

THE UN'S ROLE IN STRENGTHENING THE RULE OF LAW: Current and Past Issues in the “Rule of Law” debate regarding the ICC

History of ROL Debates

The “Rule of Law” is slightly different from other issues on the Security Council agenda, as it serves not only as the topic for thematic debates, but also factors into individual state-focused debates, as well as into other thematic debates. Rule of Law first entered the Security Council’s purview in 1991 when Resolution 688 on the situation in Iraq announced that the repression of the civilian population was a threat to regional peace and security. Following this decision, Rule of Law became an increasingly integral element of Security Council’s mandate to promote peace and security.

Since the establishment of the ICC, there have been four debates on the Rule of Law – two in 2003, one in 2004 and one in June 2006 – there has been one Secretary-General’s Report drafted and two presidential statements issued. The 2004 debate was called to discuss the Secretary-General’s report on “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.”

Promoting international law is also a common theme in General Assembly discussion and was discussed at the World Summit in September 2005. The focus on international law at the summit and the work done in the GA were noted in the Discussion Paper issued by Denmark leading up to the June 2006 SC debate as major influences for the decision to call the meeting and keep Rule of Law on the SC agenda¹.

The issue of Rule of Law has come up in a number of other thematic and regional debates including: the Protection of Civilians in Armed Conflict, the establishment and renewal of Peacekeeping mandates, the establishment of international and hybrid criminal tribunals, etc.

The ICC and the ROL Debate

The ICC figures prominently in the “Rule of Law” debate. The Rome Statute serves as an important legal text in the establishment of an international legal mechanism. Specifically, the Rome Statute’s definitions of War Crimes, Crimes against Humanity, and Genocide, are important steps in the establishment of this mechanism. Universal ratification of the Rome Statute is often mentioned in these debates as a means of establishing international rule of law.

The Court itself is often mentioned in this debate in its capacity to effectively fight impunity. It has been mentioned as a “destination for action” against violations of human

¹ “Letter dated 7 June 2006 from the Permanent Representative of Denmark to the United Nations addressed to the Secretary-General.” This discussion paper can be found on the Mission of Denmark to the UN in New York’s website at: <http://www.sikkerhedsraadet.um.dk/NR/ronlyres/83E82D5B-09E7-41E9-A268-A986A7D2F085/0/DiscussionpaperS2006367.pdf>

rights and crimes against children, in particular. The Court's individual cases have received praise in these debates in their effective handling of instances of impunity.

The Security Council's ability and responsibility to refer cases of grave abuses to the legal framework set out in the Rome Statute figures prominently in the rule of law debate. This function of the Security Council was highlighted by the Secretary-General in his 3 August 2006 report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict situations.

Recent ROL Debates and the ICC

There have been four debates specifically devoted to the Rule of Law since 2003. Two were held in 2003 to discuss the UN's role in Justice and the Rule of Law, which resulted in a presidential statement and the drafting of a Secretary-General's report. The meeting held in 2004 was a follow-up to the two previous debates and was called to discuss the Secretary-General's report. The most recent debate was called by the Danish Presidency of the Security Council in order to "to identify current challenges and opportunities for the Council in promoting the international legal order."²

Security Council Open Debate on "Strengthening International Law: Rule of Law and Maintenance of International Peace and Security," 22 June 2006 (S/PV.5474 & Resumption 1)

The June 2006 Rule of Law debate was preceded by an Arria Formula meeting on 20 June 2006, in which members of civil society came together to support strengthening rule of law and offer suggestions for the future of the upcoming debate. The following statements were made in support of the ICC in the Rule of Law Arria Formula meeting. Please note that Arria Formula meetings are "informal" and the excerpts listed below are only from those individual organizations who wished to distribute their statements publicly.

International Center for Transitional Justice, presented by Graeme Simpson

"[...] the Security Council is already familiar with prosecutions as a critical means of ensuring accountability for international crimes. The ad hoc Tribunals for the former Yugoslavia and Rwanda have made invaluable contributions to the clarification of international legal principles and the definition of international crimes. *They have also set the stage for the establishment of the International Criminal Court (ICC) – perhaps the most significant achievement in the fight against impunity – as a vital complement to the Security Council's efforts in this regard. The referral by the Security Council of the situation in Darfur is indicative of the crucial role that the Council may play in relation to the ICC.*"

"[...] The case of the Democratic Republic of the Congo (DRC) presents a further challenge. While there is some evidence of the domestic military courts endeavoring to bring some (mostly junior) soldiers to trial, and *while the transfer of Thomas Lubanga to the ICC is to be welcomed, the magnitude of the violations which have taken place in the DRC and the scope of the UN intervention may mean that a further initiative may be appropriate, such as a hybrid court.*"

"[...] these lessons have vital implications for the Security Council, which must take responsibility when political or institutional contexts make it impracticable for the countries directly involved to address impunity. The fact that domestic governments shrink from this responsibility—as in the case of Sudan with Darfur—

² Ibid

simply cannot constitute a basis for inaction. *The government of Sudan cannot be permitted to simply choose not to cooperate with the Office of the Prosecutor of the ICC.*"

