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Strengthening the Rule of Law  
through the United Nations  
Security Council

Policy Proposals



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**Policy Proposals**

Strengthening the Rule of Law  
through the United Nations Security Council:  
POLICY PROPOSALS

Jeremy Farrall  
Hilary Charlesworth  
Centre for International Governance and Justice  
RegNet: School of Regulation and Global Governance  
The Australian National University

Alan Ryan  
Australian Civil-Military Centre  
Australian Government

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# Preface

These Policy Proposals are the product of a three-year Australian Research Council-funded project on 'Strengthening the Rule of Law through the UN Security Council'. The project is a collaboration between the Australian National University's Centre for International Governance and Justice and the Australian Government's Australian Civil-Military Centre. The project examined the relationship between the Security Council and the rule of law when it uses three of its most prominent tools for the maintenance of international peace and security, namely peace operations, sanctions and force. An important project aim was to develop policy proposals to enhance the Security Council's ability to strengthen the rule of law when it deploys peace operations, applies sanctions and authorises the use of force.

During the course of the Strengthening the Rule of Law project a series of eight workshops were convened, involving highly engaged practitioners and academics. Four workshops took place at the Australian National University in Canberra and four were hosted by the Australian Mission to the United Nations in New York. Each workshop brought together a blend of 25-30

practitioners and academics who were experts and creative thinkers in the area of focus. Two hundred and twelve participants were involved across all workshops, drawn from across Australia and around the world. Practitioner participants came from various Australian government departments and agencies, as well as a range of UN Secretariat departments and agencies, diplomatic missions to the UN and non-government organisations.

The Policy Proposals presented here emerged from the dialogue and debate that took place at these eight project workshops. The Proposals are framed by a responsive approach to the rule of law, informed by the empirical research of scholars in the field of regulatory studies. The significance of a responsive approach to the rule of law lies in its capacity to generate modest but meaningful progress in rule-of-law promotion both within the UN Security Council itself and in its interventions in the diverse conflict settings that trigger its responsibilities under the UN Charter. We thank Shane Chalmers and Marie-Eve Loiselle for their outstanding research assistance with the preparation of these Policy Proposals.

## About the project leaders

**Dr Jeremy Farrall** is the Australian Research Council Linkage Industry Fellow at the ANU Centre for International Governance and Justice in the Regulatory Institutions Network, and Fellow at the Asia-Pacific College of Diplomacy in the Coral Bell School of Asia Pacific Affairs at the Australian National University. He was previously a UN official in the Security Council Affairs Division of the UN Department of Political Affairs.

**Prof Hilary Charlesworth** is Professor and Director of the Centre for International Governance and Justice in the Regulatory Institutions Network at the Australian National University and holds an appointment as Professor of International Law and Human Rights in the ANU College of Law. She is also an Australian Research Council Laureate Fellow.

**Dr Alan Ryan** is Executive Director of the Australian Civil-Military Centre. His previous positions include Principal of the Centre for Defence and Strategic Studies at the Australian Defence College, and Senior Adviser to the Australian Minister for Defence. He has worked as a consultant for US Joint Chiefs of Staff and UN Department of Peacekeeping Operations.

# Executive summary

These Policy Proposals aim to enhance the Security Council's capacity to strengthen the rule of law, particularly when it deploys peace operations, applies sanctions and authorises the use of force.

The UN Charter grants the Council primary responsibility for the maintenance of international peace and security (Article 24). The Charter also equips the Council with a wide range of powers to promote the peaceful settlement of international disputes (Chapter VI) and to take coercive action to maintain or restore international peace (Chapter VII). The Charter also requires all UN member states to give effect to the Council's decisions (Article 25), thus giving them the force of law.

This ability to take legally binding decisions gives the Council substantial capacity to promote the rule of law in international affairs. Ultimately, however, the Council's effectiveness hinges on the capacity and willingness of UN member states to take the necessary steps to convert its decisions into action. States are more likely to do this if the Council has a reputation for promoting and respecting the rule of law.

While the Council has taken important steps over the past two decades to strengthen the rule of law through its use of peace operations, sanctions and force, considerable challenges remain. Peace operations are mandated to strengthen the rule of law, but inadequate responses to peacekeeping misconduct scandals in the Democratic Republic of Congo and other peacekeeping theatres suggest that peace operations and peacekeepers are not always held to the same legal standards as those whose peace they keep. In the area of sanctions, while the creation of the Al-Qaeda Ombudsperson process improved the due process protections afforded to those on the Al-Qaeda targeted sanctions list, individuals on the more than a dozen remaining targeted sanctions lists do not have recourse to the Ombudsperson process. In the area of force, excesses in the implementation of the Council's authorisation to use force to protect civilians in Libya under Resolution 1973 (2011) raised concerns about the Council's accountability under the rule of law.

The Council's capacity to serve as an effective promoter of the rule of law and guardian of

international peace and security will be shaped by its responses to these challenges. There is thus a strong need to continue refining the way in which the Council's decisions and activities both promote and respect the rule of law.

The Proposals advanced here promote a responsive model of decision-making designed to increase the Council's capacity to strengthen the rule of law. Drawing on theories of regulation and law, this model emphasises the need for a dynamic approach to regulating the complex problems facing the contemporary Council. The responsive model balances a commitment to preventing the arbitrary use of power with a pragmatic openness to finding the best way to strengthen the rule of law in different contexts.

The responsive model of the rule of law contains four basic principles that combine to increase the likelihood that the Council's decision-making will strengthen the rule of law: transparency, consistency, accountability and engagement. According to this model, the more the Council can respect and promote these principles, both in its internal decision-making processes as well as in the ways in which its decisions are

implemented and administered externally, the greater its capacity will be to strengthen the rule of law in practice. This model of the rule of law is designed to inform the actions of the Council as a whole, as well as of its permanent and non-permanent members. The model can be employed as a tool of analysis and evaluation by UN member states that are not Council members, as well as by civil society actors and researchers.

The model emphasises how regulatory outcomes are best achieved through a dynamic combination of tools employed by a web of actors with the aim of promoting the internalisation of norms by members of society. This is in contrast to traditional Western legal approaches that rely on top-down 'command and control' or 'coercive enforcement' measures. Underlying a responsive approach to regulation is the basic idea that new standards of behaviour are most likely to be respected and promoted when a wide range of actors consider the standards legitimate because they are responsive to their own individual situations, expectations, values and concerns.

# 1. Background

These Policy Proposals aim to increase the capacity of the Security Council to strengthen the rule of law, particularly when it deploys peace operations, applies sanctions and authorises the use of force. This background section explains what the rule of law is, why and when it is important to the Security Council, and how the Council's efforts to promote the rule of law can be enhanced by employing a responsive model of the rule of law.

## 1.1 Defining the rule of law

The question of how to define the rule of law has preoccupied philosophers for centuries. Scholars and jurists have proposed different models of the rule of law, comprising varying principles, and relying on a range of differing institutional mechanisms for application in diverse contexts. While these models differ substantially in appearance and sophistication, they share a central concern with preventing the arbitrary exercise of power.

In 2004 UN Secretary-General Kofi Annan proposed the following definition of the rule of law to guide the work of UN departments, agencies and programs:

*The rule of law is 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.<sup>1</sup>*

## 1.2 Why the Security Council is important to the rule of law

The UN Charter bestows upon the Security Council the primary responsibility for the maintenance of international peace and security

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<sup>1</sup> UN Doc S/2004/616, 23 August 2004, 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General', para 6.

(Article 24). In order to equip the Council to meet these responsibilities, the Charter endows it with a wide range of powers to promote the peaceful settlement of international disputes (Chapter VI) and to take coercive measures to maintain and restore international peace and security (Chapter VII). The Charter also enables the Council to give its initiatives the force of law by placing a legal obligation on all UN member states to give effect to the Council's decisions (Article 25). The Council's ability to make decisions that are legally binding gives it substantial power to promote and reinforce the rule of law in international affairs.

### 1.3 Why the rule of law is important to the Security Council

On 24 September 2003 the Security Council held its first meeting on a new agenda item titled 'Justice and the Rule of Law'. The first speaker at that meeting, UN Secretary-General Kofi Annan, observed that: 'This Council has a very heavy responsibility to promote justice and the rule of law in its efforts to maintain international peace and security. This applies both internationally and in rebuilding shattered societies'.<sup>2</sup>

The importance of the rule of law for the Council and the UN more broadly has been consistently reinforced since that Council meeting. The Council has adopted six presidential statements on the rule of law, each emphasising the Council's central role in promoting the rule of law in international affairs. In September 2012 the UN General Assembly's High-level Declaration on the rule of law reaffirmed the commitment of all UN member states 'to an

international order based on the rule of law'. The Declaration also recognised:

*that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.*<sup>3</sup>

The Security Council's relationship with the rule of law is shaped by the extent to which the Council both promotes and respects the concept. The Council's engagements with the rule of law play a critical role in reinforcing its own legitimacy, which in turn increases its effectiveness. While the Council's decisions are legally binding on all UN member states under Article 25 of the UN Charter, ultimately the Council's effectiveness hinges on the capacity and willingness of member states to take concrete steps that are necessary to transform its decisions from words on a page into action in the real world. Member states are more likely to treat the Council's decisions as legitimate, and therefore to take the steps required to implement them in practice, if the Council has a reputation for promoting and respecting the rule of law.

The Council's posture towards the rule of law is particularly significant when it exercises powers that have the strongest impact on the internal affairs of its member states and the lives of their populations. For this reason, these Policy Proposals focus on improving the capacity of the Council to strengthen the rule of law when

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<sup>2</sup> UN Doc. S/PV.4833, 24 September 2003, p. 2.

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<sup>3</sup> UN Doc. A/RES/67/1, 30 November 2012, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels', para 2.

it uses three of its most prominent tools for the maintenance of international peace and security, namely the deployment of UN peace operations, the application of UN sanctions under Article 41, and the authorisation of force under Article 42.

## 1.4 The need to continue strengthening the rule of law

The Security Council has taken important steps to strengthen the rule of law through its use of peace operations, sanctions and force. Since 1999 the Council has routinely included the task of strengthening the rule of law in the mandates of its multidimensional peace operations. UN operations from Bosnia to Liberia and from Timor-Leste to Haiti have sought to (re)build police forces, corrections facilities and judicial systems. In the area of sanctions, the Council made a significant effort to improve the due process afforded to individuals subject to targeted sanctions by empowering the Office of the Ombudsperson for the 1267/1989 sanctions regime against Al-Qaeda to investigate the grounds upon which individuals were included in the targeted sanctions list and, when appropriate, to recommend delisting.<sup>4</sup> The Council clarified that the Ombudsperson's delisting recommendations must be implemented unless the 1267/1989 sanctions committee as a whole or the Council itself were to decide otherwise.<sup>5</sup> In the area of force, the endorsement of the responsibility to protect doctrine by member states in 2005 recognised the responsibility of all states to protect their own civilians threatened by genocide, crimes against humanity, ethnic cleansing and war

crimes.<sup>6</sup> Where a state is unwilling or unable to meet its responsibility to protect, there is now a responsibility on the international community to intervene to protect those civilians, using force when necessary and acting through the Council. This new doctrine sought to introduce more principled decision-making into the highly politically-charged environment surrounding decision-making on the prospective use of force.

While these constructive initiatives have strengthened the rule of law, other developments have undermined the Council's rule of law credibility. Peace operations are mandated to strengthen the rule of law, but inadequate responses to peacekeeping misconduct scandals in the Democratic Republic of Congo and other peacekeeping theatres suggest that peace operations and peacekeepers are not always held to the same legal standards as those whose peace they keep. Indeed, the legal norms regulating peacekeeping environments sometimes appear designed to shield peacekeepers from, rather than hold them accountable to, the rule of law. In the area of sanctions, while improvements in the due process protections afforded to individuals on the Al-Qaeda targeted sanctions list are welcome, individuals on the more than a dozen remaining targeted sanctions lists do not have recourse to the Ombudsperson process. In the area of force, excesses in the implementation of the Council's authorisation in Resolution 1973 (2011) to use force to protect civilians in Libya have raised important questions from a rule of law perspective. Where do the legal boundaries lie when the Council delegates power to use force, whether to states or peace operations? How can the Council ensure those receiving

4 UN Doc. S/RES/1989, 17 June 2011, para 23 and Annex II. For the Ombudsperson's initial mandate, see: UN Doc. S/RES/1904, 17 December 2009, paras 20–21 and Annex II.

