by Ambassador Mayoral, Chairman of the 1267 Committee (Al-Qaeda/Taliban), Ambassador Løj, Chairman of the 1373 Committee (Counterterrorism), and Ambassador Motoc, Chairman of the 1540 Committee (WMDs). • S/PV.4993 and Res. 1 (22 June 2004) was an open debate on the role of civil society in post-conflict peacebuilding. • S/PV.4903 and Res. 1 and Corr. 1 (26 January 2004) was an open debate on the role of the United Nations in post-conflict national reconciliation. • S/PV.5052 and Res. 1 (6 October 2004) was an open debate in which the Council discussed the Secretary-General's report on the rule of law. • S/PV.4835 (30 September 2003) was a follow-up on the meeting of 24 September 2003; emphasis was placed on the justice system and the importance of having an independent and impartial judiciary. • S/PV.4833 (24 September 2003) was an open meeting on the role of the United Nations with regard to justice and the rule of law. • S/PV. 4394 Res. 1 and Corr.1 (25 October 2001) was a continuation of the debate of 22 October. • S/PV. 4394 (22 October 2001) was an open debate on general issues related to sanctions.
Other Documents
• S/2006/367 (7 June 2006) contained the Danish discussion paper for the 22 June meeting. • A/RES/60/1 (24 October 2005) contained the 2005 World Summit Outcome Document. • S/2005/613 (28 September 2005) was a letter from the president of the Council requesting further recommendations on justice and reconciliation for Timor-Leste. • SC/7672 (25 February 2003) was a press release on the presentation of the Stockholm process findings to the Council. • SC/7673 (25 February 2003) was a press release encouraging further discussion and work to refine the instrument of targeted sanctions.

Useful Additional Sources

- 1267 Committee website with annual reports and selected documents (http://www.un.org/Docs/sc/committees/1267Template.htm)
- Human Rights Watch publications on international justice (http://www.hrw.org/doc/?t=justice)
- International Center for Transitional Justice publications (http://www.ictj.org/en/index.html)
- *Strengthening Targeted Sanctions through Fair and Clear Procedures,* White Paper, Watson Center, Brown University, 30 March 2006 (http://www.watsoninstitute.org/news_detail.cfm?id=425)
- Wallensteen, Peter (ed.), *Making Targeted Sanctions Effective—Guidelines for the Implementation of UN Policy Options*, Coronet Books, April 2003
- *Targeted Financial Sanctions*, 2001 (http://www.smartsanctions.ch)
- *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions*, 2001 (http://www.smartsanctions.de/)

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