Amnesty International

"[The Security Council] routinely addresses rule of law and human rights issues, has created two international tribunals – the ICTY and the ICTR – *and has taken the historic step of making its first referral in March 2005 of a situation, in Darfur, to the Prosecutor of the International Criminal Court (ICC). It is important that the Security Council ensures that the first referral bears practical fruits. The Council should ensure that the government most directly concerned effectively extends its full cooperation to the ICC – which it appears reluctant to do at the moment, despite the recent direct discussions between the ICC prosecutor and the Sudanese government. More broadly, the Security Council, in all future appropriate resolutions, must encourage all member states to cooperate fully with the ICC and other international and mixed war crimes tribunals, and to surrender accused persons to them on request so that none of them will ever find a safe haven anywhere. Nor should the Security Council shirk from its future responsibilities to refer situations to the ICC where one or more of the crimes identified in the Rome Statute of the ICC have been committed.*"

"[...] A key question is how to ensure a determined response by the Security Council in situations where international crimes have been committed. The Security Council should urge all Member States to fully cooperate with international and internationalized criminal courts investigating and prosecuting international crimes."

"[...] *considering that the ICC does not have its own police force, the Security Council should also require UN mandated peace-keeping operations to help preserve evidence, to cooperate with international courts in carrying out arrest warrants and to assist, where necessary, in the protection of witnesses.*"

The Danish Presidency of the Security Council for the month of June 2006 issued a discussion paper which included three talking points to guide statements at the debate. Most of the countries mentioned the ICC under the theme of the second talking point, "Ending impunity for international crimes."³

At the Open Debate, many states prominently mentioned the ICC in their remarks. Of the 29 states making statements, 19 explicitly referred to the role of the ICC in ending impunity for international crimes including, the United Kingdom, Slovakia, Japan, Peru, Russian Federation, France, Argentina, Tanzania, Greece, Ghana, Republic of the Congo, Mexico, Austria, Sierra Leone, Canada, Liechtenstein, Venezuela, Norway, and Nigeria [in the order of their statements]. Austria's statements were made on behalf of the European Union, and Canada's statements were made on behalf of CANZ (Canada, Australia, and New Zealand). A number of countries went a step further, specifically calling on UN Member States to ratify the Rome Statute or criticizing attempts to weaken the Court through bilateral immunity agreements. In addition, Mr. Nicolas Michel, Legal Counsel of the United Nations mentioned the ICC in his briefing at the outset of the debate.

Security Council Open Debate on "Justice and the Rule of Law: the United Nations Role," 6 October 2004 (S/PV.5052 & Resumption 1)

This debate was called to discuss the Secretary-General's report of 3 August 2004, which highlighted the ICC's role in issues of Justice and the Rule of Law (see below). The debate served as a follow-up to the two meetings held in September 2003 which had called for the writing of the report.

³Ibid

Of the 41 countries speaking, 33 voiced support for the ICC in its capacity to strengthen the rule of law, including, Russia, Germany, Spain, Chile, Brazil, Romania, Algeria, Benin, France, the United Kingdom, the Netherlands, Australia, Jordan, Finland, Austria, Uganda, Switzerland, South Africa, Liechtenstein, Palestine, Sweden, Argentina, Burundi, South Korea, Costa Rica, Japan, Peru, Fiji, Sierra Leone, Canada, Mexico, Saint Vincent and the Grenadines, and Nigeria [in the order of their statements]. The United States spoke out against the inclusion of “Supporting the Role of the International Criminal Court” in the Secretary-General’s report. Additionally, the Netherlands spoke on behalf of the European Union. The Secretary-General, Mr. Kofi Annan, and the Special Advisor on the Prevention of Genocide, Mr. Juan Méndez, both spoke positively on the ICC during their briefings before the council.

The debate resulted in a Presidential Statement (S/PRST/2004/34) which did not explicitly mention the ICC, but which did support all of the Secretary-General’s recommendations, which did include supporting the ICC and universal ratification of the Rome Statute.

Security Council Open Debate on “Justice and the Rule of Law: the United Nations Role,” 30 September 2003 (S/PV.4835)

Of the 25 states who spoke at the meeting, 19 states openly supported the ICC, including Italy, Japan, New Zealand, Serbia and Montenegro, Austria, Liechtenstein, Romania, Switzerland, Finland, Canada, Jordan, San Marino, Sweden, Sierra Leone, Uruguay, the Democratic Republic of the Congo, Argentina, Trinidad and Tobago, and Brazil [in the order of their statements]. Additionally, the representative for Italy, who expressed great support for the court, was also speaking on behalf of the European Union.

Security Council Ministerial Meeting on “Justice and the Rule of Law: the United Nations Role,” 24 September 2003 (S/PV.4833)

Of the 10 countries speaking, 15 voiced support for the ICC, including Russia, France, Mexico, Bulgaria, Guinea, Germany, Angola, Cameroon, Chile, and the United Kingdom.

The debate resulted in the adoption of a presidential statement (S/PRST/2003/15) which called for a report from the Secretary-General on justice and the rule of law. The report was released on August 3, 2004 and was the basis for the October 2004 open debate.

Secretary-General’s Reports

There has only been one Secretary-General’s report on the Rule of Law since the establishment of the International Criminal Court in 2002. This report, entitled “Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies,” was issued on August 3, 2004 (S/2004/616). The report included an entire chapter on the need to support the role of the ICC in this debate. The report called the establishment of the ICC “[u]ndoubtedly, the most significant recent development in the international community’s long struggle to advance the cause of justice and rule of law.” The report also called for immediate universal ratification and highlighted the Security Council’s role in referring situations to the court.