5 UN Doc. S/RES/1989, 17 June 2011, para 23 and Annex II.

6 UN Doc. A/RES/60/1, 24 October 2005, 'World Summit outcome', paras 138 and 139.

such delegations remain accountable for, and do not exceed, their delegated authority?

These challenges to the Security Council's efforts to promote the rule of law through the use of peace operations, sanctions and force are substantial. Indeed, the Council's capacity to serve as an effective promoter of the rule of law and guardian of international peace and security will continue to be shaped by how it responds to these challenges.

## 1.5 Designing a responsive model of the rule of law for the Security Council

The Proposals advanced below are based on a simple responsive model of the rule of law designed to increase the Security Council's capacity to strengthen the rule of law. Drawing on theories of regulation and law, this model emphasises the need for a dynamic approach to regulating the complex problems facing the contemporary Council. At its centre is an understanding of the rule of law as a flexible, responsive ideal that is capable of balancing openness to different contexts and robust deliberation amongst a diversity of actors with an uncompromising commitment to counter the arbitrary misuse and abuse of power.

The rule of law model underpinning these Proposals consists of four basic principles that combine to increase the likelihood that a decision-making process will strengthen the rule of law. These principles are transparency, consistency, accountability and engagement.

### 1.5.1 Transparency

The principle of transparency requires that power should be exercised in as open and

transparent a manner as possible. The decision-making process involved in the exercise of power should therefore be clear and accessible to those affected by the decision. The reasons for decision should be transparent and it should be clear that power is exercised in accordance with legitimate authority.

### 1.5.2 Consistency

The principle of consistency requires that power should be exercised in a predictable manner. Consistency contributes to the rule of law by demonstrating stable patterns of decision-making. This in turn promotes consistent standards of behaviour by those who are affected by the exercise of power.

### 1.5.3 Accountability

The principle of accountability requires decision-makers exercising power to remain accountable for that exercise of power. This accountability flows in two directions. First, the decision-maker must remain accountable to those actors on behalf of whom it exercises power, thus ensuring power is exercised in accordance with legitimate authority. Second, the decision-maker must remain accountable to those against whom power is exercised, in the sense that power should not be exercised arbitrarily or disproportionately.

An important component of accountability is that the decision-maker continues to remain accountable for the exercise of power if they delegate that power to a third party. Indeed, in the event that a decision-maker delegates the exercise of power they should ensure that sufficient accountability mechanisms are in place to hold the third party accountable for the delegated exercise of power.

### 1.5.4 Engagement

The principle of engagement requires decision-makers exercising power to take into account the core interests and concerns of the actors that will be affected by their decisions. The most effective way to do this is to provide meaningful opportunities to affected actors to express their views on proposed decisions and thus to influence the decision-making process. Active engagement demonstrates the responsiveness of decision-makers and helps to provide due process to affected actors.

## 1.6 Applying the responsive model of the rule of law

The four principles of the responsive model of the rule of law are closely related, yet distinct. According to this model, the more the Security Council is able to respect and promote these principles, both in its internal decision-making processes as well as in the ways in which its decisions are implemented and administered externally, the greater its capacity will be to strengthen the rule of law in practice. This model is designed to inform the actions of the Council as a whole, as well as of its permanent and non-permanent members. The model can be employed as a tool of analysis and evaluation by UN member states that are not Council members, as well as by civil society actors and researchers.

The responsive model of the rule of law facilitates a tailored yet labour-efficient approach to strengthening the rule of law. Drawing on the empirical research of scholars in the field of regulation, this approach shows how regulatory outcomes are best achieved through a dynamic combination of tools employed by

a web of actors with the aim of promoting the internalisation of norms by members of society. This is in contrast to traditional Western legal approaches that rely on top-down ‘command and control’ or ‘coercive enforcement’ measures. Underlying a responsive approach to regulation is the basic idea that new standards of behaviour are most likely to be respected and promoted when a wide range of actors consider the standards legitimate because they are responsive to their own individual situations, expectations, values and concerns.

The concept of the rule of law and the regulatory approach that frame these Proposals are complementary. By emphasising how the Security Council’s power as the central regulator of international peace and security depends on the legitimacy of its decision-making, respect for the rule of law within the Council becomes a matter of urgency for the Council itself. At the same time, these Proposals offer a pragmatic way to pursue the promise of the rule of law as an international principle of governance, by highlighting how the decentralised nature of the international system and its lack of a strong enforcement capacity can be transformed into a strength rather than a weakness.

## 1.7 Introducing the Policy Proposals

The 66 Proposals advanced in this document represent the culmination of a sustained, consultative effort to develop and apply this responsive model of the rule of law to the challenges facing the Security Council as it seeks to strengthen the rule of law through its use of peace operations, sanctions and force. The following section (Section 2) describes

how the Council can benefit from the insights of regulatory scholarship in order to increase its effectiveness as the central regulator of international peace and security seeking to strengthen the rule of law. The Proposals themselves are then introduced in four sections. Section 3 presents nine proposals (Proposals 1-9) designed to enhance the capacity of the Council's internal decision-making processes to strengthen the rule of law. Section 4 presents 22 proposals (Proposals 10-31) that seek to enhance the Council's ability to strengthen the rule of law through its use of peace operations. Section 5 presents 20 proposals (Proposals 32-51) that aim to increase the Council's capacity to strengthen the rule of law when applying sanctions. Finally, Section 6 presents 15 proposals (Proposals 52-66) designed to reinforce the Council's ability to strengthen the rule of law when authorising the use of force.

## 2. Strengthening the Security Council's effectiveness as the central regulator of international peace and security

This section describes how the Security Council's efforts to strengthen the rule of law can be enhanced by applying lessons drawn from scholarship on how to regulate the behaviour of individuals and groups across a range of fields of governance. A key insight of this scholarship is that regulation is most effective when actors internalise regulatory norms, so that they tend to comply with those norms without the need for additional intervention by a regulator. The best way for regulators to promote norm internalisation is to employ a responsive approach to regulation.

### 2.1 The role of the Security Council as a responsive central regulator

The UN Charter anoints the Security Council as the central regulator of global peace by granting it primary responsibility for the maintenance of international peace and security (Article 24). The Charter also places at the Council's disposal a variety of soft power and hard power tools with which to regulate international peace and security. The soft power tools, outlined in Chapter VI of the Charter, include peaceful

settlement measures such as 'negotiation, enquiry, mediation, conciliation, arbitration, [and] judicial settlement' (Article 33). The hard power tools include the application of coercive measures under Chapter VII, such as the application of sanctions (Article 41) and the use of force (Article 42), in response to threats to the peace, breaches of the peace, and acts of aggression (Article 39). The Council has also developed innovative peace and security regulatory tools not explicitly provided for in the Charter, such as UN peace operations.

The empirical findings of responsive regulation scholars suggest that the Council's efforts to regulate international peace and security will be most effective if the Council prioritises the persuasive capacity of its Chapter VI tools, while remaining willing to apply its Chapter VII tools when necessary. By their nature, the Council's Chapter VI tools tend to convey and promote responsiveness to the core concerns of actors whose behaviour the Council seeks to change. The Council's Chapter VII tools, by contrast, are coercive in nature as well as in name. This makes it more challenging, but also more important, to apply and administer those tools in a principled and responsive manner.

## 2.2 Regulation is most effective when it is responsive

Scholars in the field of regulatory theory have challenged traditional assumptions about how to influence other actors to behave in a particular way.<sup>7</sup> An important insight of these scholars is that the best way to achieve compliance with norms of behaviour is to create the conditions necessary for actors to internalise these norms and persuade others to do likewise. While the conditions necessary to achieve this ideal of self-regulation and co-regulation will differ according to context, underlying every effective regulatory arrangement is a common principle of responsiveness.

The principle of responsiveness requires that the methods used to achieve the desired regulatory outcomes, such as the working methods underpinning a regulator's decision-making process and the mechanisms designed to promote implementation of the regulator's decisions, should be reinforced by outreach to others and should take into account the particular circumstances of each context. Responsiveness thus seeks to promote a dialogue-based process that respectfully

engages with the positions, values and concerns of all actors implicated in the regulatory regime. This dialogue-based process aims to strengthen trust, relationships and responses between all actors and seeks to achieve constructive, effective and efficient regulatory outcomes.

Empirical research demonstrates that non-responsive regulation generally fails to achieve effective compliance. When a regulatory regime is not responsive to the core interests and concerns of the actors whose behaviour it is trying to influence, those actors tend either not to comply or to make hollow pledges of compliance without changing the behaviour in question. These negative reactions increase both the scale and cost of subsequent interventions to pursue and enforce effective regulation. Even in national contexts, where robust regulatory regimes contain active enforcement mechanisms to coerce actors into compliance, non-responsive approaches are labour and cost intensive and they generally fail to achieve the optimal long-term regulatory goal of norm internalisation. In the international context, where regulatory regimes and enforcement mechanisms are considerably less robust and reliable, the need to employ a responsive approach in order to achieve effective regulatory outcomes becomes even more pressing.

Another distinct advantage of responsiveness is that it enables and requires rule of law promoters to develop a tailored approach to strengthening the rule of law, based on the specific norms, institutions, actors and needs of the context in question. This is particularly important for the Security Council's efforts to strengthen the rule of law by using different tools in diverse contexts. While each regulatory regime has a central animating idea, such as promoting transparency, accountability,

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<sup>7</sup> See, for example, I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, Oxford, 1992; N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy*, Clarendon Press, Oxford, 1998; J Braithwaite and P Drahos, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000; H Charlesworth and C Chinkin, 'Regulatory frameworks in international law' in C Parker, C Scott, N Lacey and J Braithwaite (eds), *Regulating Law*, Oxford University Press, Oxford 2004, pp. 246–68; J Braithwaite, 'Fasken lecture: The essence of responsive regulation', *UBC Law Review*, Vol 44, No 3, 2011, pp. 475–520; and J Farrall and H Charlesworth (eds), *Strengthening the Rule of Law through the UN Security Council*, Routledge, Aldershot, 2016.

consistency and engagement in order to prevent the arbitrary exercise of power, the specific rules and mechanisms that best assist to realise that central idea will vary according to the actors involved and the social structures in place.

## 2.3 Regulation is most responsive when it prioritises persuasion

Although responsive regulation emphasises norm internalisation as the mechanism for changing behaviour, regulatory scholars also stress that self-regulation is most effective when there is a central regulator that is both responsive and strong. Effective regulation depends on the central regulator's ability to achieve the optimal balance between persuasion and coercion. This is achieved when the regulator maximises its persuasiveness and de-emphasises its capacity to punish.

The image of a pyramid is often used in regulatory scholarship to depict this idea (see Diagram 1). The pyramid represents the tools or responses available to a regulator. Located at the base of the pyramid are the 'soft' instruments that a central regulator can use, such as diplomatic persuasion, dialogue and positive incentives, to inform the actors whose behaviour the regulator seeks to influence about the regulatory regime's expectations, norms and obligations. As the concept of responsiveness described above requires, ideally the central regulator should also demonstrate a capacity to take into account and acknowledge the core interests and concerns of those actors. The 'softest' enforcement tools are therefore designed to be as restorative and dialogue-based as possible, to convince actors to maintain good faith engagement with the central regulator.

In the event that these soft, persuasive regulatory instruments fail to achieve the desired behavioural change, then the central regulator can move up the pyramid as required, employing progressively more 'hard' or 'coercive' techniques and tools depending on how the actors respond. The central regulator's most coercive tools lie at the top of the pyramid. However, in the most effective regulatory regimes these tools are rarely used. Their power derives from the fact that they remain in the background as a remote yet real possibility. This coercive 'hard' power serves to strengthen the regulator's persuasive 'soft' power.

## 2.4 Harnessing the responsive regulatory capacity of other actors

Responsive regulation works best when a central regulator can harness the regulatory potential of other players with the capacity to promote behavioural change in the actors whose behaviour it seeks to regulate. The UN Charter creates a system for the maintenance of international peace and security that requires the Security Council to draw on the regulatory capacity of other actors, as it gives the Council the legal authority to take decisions that bind all member states. When the Council authorises Chapter VII measures such as sanctions or force, it relies upon and benefits from the regulatory actions taken by member states to implement those decisions within their national jurisdictions. Other regulators who are typically drawn into the Council's regulatory web include regional organisations and arrangements, as well as members of the development and donor communities. Each of these different regulatory actors has a variety of tools at their disposal to persuade or coerce others to change their behaviour. Empirical research reinforces that

this is how the most effective regulatory regimes operate, engaging a dynamic mix of tools, employed by multiple actors (see Diagrams 2 and 3).

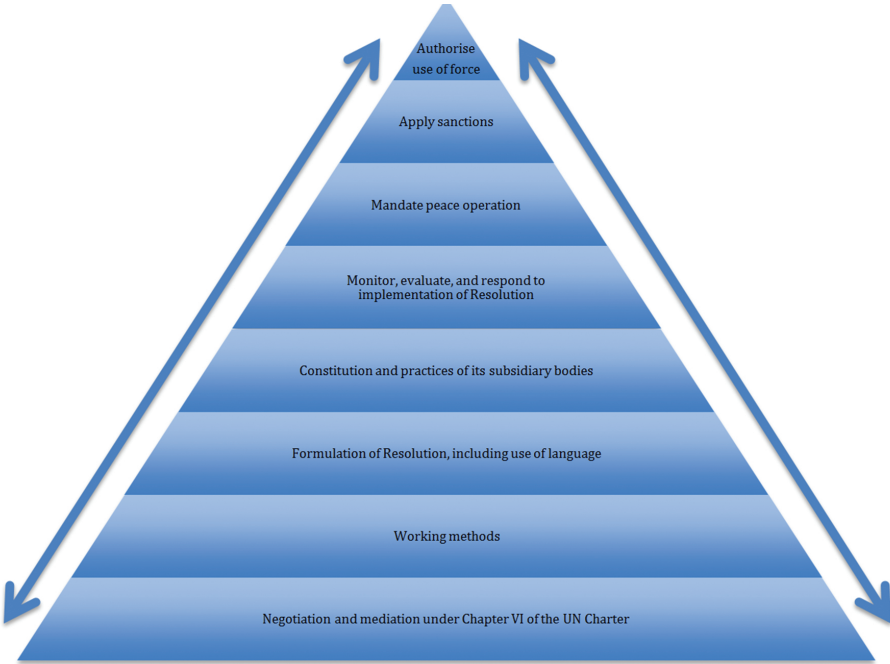
## 2.5 Strengthening the rule of law in diverse contexts

One of the most important features of a responsive approach to the rule of law is its capacity to connect with and influence the behaviour of a wide range of actors in diverse contexts. The principle of responsiveness, introduced in section 2.2 above, enables the political ideal of the rule of law to adapt in a principled and tailored way to achieve maximum effect in each new context. In an international system comprised of a great diversity of peoples, values and social structures, such openness is critical if a common ideal such as respect for the rule of law is to take hold. The responsive model of the rule of law can provide meaningful guidance both for efforts to strengthen the rule of law in the collective security system that structures Security Council decision-making *and* in the diverse domestic and regional conflict settings that trigger the Council's responsibilities (see Diagram 4).

## 2.6 An existing toolkit

A wealth of tools already exists in the international system with which to strengthen the rule of law, both within the Security Council and through its interventions to maintain international peace and security. The focus of these Proposals is on how those tools may be enhanced, adapted, extended and used together in more dynamic ways, rather than on proposing new mechanisms or radical institutional or systemic reform. This approach is consistent with the idea that effective regulation must be responsive to existing settings if it is to influence the course of events.

Diagram 1. The Security Council as Responsive Regulator



Escalating and de-escalating engagement and coercion based on a reciprocal, dialogue-based approach

Diagram 2. Web of actors that strengthen the rule of law through UNSC decision-making



Diagram 3. Webs of actors that strengthen the rule of law through peace operations, sanctions and the use of force

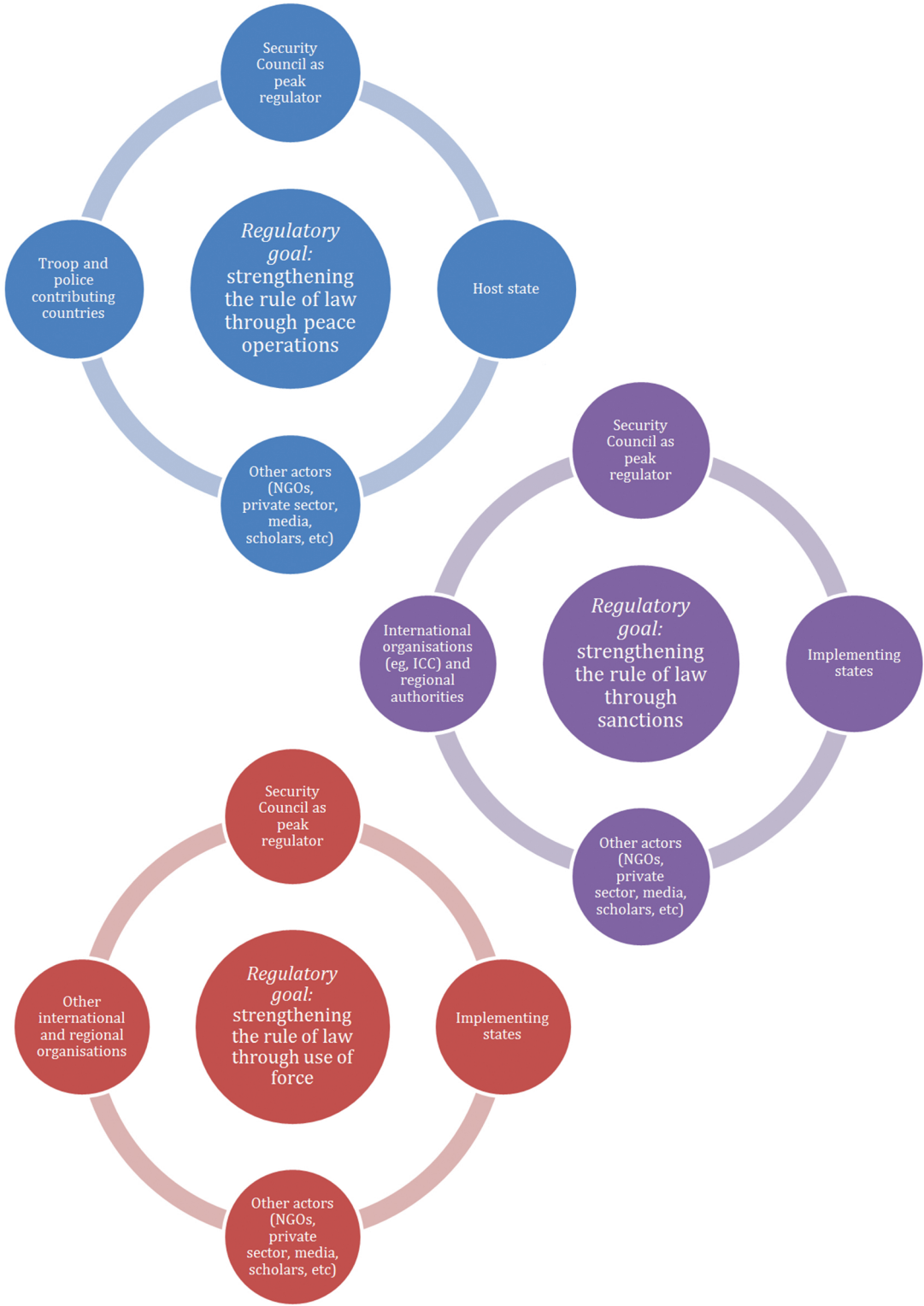
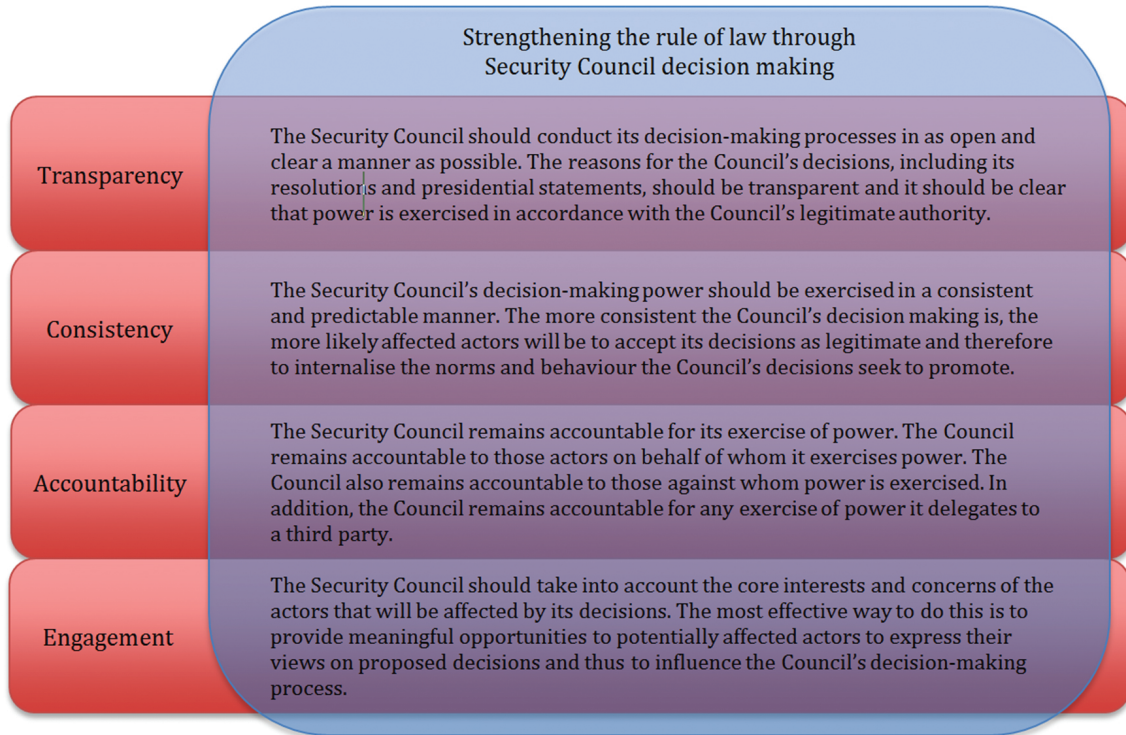


Diagram 4. Principles for strengthening the rule of law (examples)



## 3. Strengthening the rule of law through Security Council decision-making

This section applies the responsive model of the rule of law to the Security Council's general decision-making processes. It advances proposals designed to increase the Council's capacity to respect and promote the four key rule-of-law principles of transparency, consistency, accountability and engagement.

### 3.1 Transparency

The principle of transparency requires the Security Council to conduct its decision-making processes in as open and clear a manner as possible. The reasons for the Council's decisions, including its resolutions and presidential statements, should be transparent and it should be clear that power is exercised in accordance with the Council's legitimate authority. Enhancing the transparency of decision-making increases effectiveness by reassuring actors who are affected by the Council's decisions that those decisions have been taken in a considered way rather than arbitrarily. It also allows those actors to understand what steps they might be able to take to address the Council's concerns.

**Recommendation 1.** The Security Council should ensure that the reasons for its decisions, contained in its resolutions and presidential statements, are clear and transparent. The Council should meet in open session before taking new decisions and Council members should be given the opportunity to strengthen decision-making transparency by stating their country's position on the proposed decision.

**Recommendation 2.** Security Council decisions that require actors to respect or promote the rule of law should identify in clear terms what rule of law objectives will be achieved by implementing the decision.

### 3.2 Consistency

The principle of consistency requires that the Security Council's decision-making power should be exercised in a consistent and predictable manner. The more consistent the Council's decision-making is, the more likely affected actors will be to accept its decisions as legitimate and therefore to internalise the norms and behaviour the Council's decisions seek to promote.

**Recommendation 3.** The Security Council should employ a consistent understanding of the rule of law in its decisions that seek to promote the rule of law. This understanding should be based on the 2004 definition of the rule of law articulated by the UN Secretary-General.<sup>8</sup>

### 3.3 Accountability

The principle of accountability requires that the Security Council remains accountable for its exercise of power. This accountability flows in two directions. First, the Council remains accountable to those actors on behalf of whom it exercises power, namely UN member states. Second, the Council also remains accountable to those against whom power is exercised, in the sense that its power should not be exercised arbitrarily or disproportionately against those actors. When the Council remains accountable in both of these directions, it reinforces the fact that it is exercising its considerable powers in accordance with the UN Charter.

The Security Council also remains accountable for any exercise of power it delegates to a third party. When it delegates the exercise of power it should ensure that sufficient accountability mechanisms are in place to hold third parties accountable for any serious adverse consequences that result from their exercise of delegated power. This principle is consistent

with UN Sustainable Development Goal 16 on the need to build effective, accountable and inclusive institutions at all levels.<sup>9</sup>

**Recommendation 4.** When a Security Council decision requires state and non-state actors to respect or promote the rule of law, it should affirm that the same requirement applies to all relevant UN actors, including the Council itself, as affirmed by the 2012 High-level Declaration on the rule of law.<sup>10</sup>

**Recommendation 5.** The Security Council should continue to promote accountability of actors tasked with implementing its resolutions, including UN and non-UN, state and non-state actors, especially when allegations are made of serious crimes committed in the course of implementation of a Council resolution.

**Recommendation 6.** The Security Council should clearly indicate that the principle ‘exceptions must be interpreted restrictively’ (*exceptio est strictissimae interpretationis*) applies to the interpretation of its resolutions, to ensure its objectives are implemented as intended.

**Recommendation 7.** The Security Council should ensure that its resolutions and decision-making processes reflect the principle that all UN activities should respect local laws, norms and customs of the peoples affected by its operations and decisions.

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8 UN Doc. S/2004/616, 23 August 2004, ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General’, para 6

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9 UN Doc. A/RES/70/1, 25 September 2015, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, Goal 16, pp. 14, 25–26.

10 UN Doc. A/RES/67/1, 30 November 2012, ‘Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels’, para 2.

## 3.4 Engagement

The principle of engagement requires the Security Council to take into account the core interests and concerns of the actors that will be affected by its decisions. The most effective way to do this is to provide meaningful opportunities to potentially affected actors to express their views on proposed decisions and thus to influence the Council's decision-making process. Active engagement demonstrates the Council's responsiveness and helps to provide due process to affected actors.

**Recommendation 8.** The Security Council should ensure, as far as possible, that actors who stand to be adversely affected by a prospective decision are given an opportunity to express their concerns relating to the prospective decision.

**Recommendation 9.** The Security Council should consider making greater use of commissions of inquiry and fact-finding missions, in accordance with Article 33 of the UN Charter, in order to obtain a more holistic picture of the need for, and potential impact of, its responses to emerging peace and security threats.

## 4. Strengthening the rule of law through UN peace operations

Since 1999 the Security Council has routinely included the task of strengthening the rule of law in the mandates of its multidimensional peace operations. UN operations from Bosnia to Liberia and from Timor-Leste to Haiti have taken direct action or provided support to host states to (re)build police forces, corrections facilities and judicial systems. While these activities have undoubtedly helped to strengthen the rule of law, other developments have undermined the Council's rule of law credibility. Inadequate responses to peace operation misconduct scandals in the Democratic Republic of Congo and elsewhere convey the unfortunate impression that peace operations and peacekeepers are not always held to the same legal standards as those whose peace they keep.

The Proposals in this section apply the responsive model of the rule of law to the Security Council's decision-making processes relating to peace operations. These Proposals are therefore designed to increase the Council's capacity to respect and promote transparency, consistency, accountability and engagement when it creates, deploys and modifies peace operations.

### 4.1 Transparency

#### 4.1.1 Crafting clear and transparent rule-of-law mandates

The Security Council's approach to articulating rule-of-law mandates has varied considerably since it began tasking peace operations with promoting the rule of law. On some occasions, the Council has referred to both the concept of the rule of law and the tasks to be undertaken to strengthen the rule of law in a broad, non-specific way. On other occasions, the Council has provided greater detail relating to a peace operation's rule-of-law components, including those supporting the reform and restructuring of the police and of court and corrections facilities. Where possible the Council should provide greater transparency around the central rule-of-law objectives to be pursued by its peace operations. It should also make clear in each new or modified rule-of-law mandate which components within an operation will be tasked with achieving the central rule-of-law objectives.

**Recommendation 10.** When the Security Council creates or modifies a peace operation mandate that seeks to strengthen the rule of

law, the Council should ensure that the mandate clearly identifies the operation's central rule-of-law objectives, as well as the components of the operation that will pursue those objectives.

#### 4.1.2 Monitoring and evaluating rule-of-law mandates

The Secretary-General's peace operation progress reports to the Security Council tend to measure progress in efforts to strengthen the rule of law according to selective quantitative data, such as the numbers of new police officers that have been trained, corrections facilities reconstructed and court houses functioning. These types of statistics can give a misleading picture of the rule-of-law environment on the ground. The Council should encourage the Secretary-General to employ a more sophisticated approach to monitoring and evaluating the performance of UN peace operations in strengthening the rule of law.

**Recommendation 11.** The Security Council should request the Secretary-General to conduct baseline assessments of a new peace operation's rule-of-law environment upon deployment. These assessments should generate reliable qualitative and quantitative data that will assist the Council to identify appropriate benchmarks to be used in monitoring and evaluating the operation's progress in pursuing rule-of-law objectives.

**Recommendation 12.** The Security Council should request the Secretary-General to undertake periodic qualitative and quantitative monitoring and evaluation of the implementation of each peace operation's rule-of-law objectives. The Council should also request the Secretary-General to report on the findings of these monitoring and evaluation efforts in the

periodic reports on the progress of each peace operation.

## 4.2 Consistency

### 4.2.1 Employing consistent language for rule-of-law mandates

As noted above, the Security Council's approach to articulating rule-of-law mandates has varied considerably since it began tasking peace operations with promoting the rule of law. The Council should employ a consistent approach to crafting these mandates. While it is important for the Council to tailor each mandate to the particular needs and circumstances of each situation, where possible the Council should employ consistent terms and phrases for elements of the mandate that are a common feature of most rule-of-law mandates.

**Recommendation 13.** When the Security Council creates or modifies a peace operation mandate that seeks to strengthen the rule of law, the Council should employ terms and phrases that are consistent with those in the mandates of other peace operations.

### 4.2.2 Promoting greater consistency and cohesion between rule of law policy and practice

UN peace operations tasked with promoting the rule of law tend to focus on the 'justice-chain' institutions (judicial, law enforcement and correctional institutions). While justice-chain institutions are extremely important to the rule of law, other governance instruments and institutions can play an equally important role in creating, consolidating and promoting the rule of law. These instruments and institutions include constitutions, legislatures and public

administration accountability mechanisms. The Council should bear in mind the broader governance requirements of the rule of law as it tailors the rule-of-law objectives of each peace operation to the specific rule-of-law needs of the host country. This approach is consistent with the UN Secretary-General's definition of the rule of law as fundamentally a principle of governance. It also reinforces UN Sustainable Development Goal 16, which seeks to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all, as well as building effective, accountable institutions at all levels'.<sup>11</sup>

**Recommendation 14.** The Security Council should promote greater consistency between UN rule-of-law policy and peace operation practice by encouraging the Secretary-General to develop the Secretariat's capacity to support initiatives to build rule-of-law capacity in areas beyond the justice-chain institutions. The Council should request the Secretary-General to direct additional attention and resources to increasing the capacity of peace operations to support efforts to strengthen constitutions, legislatures and public administration accountability mechanisms.

## 4.3 Accountability

### 4.3.1 Strengthening respect for the rule of law

The mandate of peace operations to strengthen the rule of law is undermined when military or non-military peace operation staff undermine the rule-of-law principles they are deployed to

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<sup>11</sup> UN Doc. A/RES/70/1, 25 September 2015, 'Transforming our world: the 2030 Agenda for Sustainable Development', Goal 16, pp. 14, 25–26.

promote. The Security Council should make it clear that peacekeepers are required not just to promote the rule of law but also to respect it.

**Recommendation 15.** When the Security Council tasks a peace operation with strengthening the rule of law, it should reaffirm that the operation and all individuals associated with it have a responsibility to respect the rule of law.

### 4.3.2 Strengthening respect for international human rights norms and standards

The Secretary-General's 2004 definition of the rule of law recognises that 'all persons, institutions and entities' are 'accountable to laws that are [...] consistent with international human rights norms and standards'.<sup>12</sup> The ability of peace operations to promote and respect international human rights norms and standards is complicated by the fact that troop contributing countries may not all be parties to the same international human rights conventions and thus may have different treaty obligations. They may also have differing positions concerning the extra-territorial applicability of their human rights obligations. These discrepancies pose practical challenges to peace operations that are expected to promote and respect international human rights norms and standards. In the area of international humanitarian law, the Secretary-General has adopted a Bulletin on the Observance by United Nations Forces of International Humanitarian Law (1999),<sup>13</sup> in order

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<sup>12</sup> UN Doc. S/2004/616, 23 August 2004, 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies', para 6.

<sup>13</sup> UN Doc. ST/SGB/1999/13, 6 August 1999, 'Observance by United Nations forces of international humanitarian law'.

to reinforce the international humanitarian norms and standards that peacekeepers should promote and respect. The Security Council should encourage the Secretary-General to issue a bulletin of this kind relating to international human rights law in order to identify the minimum human rights standards that must be applied by troops serving on peace operations. This bulletin should make it clear that peacekeepers have a responsibility to promote and respect international human rights norms and standards.

**Recommendation 16.** The Security Council should request the Secretary-General to develop a bulletin for the observance by peacekeepers of international human rights law. This bulletin would complement the Secretary-General's 1999 bulletin on international humanitarian law.

#### 4.3.3 Strengthening human rights screening of UN personnel

One way of decreasing the risk that members of a peace operation will engage in criminal behaviour and/or human rights violations is to develop a process to screen out individuals who have a history of serious criminal behaviour, including violations of human rights and humanitarian law. The Human Rights Screening Policy endorsed by the UN Secretary-General in December 2012,<sup>14</sup> to ensure individuals engaged as UN personnel have not previously committed criminal offences or violations of international humanitarian and human rights law, is a welcome development in this respect.

**Recommendation 17.** The Security Council should continue to affirm the importance and

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<sup>14</sup> S-G Decision No 2012/18, 11 December 2012, 'Policy on Human Rights Screening of UN Personnel'.

applicability of the Secretary-General's Policy on Human Rights Screening of UN Personnel to all peace operations.

#### 4.3.4 Strengthening accountability for serious crimes and sexual exploitation and abuse

Troop-contributing countries are often reluctant to investigate and prosecute their troops accused of serious criminal conduct, particularly when the allegations relate to sexual exploitation and abuse. Indeed, on some occasions troops have been repatriated to avoid investigation or prosecution of such allegations. The UN Office of Internal Oversight Services has the capacity to initiate a preliminary fact finding enquiry (an 'administrative investigation') into potential criminal conduct. Such an investigation would ideally involve representatives of the national government whose troops are implicated in the allegations. The process also enables the UN to preserve evidence in the event that the troop contributing country fails to take action.

**Recommendation 18.** When the Security Council establishes or extends the mandate of a peace operation, it should reaffirm the importance of the principles relevant to troop discipline and investigation procedures contained in the Model Memorandum of Understanding between the UN and troop-contributing countries, and the UN standards of conduct set out in Annex H of the same document.<sup>15</sup> The Council should also affirm the applicability of the Human Rights Due Diligence

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<sup>15</sup> UN Doc. A/C.5/60/26, 11 January 2006, 'Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions', Annex, Chapter 9, amended by UN Doc. A/61/19 (Part III), 11 June 2007, 'Revised Draft Model Memorandum of Understanding'.

Policy on UN support to non-UN security forces (A/67/775-S/2013/110) and the Policy on Human Rights Screening of UN Personnel (S-G Decision No 2012/18).

**Recommendation 19.** When the Security Council establishes or extends the mandate of a peace operation, it should emphasise the need for troop-contributing countries to ensure accountability for the investigation and prosecution of allegations of serious crimes by their troops.

**Recommendation 20.** When the Security Council establishes or extends the mandate of a peace operation, it should reaffirm that allegations of sexual exploitation and abuse must be investigated and prosecuted by troop-contributing countries, in accordance with the Secretary-General's 2015 report on special measures for protection from sexual exploitation and sexual abuse,<sup>16</sup> as reinforced by the 2015 Horta report on UN peace operations.<sup>17</sup>

#### 4.3.5 Strengthening peace operation accountability mechanisms

UN peace operations should remain accountable both to their mandates and to the populations whose peace they are deployed to keep. If a peace operation is unresponsive to legitimate concerns of the local population, its legitimacy and effectiveness may be compromised. It is particularly important that peace operations take seriously any allegations of serious misconduct by UN personnel. The UN

Department of Peacekeeping Operations made this clear in its 1995 Comprehensive Report on Lessons Learned from United Nations Operation in Somalia,<sup>18</sup> in which it recommended the creation of an ombudsperson process in future UN peace operations to ensure they remain accountable to the local population. Ideally the ombudsperson should remain independent of the peace operation and should be locally accessible and responsive to local input. This is consistent with UN Sustainable Development Goal 16 on the need to build effective, accountable and inclusive institutions at all levels.<sup>19</sup>

**Recommendation 21.** The Security Council should establish an independent accountability mechanism, such as an ombudsperson, as part of the mandate of each UN peace operation. This mechanism should seek to ensure that the peace operation remains accountable to its mandate and responsive to the local population.

#### 4.3.6 Strengthening policing accountability

Police forces play a critical role in promoting and enforcing the rule of law. In some conflict situations a corrupt or dysfunctional policing sector may contribute to the breakdown of the rule of law. In post-conflict situations with a history of corrupt or dysfunctional law enforcement it is imperative to reform and restructure law enforcement institutions so that they do not undermine the rule of law.

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<sup>16</sup> UN Doc. A/69/779, 13 February 2015, 'Special measures for protection from sexual exploitation and sexual abuse'.

<sup>17</sup> UN Doc. A/70/95-S/2015/446, 17 June 2015, Report of the High-level Independent Panel on Peace Operations, 'Uniting our strengths for peace: politics, partnership and people', paras 279–91.

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<sup>18</sup> UN DPKO, Comprehensive Report on Lessons-learned from United Nations Operations in Somalia: April 1992–March 1995 United Nation, New York, 1995.

<sup>19</sup> UN Doc. A/RES/70/1, 25 September 2015, 'Transforming our world: the 2030 Agenda for Sustainable Development', Goal 16, pp. 14, 25–26.

In Resolution 2185 (2014) the Security Council took an important step towards enhancing the capacity of UN police components in peace operations to strengthen the rule of law. In that resolution the Council noted the important role that police components have made to support the reform, restructuring and rebuilding of host state policing and law enforcement institutions.<sup>20</sup> It also emphasised that ‘good governance and oversight of policing and law enforcement services’ were important in ensuring that those services were ‘accountable, responsive and capable of serving the population’.<sup>21</sup>

**Recommendation 22.** The Security Council should request the Secretary-General to report regularly on steps taken to ensure, consistent with Resolution 2185 (2014), that policing and law enforcement services are accountable, responsive and capable of serving their populations. This applies both to the policing and law enforcement services of the host state, as well as to the UN police components that are supporting them.

**Recommendation 23.** The Security Council should request the Secretary-General to ensure that all UN police components remain accountable, responsive and capable of serving the local population.

**Recommendation 24.** The Security Council should continue to hold annual meetings on policing issues, including how to further enhance the capacity of police components of peace operations to strengthen the rule of law, with the Heads of UN Police Components, consistent with Resolution 2185 (2014).

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<sup>20</sup> UN Doc. S/RES/2185, 20 November 2014, para 8.

<sup>21</sup> Ibid, preambular para 22.

## 4.4 Engagement

### 4.4.1 Engaging host communities

The Security Council should reinforce its own responsiveness, as well as that of its peace operations, by providing meaningful opportunities for ongoing engagement with a broad range of civil society representatives of the host population. This engagement should be prioritised throughout the peace operation lifecycle, from the initial assessment mission, to the design of the concept of operations, to the deployment, modification and drawdown of the operation.

**Recommendation 25.** The Security Council should request the Secretary-General to prioritise engagement with a broad range of civil society representatives of the local host population in the conception, design and implementation of rule-of-law mandates for peace operations.

### 4.4.2 Improving access to justice

Providing effective access to justice is a substantial challenge in most post-conflict environments. Post-conflict populations often struggle to gain effective access to national law and justice systems. This may be due to material barriers such as the lack of availability of responsive and affordable lawyers and court systems. It may also be due to the limited reach of post-conflict national law and justice systems beyond capital cities. In some instances the only available justice mechanisms are those provided by traditional religious or customary justice systems.

Security Council mandates to strengthen the rule of law should aim to increase access to justice for all, in accordance with UN

Sustainable Development Goal 16.<sup>22</sup> In post-conflict situations this demands a holistic approach that facilitates access to any available justice mechanisms. This was affirmed by the Secretary-General in his 2013 Report on Strengthening and Coordinating UN Rule of Law Activities.<sup>23</sup>

**Recommendation 26.** The Security Council should reaffirm the important role of peace operations in facilitating access to justice for all. It should affirm that this requires taking steps to improve access to both formal and informal justice systems, as part of a holistic approach to strengthening the rule of law.

#### 4.4.3 Balancing international and local justice frameworks

UN peace operations often take place in contexts where there are discrepancies between the international legal framework that sets out the norms and standards for UN led rule-of-law assistance and national and local legal and informal justice frameworks, customs and practices. Strengthening national legal systems to conform with international human rights norms and standards thus requires a delicate balance between these two frameworks.

**Recommendation 27.** When the Security Council creates and modifies peace operation mandates, it should reaffirm that UN peace operations should respect local laws, customs and practices where these are not inconsistent with international human rights standards.

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<sup>22</sup> UN Doc. A/RES/70/1, 25 September 2015, 'Transforming our world: the 2030 Agenda for Sustainable Development', Goal 16, pp. 14, 25–26.

<sup>23</sup> UN Doc. A/68/213, 29 July 2013, 'Fifth annual report on strengthening and coordinating United Nations rule of law activities', paras 51–57.

**Recommendation 28.** The Security Council should request the Secretary-General, through UN peace operations, to engage national and local actors in ongoing consultations about how to reconcile tensions between their obligations under international law and those under local laws, customs and practices.

#### 4.4.4 Pre-deployment legal and cultural sensitisation training

Few international military and civilian members of peace operations have a clear understanding of the cultures, traditions and justice systems of the societies into which they are deployed. The provision of comprehensive pre-deployment sensitisation training on local laws and customs would improve the preparedness of prospective members of peace operations for the legal environments into which they will be deployed.

**Recommendation 29.** The Security Council should request the Secretary-General to continue to enhance pre-deployment training of all prospective members of peace operations, including concerning the need to respect local laws, customs and practices where these are not inconsistent with international human rights standards.

#### 4.4.5 Supporting constitutional reform processes

In situations where the breakdown of the constitutional process played a significant role in undermining the rule of law and causing conflict, a post-conflict constitution-building process can play an instrumental role in strengthening the rule of law. UN peace operations have traditionally possessed limited capacity to provide constitutional reform assistance. The Secretary-General's 2009 Guidance Note on UN Assistance to Constitution-

making Processes sought to provide policy guidance on constitution-making processes and constitutional reform.<sup>24</sup> The Guidance Note paved the way for peace operations to build capacity to support constitution-making processes when appropriate.

**Recommendation 30.** The Security Council should include the task of supporting constitution making or constitutional reform processes in peace operation rule-of-law mandates in situations where the past breakdown of the constitutional process played a significant role in undermining the rule of law and causing conflict. Peace operations can support constitution making or constitutional reform processes by providing national and local actors embarking on such processes with access to resources and knowledge concerning options for the design, reform and implementation of a national constitution.

#### 4.4.6 Clarity in civil–military coordination

Both civilian and military actors are involved in implementing peace operation mandates. Government and UN officials, NGO workers, the police and the military are often required to work alongside one another for the fulfilment of the mandate’s objectives. Yet experience has shown that cooperation amongst actors involved in enforcement operations can be complicated by a lack of understanding of each other’s social, institutional and bureaucratic cultures.

**Recommendation 31.** The Security Council should encourage civilian and military actors to increase interoperability and develop a common understanding of each other’s cultures. It should encourage civilian and military actors to coordinate their activities, beginning with the early planning phase and proceeding through all stages of implementation of a peace operation’s mandate.

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24 UN Secretary-General’s Guidance Note, ‘UN assistance to constitution-making processes’, April 2009.

## 5. Strengthening the rule of law through UN sanctions

Article 41 of the UN Charter empowers the Security Council to apply sanctions short of force to maintain or restore international peace and security. In June 2010 the President of the Council described sanctions as ‘highly efficient tools for promoting compliance with international law’ and as ‘indispensable in the international fight against terrorism’.<sup>25</sup> States advocating the use of sanctions by the Council commonly characterise them as a tool for enforcing the rule of law. In 1990, when the Council applied sanctions against Iraq, Canada suggested that the sanctions would ‘safeguard respect for the rule of law’ and the United States emphasised that the proposed sanctions aimed to prevent ‘disregard for international law’.<sup>26</sup>

When the Council applied sanctions against Libya in February 2011, Brazil (then President of the Council) stressed that the sanctions sought ‘to ensure the protection of civilians and promote respect for international law’.<sup>27</sup>

Yet the consequences of sanctions can also challenge the rule of law. The disproportionate effect of the Security Council’s comprehensive 661 sanctions regime against Iraq in the 1990s upon both Iraqi civilians and third-party states raised questions about their appropriateness as an instrument to promote the rule of law. Although the Council now applies ‘smart sanctions’, including travel bans and assets freezes, this new generation of sanctions has also caused rule of law concerns. Some individuals subject to assets freezes have pursued national and regional litigation to remedy what they argue is a denial

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<sup>25</sup> UN Doc. S/2010/322, 18 June 2010, Annex: ‘Concept note for the open thematic debate in the Security Council to be held on 29 June 2010 under the presidency of Mexico, on the promotion and strengthening of the rule of law in the maintenance of international peace and security’, p. 5.

<sup>26</sup> UN Doc. S/PV.2933, 6 August 1990, p. 25 (Canada) and p. 18 (USA).

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<sup>27</sup> UN Doc. S/PV.6491, 26 February 2011, p. 7.

of due process rights by the Council.<sup>28</sup> In the *Kadi* case the European Court of Justice overturned the European Commission's orders implementing the assets freeze under the 1267/1989 Taliban and Al-Qaeda sanctions regime, on the basis that the Security Council Committee administering the sanctions did not provide adequate due process protections for individuals subject to the assets freeze.<sup>29</sup>

The Security Council has taken steps to address these concerns. In December 2006 the Council created the position of 'Sanctions Focal Point' in the Secretariat to receive requests from individuals seeking to be removed from individual sanctions blacklists.<sup>30</sup> In 2009 the Council created the Office of the Ombudsperson for the 1267/1989 UN sanctions regime against Al-Qaeda.<sup>31</sup> The Council empowered the Ombudsperson to investigate the grounds upon which individuals were included in the 1267/1989 sanctions list and, when appropriate, to

recommend delisting. By Resolution 1989 (2011) the Council decided that the Ombudsperson's delisting recommendations were to be implemented unless the 1267/1989 Committee as a whole or the Council itself were to decide otherwise.<sup>32</sup>

However, while these improvements in the due process protections afforded to individuals on the Al-Qaeda targeted sanctions list are welcome,<sup>33</sup> individuals on the more than a dozen remaining targeted sanctions lists do not have recourse to the ombudsperson process. Moreover, there remains considerable scope to improve the capacity of the Security Council's sanctions decision-making processes to function in a more responsive manner conducive to strengthening the rule of law.

The Proposals in this section apply the responsive model of the rule of law to the Security Council's decision-making processes relating to sanctions. These Proposals are designed to increase the Council's capacity to respect and promote transparency, consistency, accountability and engagement when it applies and modifies sanctions.

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28 The most prominent example of such litigation is the *Kadi* case, in which the European Court overturned European Commission orders to EU member states to implement an individual asset freeze against blacklisted individuals associated with the Taliban and Al-Qaeda. See *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 [2008] ECR I-6351, 3 September 2008, and *European Commission & the Council of the European Union v Yassin Abdullah Kadi*, joined Cases C 584/10 P, C 593/10 P and C 595/10 P [2013] ECR 00000, 18 July 2013. See also *Yassin Adullah Kadi v Council of the European Union and Commission of the European Communities*, Case T-315/01 [2005] ECR II-3649, 21 September 2005, and *Yassin Abdullah Kadi v European Commission*, Case T-85/09 [2010] ECHR II-0000, 30 September 2010.

29 See *European Commission & the Council of the European Union v Yassin Abdullah Kadi*, joined Cases C 584/10 P, C 593/10 P and C 595/10 P [2013] ECR 00000, 18 July 2013, paras 97–135.

30 UN Doc. S/RES/1730, 19 December 2006, paras 1–2.

31 UN Doc. S/RES/1904, 17 December 2004, para 20.

32 UN Doc. S/RES/1989, 17 June 2011, para 23 and Annex II.

33 In December 2015 the Council expanded the Al-Qaeda regime, so that it also applies to individuals and entities associated with the Islamic State in Iraq and the Levant (ISIL): UN Doc. S/RES/2253, 17 December 2015, para 2.

## 5.1 Transparency

### 5.1.1 Strengthening clarity of sanction objectives

The need to ensure sanctions are employed to achieve clear objectives was reaffirmed in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law

at the National and International Levels in 2012.<sup>34</sup> The Security Council has not always achieved transparency in the manner in which it articulates the reasons for applying sanctions. On some occasions, the objectives of sanctions have been vague and the Council has not identified in clear terms any conditions that must be satisfied by the target in order for sanctions to be lifted. An example of this was the 918 Rwanda sanctions regime, for which the Council failed to identify any explicit sanctions objective at all. On other occasions, however, the Council has acted in a much more transparent manner, making it clear to targets precisely what they can do in order to get sanctions lifted. An example of this was the way the Council required Liberia to satisfy the requirements to become part of the Kimberley Process in order for the diamond sanctions applied by Resolution 1521 (2003) to be lifted. This type of responsive approach to sanctions decision-making is much more likely to prompt the target to respond in the manner desired by the Council.

**Recommendation 32.** When the Security Council applies or modifies sanctions under Article 41 of the UN Charter, it should clearly identify the objectives of its sanctions measures. When identifying sanctions objectives, the Council should also clarify what objectively verifiable circumstances will lead to the lifting of sanctions.

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34 UN Doc. A/RES/67/1, 30 November 2012, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels', para 29.

### 5.1.2 Strengthening transparency of sanctions committee decision-making

The Security Council's sanctions committees meet in closed session and there is minimal public record of their proceedings. Calls to improve transparency in the work of those committees by the President of the Security Council,<sup>35</sup> and the Informal Working Group on General Issues of Sanctions,<sup>36</sup> have prompted some welcome developments, such as the issuance of annual reports by sanctions committees and the posting on each committee's website of information relating to the sanctions regime for which it is responsible. However, there is still no public access to committee proceedings or to meeting transcripts.

**Recommendation 33.** The Security Council should continue to improve the transparency of decision-making in its sanctions committees. In the absence of publicly available verbatim transcripts or summary records of sanctions committee meetings, committees should provide frequent detailed reports to the Council in open session. These reports should identify the decisions taken by the committee in the period under review and provide the reasons for those decisions.

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35 UN Doc. S/1995/234, 29 March 1995, 'Note by the President of the Security Council'; UN Doc. S/1999/92, 29 January 1999, 'Note by the President of the Security Council: work of the sanctions committees'.

36 UN Doc. S/2006/997, 18 December 2006, 'Report of the Informal Working Group of the Security Council on General Issues of Sanctions', Annex.

### 5.1.3 Strengthening transparency of delisting requests

When the UN Sanctions Focal Point receives delisting requests, they are forwarded to the state(s) who initially proposed a listing (the ‘designating state(s)'), as well as to the state(s) where the individual requesting delisting (the ‘petitioner’) is a citizen or resident. Consequently, sanctions committees and expert groups often remain unaware that a delisting request is under review.

**Recommendation 34.** The Security Council should request the Sanctions Focal Point to inform the relevant sanctions committees and expert groups of delisting requests.

**Recommendation 35.** The Security Council should request the Sanctions Focal Point to publish delisting requests on its website, with the consent of the petitioner.

### 5.1.4 Strengthening transparency of unsuccessful delisting requests

Security Council Resolution 1730 (2006) accords primary responsibility for approving delisting request to the state(s) who initially proposed a listing (the designating state(s)), by providing for them to review requests and indicate whether or not they support them. This decreases the likelihood that delisting requests will be submitted to the Focal Point, irrespective of the merit of the request.

**Recommendation 36.** The Security Council should encourage states to provide reasons to the sanctions committee and the Focal Point for any decision to oppose a delisting request. The Council should also request the committee and/or Focal Point to share these reasons with the petitioner.

**Recommendation 37.** The Security Council should request sanctions committees to publish the reasons for rejecting any delisting requests, unless there are compelling grounds not to. Where a committee decides that such compelling grounds exist, it should publish those grounds.

### 5.1.5 Strengthening transparency in the appointment of independent experts

The process for appointing members of sanctions expert bodies should be reformed to ensure selection is not based on nationality, as is the current informal practice. A nationality-based selection process does not lead to reasoned decisions and undermines the independence of what are supposed to be independent expert bodies. On occasion, the composition of an expert panel has prevented it from acting in an unbiased manner and/or from collecting important evidence. Introducing greater transparency to the selection process would help ensure the appointment of experts who are competent, independent, professional and impartial in accordance with Article 100 of the UN Charter.

**Recommendation 38.** The Security Council should request the Secretary-General to ensure that the appointment process for sanctions expert bodies is transparent and leads to the appointment of experts with the highest professional competence and integrity.

## 5.2 Consistency

### 5.2.1 Strengthening consistency of sanctions terminology

The consistency of Security Council sanctions terminology has improved considerably over the past two decades. This has been prompted by a series of inter-governmental processes designed to improve UN sanctions decision-making, such as the Interlaken, Stockholm and Bonn-Berlin processes.<sup>37</sup> Nevertheless, the 2015 Compendium of the High Level Review of United Nations Sanctions highlighted the need to continue to standardise the usage of terms by the Council, its sanctions committees and other actors.<sup>38</sup>

**Recommendation 39.** The Security Council should continue to improve the precision and consistency of the terminology employed in resolutions creating and modifying sanctions regimes.

### 5.2.2 Strengthening consistency of sanctions administration and monitoring

The Security Council's use of administrative bodies, such as sanctions committees, panels of

experts and monitoring bodies, has not always been consistent across different sanctions regimes. This has led to discrepancies in the quality of administration and monitoring provided to each regime. Consolidating sanctions administration and monitoring within a central, coordinating UN sanctions committee could improve both the consistency and quality of sanctions administration and monitoring. This committee would replace the existing *ad hoc* sanctions committees, streamlining the range of activities currently being conducted across all sanctions regimes, thus minimising duplication. It could draw as appropriate on country and issue expertise to monitor and evaluate the implementation of specific sanctions regimes. The increased level of responsibility of committee members should translate to an improvement in the quality of the representation in the committee with more senior representatives involved in the sanctions discussions.

**Recommendation 40.** The Security Council should consider creating a central UN Sanctions Coordination Committee responsible for ensuring consistent administration across all sanctions regimes, along the lines proposed by the 2015 High Level Review of UN Sanctions. Sanctions monitoring could also be streamlined, with a well-resourced central expert mechanism responsible for monitoring and evaluating the implementation of all sanctions regimes.

## 5.3 Accountability

### 5.3.1 Expanding the ombudsperson process

The creation of the Office of the Ombudsperson on Al-Qaeda provides an important independent mechanism for individuals to challenge their

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<sup>37</sup> See: *Targeted Financial Sanctions: A Manual for Design and Implementation*, Contributions from the Interlaken Process, Watson Institute for International Studies, Providence, RI, 2001; *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options*, Results from the Stockholm Process on the Implementation of Targeted Sanctions, Uppsala University, Uppsala, 2003; *Design and Implementation of Arms Embargo and Travel Sanctions and Aviation-Related Sanctions*, Results of the Bonn-Berlin Process, Bonn International Center for Conversion, 2001.

<sup>38</sup> UN Doc. A/69/941 – S/2015/432, 12 June 2015, 'Compendium High Level Review of United Nations Sanctions', p. 52 (recommendations 74–76).

listing on the Al-Qaeda sanctions list. This bolsters the accountability of UN sanctions and demonstrates the responsiveness of the Security Council to due process concerns. However, this accountability mechanism is only available to individuals who are inscribed on the Al-Qaeda sanctions list. Individuals listed on the more than a dozen other sanctions lists do not have access to the same accountability mechanism. This creates problematic inconsistencies between sanctions regimes with respect to due process rights. The Council should therefore extend the ombudsperson process to all individuals and entities inscribed on UN sanctions consolidated lists. One way to do this would be to create a new general Office of the Ombudsperson covering all UN sanctions regimes. This is consistent with UN Sustainable Development Goal 16 on the need to build effective, accountable and inclusive institutions at all levels.

**Recommendation 41.** The Security Council should institutionalise the current ombudsperson process and make it available to all individuals and entities inscribed on UN sanctions consolidated lists.

### 5.3.2 Employing sunset clauses

The Security Council's accountability for its sanctions regimes is undermined by open-ended authorisations of sanctions that have no termination date. The use of sunset clauses enhances responsiveness by prompting the Council to reconsider both the need and the scope and objectives of its sanctions measures. If Council members consider the renewal of a sanctions regime to be necessary, then the Council should be able to act swiftly to adopt a resolution extending the sanctions prior to their termination under the sunset clause.

**Recommendation 42.** When the Security Council establishes a new sanctions regime, it should include a sunset clause. The sunset clause should identify a specific set of benchmarks tied to the sanctions regime's objectives, the achievement of which will trigger termination of sanctions. The sunset clause should also identify a specific date (for instance, twelve months hence) on which the sanctions will terminate.

## 5.4 Engagement

### 5.4.1 Strengthening engagement with affected populations and states

When the Security Council is deliberating on the application of a new sanctions regime or undertaking a regular review of an existing sanctions regime, it should give careful consideration to the impact of the sanctions on the local population and on neighbouring and regional states. The Council should provide meaningful opportunities for representatives of affected populations and member states to share their concerns relating to prospective and existing sanctions measures.

**Recommendation 43.** Before applying new sanctions, the Security Council should, in accordance with Article 51 of the UN Charter, hear and respond to the views of UN member states whose interests may be adversely affected by sanctions.

**Recommendation 44.** Before applying new sanctions, the Security Council should request the Secretary-General to provide a detailed assessment of the potential impact of the proposed sanctions on the local population, as well as on neighbouring and regional states. This impact assessment should consider the

potential economic, environmental, human rights, humanitarian, political, security and social consequences of applying the sanctions.

**Recommendation 45.** When the Security Council reviews its sanctions regimes, it should request the Secretary-General to provide a detailed assessment of the actual impact of the sanctions on the local population, as well as on neighbouring and regional states. This impact assessment should evaluate the actual economic, environmental, human rights, humanitarian, political, security and social consequences of the sanctions.

#### 5.4.2 Strengthening engagement with individuals subject to sanctions

Individuals targeted by UN sanctions measures, including an assets freeze or a travel ban, should be informed of their listing and given the opportunity to hear and contest the basis for their targeting, as a matter of due process. In practice, individuals are not always notified of their listing, and the listing process does not provide them with an opportunity to hear or contest the accusations against them.

**Recommendation 46.** The Security Council should institute an effective procedure for notifying individuals and entities of their listing on a consolidated sanctions list. This notification should also explain the reasons for their listing.

**Recommendation 47.** The Security Council should consider employing a provisional initial listing process for all individuals proposed for addition to consolidated sanctions lists. Under this process, individuals would be placed on a temporary consolidated list for a period of three months. If the relevant sanctions committee is satisfied within this period, based on evidence such as the ombudsperson's opinion, that

the statement of cases and reasons for listing is based on credible information, then the individual would be moved from the provisional list to the consolidated list. In the absence of such evidence, the provisional listing of the individual would lapse.

#### 5.4.3 Strengthening responsiveness to delisting requests

Under Security Council Resolution 1730 (2006) delisting requests must be reviewed within three months by the designating government and the government of citizenship and residence of the individual requesting delisting. After that period, these parties can request an additional 'definite' period of time, if required. However, as Resolution 1730 (2006) does not define 'definite', there is little pressure on governments to engage in a timely review of such requests. In practice they may place on hold a delisting request for political or other reasons, preventing individuals from receiving a final decision on their case.

**Recommendation 48.** The Security Council should identify a maximum time limit for governments to review delisting requests under the delisting procedure outlined by Security Council Resolution 1730 (2006).

#### 5.4.4 Strengthening coordination with regional organisations

A number of regional organisations have developed their own sanctions regimes of varying complexity. These include the European Union, the African Union, the Organization of American States and the Commonwealth of Nations. Better coordination with these regional arrangements in the design and implementation of UN sanctions would strengthen the efficiency of both UN and regional sanctions regimes

and increase the prospect of achieving their regulatory objectives.

**Recommendation 49.** The Security Council should coordinate the design and implementation of UN sanctions regimes with relevant regional organisations.

#### 5.4.5 Strengthening sanctions complementarity with other UN action

Sanctions regimes are often one of a number of measures used by the Security Council to address specific situations. Before designing a new sanctions regime, careful consideration should be given to how the sanctions might complement other UN initiatives and activities to address the situation.

**Recommendation 50.** When the Security Council applies sanctions measures it should articulate how the new measures relate to other actions previously taken by the Council to address the situation.

#### 5.4.6 Strengthening sanctions complementarity with referrals to the International Criminal Court

The Security Council has the power to refer situations to the International Criminal Court (ICC). However, the Council's decision-making process for making a referral to the ICC is not coordinated or integrated with its other mechanisms addressing the same situations. Where sanctions are applied to address a situation that has been referred to the ICC, the Security Council should consider applying a travel ban against individuals subject to an ICC arrest warrant.

**Recommendation 51.** When the Security Council applies or modifies a sanctions regime in connection with a situation that it has referred to the International Criminal Court (ICC), it should consider applying a travel ban against all individuals subject to an arrest warrant by the ICC.

## 6. Strengthening the rule of law through the use of force

Article 42 of the UN Charter empowers the Security Council to ‘take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security’. As with the Council’s sanctions tool, the use of force has also been characterised as an enforcement mechanism for the rule of law. When the Council authorised UN member states cooperating with Kuwait to use all necessary means against Iraq in November 1990, United States Secretary of State James Baker described the step as prioritising ‘peace and the rule of law’ over ‘brutal aggression and the law of the jungle’.<sup>39</sup>

When the Council authorises force it generally delegates to designated states or groups of states the power to use ‘all necessary means’ or ‘all necessary measures’ to pursue particular goals, such as the withdrawal of Iraq from Kuwait in 1991,<sup>40</sup> and the protection of civilians in Libya in 2011.<sup>41</sup> The Council has also granted limited authorisations to peace operations to use force. At their most robust, these authorisations have mandated peace

enforcement, such as in Somalia in 1992<sup>42</sup> and the Democratic Republic of the Congo in 2013.<sup>43</sup> More commonly, however, the Council has authorised peace operations to use all necessary measures under Chapter VII to implement their mandates and protect civilians.

The gravity of the consequences of the Security Council’s decisions on whether or not to authorise force led the Secretary-General’s 2004 High-Level Panel on Threats, Challenges and Change to recommend a more principled approach to decision-making on the prospective use of force. This principled approach centred on a new doctrine called the responsibility to protect. This doctrine, which was endorsed by the Secretary-General and UN member states in 2005, recognises the responsibility of all states to protect their own civilians threatened by genocide, crimes against humanity, ethnic cleansing and war crimes.<sup>44</sup> Where a state is unwilling or unable to meet its responsibility

39 UN Doc. S/PV.2963, 29 November 1990, pp. 104–05.

40 UN Doc. S/RES/678, 29 November 1990, para 2.

41 UN Doc. S/RES/1973, 17 March 2011, para 4.

42 UN Doc. S/RES/794, 3 December 1992, para 10.

43 UN Doc. S/RES/2098, 28 March 2013, para 12(b).

44 UN Doc. A/59/2005, 21 March 2005, ‘In larger freedom: Towards development, security and human rights for all’, para 135; UN Doc. A/RES/60/1, 24 October 2005, ‘World Summit outcome’, paras 138 and 139.

to protect, there is a responsibility on the international community to intervene to protect those civilians, using force when necessary and acting through the Council.

While the introduction of the responsibility to protect sought to strengthen the legitimacy of the Security Council's decision-making process surrounding the use of force, the implementation by the North Atlantic Treaty Organization of the Council's authorisation of force to protect civilians in Libya in 2011 prompted calls for greater accountability in the authorisation and use of force, as reflected in the concept of 'responsibility while protecting' (RWP).<sup>45</sup> The primary concern underpinning responsibility while protecting is how to ensure that the Council's authorisations of force are implemented in good faith and are not exceeded or abused.

The Proposals in this section apply the responsive model of the rule of law to the Security Council's decision-making processes relating to the use of force. These Proposals seek to increase the Council's capacity to respect and promote transparency, consistency, accountability and engagement when it authorises the use of force.

## 6.1 Transparency

### 6.1.1 Strengthening clarity in protection of civilian mandates

The Security Council has authorised both peace operations and member states to use force to protect civilians. This was notably the case in

Libya, where Security Council Resolution 1973 authorised member states to take 'all necessary measures ... to protect civilians and civilian populated areas under threat of attack'. The Libya intervention demonstrated the difficulties of conceptualising and operationalising protection of civilians mandates that are drafted in general terms. Controversy arose over both the means for implementing the mandate and the very objective of the intervention.

**Recommendation 52.** When the Security Council authorises the use of force under Article 42 of the Charter it should clearly identify the objectives for which force may be employed. When identifying use of force objectives, the Council should also clarify what objectively verifiable circumstances will lead to the termination of its authorisation.

**Recommendation 53.** When the Security Council authorises the use of force it should clearly articulate the full parameters of the use-of-force mandate, including which specific actors are authorised to use force and for what specific objective.

## 6.2 Consistency

### 6.2.1 Strengthening consistency of mandate implementation

The expression 'all necessary means' gives states a large margin of appreciation in the interpretation and implementation of a mandate. While states must have discretion to decide what means they may use to achieve a mandate's objectives, they should not have discretion to revise the objectives of the mandate.

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<sup>45</sup> UN Doc. S/2011/701, 11 November 2011, Annex: 'Responsibility while Protecting: Elements for the Development and Promotion of a Concept'.

**Recommendation 54.** The Security Council should request the Secretary-General to prepare guidance principles on the implementation of use-of-force mandates. These principles should be developed through a consultative process, such as an informal dialogue with state and non-state actors.

**Recommendation 55.** When the Security Council authorises the use of force it should affirm that the authorisation is subject to the principle that ‘exceptions must be interpreted restrictively’ (*exceptio est strictissimae interpretationis*).

## 6.3 Accountability

### 6.3.1 Strengthening the frequency and quality of reporting by implementing states

The Security Council remains accountable for the exercise of force in accordance with its authorisations. The Council therefore has a strong interest in ensuring that the states that employ force do so within the parameters of the authorisation and only in pursuit of the objectives identified by the Council. A simple way to verify that states are employing force in accordance with the Council’s authorisation is to require those states to provide it with frequent, detailed reports on any action taken in pursuit of the use of force authorisation. At the same time, in order to obtain a more complete understanding of the implementation and impact of its use of force mandates, the Council should supplement the information it receives from states with independent monitoring and evaluation.

**Recommendation 56.** When the Security Council authorises the use of force it should establish a reporting schedule and specify the information to be included in reports by states and groups of states implementing use of force mandates.

**Recommendation 57.** The Security Council should request regular briefings by states and groups of states implementing use of force mandates.

**Recommendation 58.** The Security Council should consider the creation of independent mechanisms, such as fact-finding missions or commissions of inquiry, to monitor and evaluate the implementation of use-of-force mandates.

**Recommendation 59.** The Security Council should set up fact-finding missions in response to allegations of violations of international law during military operations to assist in resolving any problems in relation to the attribution of responsibility.

### 6.3.2 Reaffirming the applicability of international law

In presidential statement 1998/35, the President of the Security Council stressed that ‘missions and operations must ensure that their personnel respect and observe international law, including humanitarian, human rights and refugee law’. This applies to missions that are undertaken by member states and regional and subregional organisations under Chapter VII of the UN Charter.

**Recommendation 60.** In every resolution authorising a use-of-force mandate, the Security Council should affirm the obligation upon all actors involved to abide by international law, including humanitarian, human rights and refugee law.

### 6.3.3 Applying the principles of necessity and proportionality

The expression ‘all necessary means’ used by the Security Council to authorise the use of force imposes the same legal conditions on the use of force under Chapter VII as in situations of self-defence. This means that all use of force mandates should be exercised in conformity with the requirements of necessity and proportionality.

**Recommendation 61.** When the Security Council authorises the use of force, it should express its readiness to terminate the use of force mandate for any actor that exercises force in an unnecessary or disproportionate manner. At the same time, the Council should request the Secretary-General to report to it any allegations that a use of force mandate is being implemented in an unnecessary or disproportionate manner.

### 6.3.4 Employing sunset clauses

The accountability of the Security Council for its use of force mandates is undermined by open-ended authorisations of the use of force that have no termination date. The use of sunset clauses enhances responsiveness by prompting the Council to reconsider both the need and the scope and objectives of its use of force mandates. If the members of the Council consider the renewal of a use of force mandate to be necessary, then the Council should be able to adopt swiftly a resolution extending the mandate prior to its termination under the sunset clause.

**Recommendation 62.** When the Security Council authorises a use of force mandate, it should include a sunset clause. The sunset clause should identify a specific set of benchmarks tied to the mandate’s objectives,

the achievement of which will trigger termination of the mandate. The sunset clause should also identify a specific date (for instance, three months hence) on which the use of force mandate will terminate.

## 6.4 Engagement

### 6.4.1 Strengthening engagement with affected populations and states

When the Security Council is deliberating on the authorisation of a new use-of-force mandate or undertaking a review of an existing use-of-force mandate, it should give careful consideration to the impact of the mandate on the local population and on neighbouring and regional states. The Council should provide meaningful opportunities for representatives of affected populations and member states to share their concerns relating to the prospective and actual use of force consistent with a Council mandate.

**Recommendation 63.** Before adopting a new use-of-force mandate, the Security Council should hear and respond to the views of UN member states whose interests may be adversely affected by the proposed use of force.

**Recommendation 64.** Before adopting a new use-of-force mandate, the Security Council should request the Secretary-General to provide a detailed assessment of the potential impact of the proposed use of force on the local population, as well as on neighbouring and regional states. This impact assessment should consider the potential economic, environmental, human rights, humanitarian, political, security and social consequences of the proposed use of force.

**Recommendation 65.** When the Security Council reviews an existing use-of-force mandate, it should request the Secretary-General to provide a detailed assessment of the actual impact of the force on the local population, as well as on neighbouring and regional states. This impact assessment should evaluate the actual economic, environmental, human rights, humanitarian, political, security and social consequences of the use of force.

#### 6.4.2 Employing commissions of inquiry

Under Articles 29 and 34 of the UN Charter the Security Council has the power to create commissions of inquiry. It has generally used such commissions to undertake *ex post facto* investigations. Examples include the Commission of Experts established pursuant to Security Council Resolution 935 (1994) concerning Rwanda, and the International Commission of Inquiry on the Hariri bombing in Lebanon established by Security Council Resolution 1636 (2005). The creation of the 1946 Sub-committee on the Spanish question to investigate the threat posed by the Franco regime provides a precedent for the preventive use of fact-finding commissions.

**Recommendation 66.** The Security Council should consider making greater use of commissions of inquiry and fact-finding missions under Article 33 of the Charter as a preventive tool to collect information on emerging threats to international peace and security.

# Annexes

## I. Complete list of Policy Proposals

### A. General principles of Security Council decision-making

#### **Transparency**

**Recommendation 1.** The Security Council should ensure that the reasons for its decisions, contained in its resolutions and presidential statements, are clear and transparent. The Council should meet in open session before taking new decisions and Council members should be given the opportunity to strengthen decision-making transparency by stating their country's position on the proposed decision.

**Recommendation 2.** Security Council decisions that require actors to respect or promote the rule of law should identify in clear terms what rule of law objectives will be achieved by implementing the decision.

#### **Consistency**

**Recommendation 3.** The Security Council should employ a consistent understanding of the rule of law in its decisions that seek to promote the rule of law. This understanding should be

based on the 2004 definition of the rule of law articulated by the UN Secretary-General.

#### **Accountability**

**Recommendation 4.** When a Security Council decision requires state and non-state actors to respect or promote the rule of law, it should affirm that the same requirement applies to all relevant UN actors, including the Council itself, as affirmed by the 2012 High-level Declaration on the rule of law.

**Recommendation 5.** The Security Council should continue to promote accountability of actors tasked with implementing its resolutions, including UN and non-UN, state and non-state actors, especially when allegations are made of serious crimes committed in the course of implementation of a Council resolution.

**Recommendation 6.** The Security Council should clearly indicate that the principle 'exceptions must be interpreted restrictively' (*exceptio est strictissimae interpretationis*) applies to the interpretation of its resolutions, to ensure its objectives are implemented as intended.

**Recommendation 7.** The Security Council should ensure that its resolutions and decision-making processes reflect the principle that all UN activities should respect local laws, norms and customs of the peoples affected by its operations and decisions.

### ***Engagement***

**Recommendation 8.** The Security Council should ensure, as far as possible, that actors who stand to be adversely affected by a prospective decision are given an opportunity to express their concerns relating to the prospective decision.

**Recommendation 9.** The Security Council should consider making greater use of commissions of inquiry and fact-finding missions, in accordance with Article 33 of the UN Charter, in order to obtain a more holistic picture of the need for, and potential impact of, its responses to emerging peace and security threats.

## **B. Deployment of peace operations**

### ***Transparency***

**Recommendation 10.** When the Security Council creates or modifies a peace operation mandate that seeks to strengthen the rule of law, the Council should ensure that the mandate clearly identifies the operation's central rule-of-law objectives, as well as the components of the operation that will pursue those objectives.

**Recommendation 11.** The Security Council should request the Secretary-General to conduct baseline assessments of a new peace operation's rule-of-law environment upon deployment. These assessments should generate reliable qualitative and quantitative data that will assist the Council to identify appropriate benchmarks to be used in

monitoring and evaluating the operation's progress in pursuing rule-of-law objectives.

**Recommendation 12.** The Security Council should request the Secretary-General to undertake periodic qualitative and quantitative monitoring and evaluation of the implementation of each peace operation's rule-of-law objectives. The Council should also request the Secretary-General to report on the findings of these monitoring and evaluation efforts in the periodic reports on the progress of each peace operation.

### ***Consistency***

**Recommendation 13.** When the Security Council creates or modifies a peace operation mandate that seeks to strengthen the rule of law, the Council should employ terms and phrases that are consistent with those in the mandates of other peace operations.

**Recommendation 14.** The Security Council should promote greater consistency between UN rule-of-law policy and peace operation practice by encouraging the Secretary-General to develop the Secretariat's capacity to support initiatives to build rule of law capacity in areas beyond the justice-chain institutions. The Council should request the Secretary-General to direct additional attention and resources to increasing the capacity of peace operations to support efforts to strengthen constitutions, legislatures and public administration accountability mechanisms.

### ***Accountability***

**Recommendation 15.** When the Security Council tasks a peace operation with strengthening the rule of law, it should reaffirm that the operation and all individuals associated with it have a responsibility to respect the rule of law.

**Recommendation 16.** The Security Council should request the Secretary-General to develop a bulletin for the observance by peacekeepers of international human rights law. This bulletin would complement the Secretary-General's 1999 bulletin on international humanitarian law.

**Recommendation 17.** The Security Council should continue to affirm the importance and applicability of the Secretary-General's Policy on Human Rights Screening of UN Personnel to all peace operations.

**Recommendation 18.** When the Security Council establishes or extends the mandate of a peace operation, it should reaffirm the importance of the principles relevant to troop discipline and investigation procedures contained in the Model Memorandum of Understanding between the UN and troop-contributing countries, and the UN standards of conduct set out in Annex H of the same document. The Council should also affirm the applicability of the Human Rights Due Diligence Policy on UN support to non-UN security forces (A/67/775-S/2013/110) and the Policy on Human Rights Screening of UN Personnel (S-G Decision No 2012/18).

**Recommendation 19.** When the Security Council establishes or extends the mandate of a peace operation, it should emphasise the need for troop-contributing countries to ensure accountability for the investigation and prosecution of allegations of serious crimes by their troops.

**Recommendation 20.** When the Security Council establishes or extends the mandate of a peace operation, it should reaffirm that allegations of sexual exploitation and abuse must be investigated and prosecuted by troop-contributing countries, in accordance with the

Secretary-General's 2015 report on special measures for protection from sexual exploitation and sexual abuse, as reinforced by the 2015 Horta report on UN peace operations.

**Recommendation 21.** The Security Council should establish an independent accountability mechanism, such as an ombudsperson, as part of the mandate of each UN peace operation. This mechanism should seek to ensure that the peace operation remains accountable to its mandate and responsive to the local population.

**Recommendation 22.** The Security Council should request the Secretary-General to report regularly on steps taken to ensure, consistent with Resolution 2185 (2014), that policing and law enforcement services are accountable, responsive and capable of serving their populations. This applies both to the policing and law enforcement services of the host state, as well as to the UN police components that are supporting them.

**Recommendation 23.** The Security Council should request the Secretary-General to ensure that all UN police components remain accountable, responsive and capable of serving the local population.

**Recommendation 24.** The Security Council should continue to hold annual meetings on policing issues, including how to further enhance the capacity of police components of peace operations to strengthen the rule of law, with the Heads of UN Police Components, consistent with Resolution 2185 (2014).

### **Engagement**

**Recommendation 25.** The Security Council should request the Secretary-General to prioritise engagement with a broad range of civil society representatives of the local host

population in the conception, design and implementation of rule-of-law mandates for peace operations.

**Recommendation 26.** The Security Council should reaffirm the important role of peace operations in facilitating access to justice for all. It should affirm that this requires taking steps to improve access to both formal and informal justice systems, as part of a holistic approach to strengthening the rule of law.

**Recommendation 27.** When the Security Council creates and modifies peace operation mandates, it should reaffirm that UN peace operations should respect local laws, customs and practices where these are not inconsistent with international human rights standards.

**Recommendation 28.** The Security Council should request the Secretary-General, through UN peace operations, to engage national and local actors in ongoing consultations about how to reconcile tensions between their obligations under international law and those under local laws, customs and practices.

**Recommendation 29.** The Security Council should request the Secretary-General to continue to enhance pre-deployment training of all prospective members of peace operations, including concerning the need to respect local laws, customs and practices where these are not inconsistent with international human rights standards.

**Recommendation 30.** The Security Council should include the task of supporting constitution making or constitutional reform processes in peace operation rule-of-law-mandates in situations where the past breakdown of the constitutional process played a significant role in undermining the rule of law and causing conflict. Peace operations can

support constitution making or constitutional reform processes by providing national and local actors embarking on such processes with access to resources and knowledge concerning options for the design, reform and implementation of a national constitution.

**Recommendation 31.** The Security Council should encourage civilian and military actors to increase interoperability and develop a common understanding of each other's cultures. It should encourage civilian and military actors to coordinate their activities, beginning with the early planning phase and proceeding through all stages of implementation of a peace operation's mandate.

## C. Application of sanctions

### *Transparency*

**Recommendation 32.** When the Security Council applies or modifies sanctions under Article 41 of the UN Charter, it should clearly identify the objectives of its sanctions measures. When identifying sanctions objectives, the Council should also clarify what objectively verifiable circumstances will lead to the lifting of sanctions.

**Recommendation 33.** The Security Council should continue to improve the transparency of decision-making in its sanctions committees. In the absence of publicly available verbatim transcripts or summary records of sanctions committee meetings, committees should provide frequent detailed reports to the Council in open session. These reports should identify the decisions taken by the committee in the period under review and provide the reasons for those decisions.

**Recommendation 34.** The Security Council should request the Sanctions Focal Point to

inform the relevant sanctions committees and expert groups of delisting requests.

**Recommendation 35.** The Security Council should request the Sanctions Focal Point to publish delisting requests on its website, with the consent of the petitioner.

**Recommendation 36.** The Security Council should encourage states to provide reasons to the sanctions committee and the Focal Point for any decision to oppose a delisting request. The Council should also request the committee and/or Focal Point to share these reasons with the petitioner.

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Sanctions monitoring could also be streamlined, with a well-resourced central expert mechanism responsible for monitoring and evaluating the implementation of all sanctions regimes.

### ***Accountability***

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**Recommendation 44.** Before applying new sanctions, the Security Council should request the Secretary-General to provide a detailed assessment of the potential impact of the proposed sanctions on the local population, as well as on neighbouring and regional states. This impact assessment should consider the potential economic, environmental, human rights, humanitarian, political, security and social consequences of applying the sanctions.

**Recommendation 45.** When the Security Council reviews its sanctions regimes, it should request the Secretary-General to provide a detailed assessment of the actual impact of the sanctions on the local population, as well as on neighbouring and regional states. This impact assessment should evaluate the actual economic, environmental, human rights, humanitarian, political, security and social consequences of the sanctions.

**Recommendation 46.** The Security Council should institute an effective procedure for notifying individuals and entities of their listing on a consolidated sanctions list. This notification should also explain the reasons for their listing.

**Recommendation 47.** The Security Council should consider employing a provisional initial listing process for all individuals proposed for addition to consolidated sanctions lists. Under this process individuals would be placed on a temporary consolidated list for a period of three months. If the relevant sanctions committee is satisfied within this period, based on evidence such as the ombudsperson's opinion, that the statement of cases and reasons for listing is based on credible information, then the individual would be moved from the provisional list to the consolidated list. In the absence of such evidence, the provisional listing of the individual would lapse.

**Recommendation 48.** The Security Council should identify a maximum time limit for governments to review delisting requests under the delisting procedure outlined by Security Council Resolution 1730 (2006).

**Recommendation 49.** The Security Council should coordinate the design and implementation of UN sanctions regimes with relevant regional organisations.

**Recommendation 50.** When the Security Council applies sanctions measures it should articulate how the new measures relate to other actions previously taken by the Council to address the situation.

**Recommendation 51.** When the Security Council applies or modifies a sanctions regime in connection with a situation that it has referred to the International Criminal Court (ICC), it should consider applying a travel ban against all individuals subject to an arrest warrant by the ICC.

## D. The use of force

### *Transparency*

**Recommendation 52.** When the Security Council authorises the use of force under Article 42 of the Charter it should clearly identify the objectives for which force may be employed. When identifying use of force objectives, the Council should also clarify what objectively verifiable circumstances will lead to the termination of its authorisation.

**Recommendation 53.** When the Security Council authorises the use of force it should clearly articulate the full parameters of the use-of-force mandate, including which specific actors are authorised to use force and for what specific objective.

### *Consistency*

**Recommendation 54.** The Security Council should request the Secretary-General to prepare guidance principles on the implementation of use-of-force mandates. These principles should be developed through a consultative process, such as an informal dialogue with state and non-state actors.

**Recommendation 55.** When the Security Council authorises the use of force it should affirm that the authorisation is subject to the principle that ‘exceptions must be interpreted restrictively’ (*exceptio est strictissimae interpretationis*).

### **Accountability**

**Recommendation 56.** When the Security Council authorises the use of force it should establish a reporting schedule and specify the information to be included in reports by states and groups of states implementing use of force mandates.

**Recommendation 57.** The Security Council should request regular briefings by states and groups of states implementing use of force mandates.

**Recommendation 58.** The Security Council should consider the creation of independent mechanisms, such as fact-finding missions or commissions of inquiry, to monitor and evaluate the implementation of use-of-force mandates.

**Recommendation 59.** The Security Council should set up fact-finding missions in response to allegations of violations of international law during military operations to assist in resolving any problems in relation to the attribution of responsibility.

**Recommendation 60.** In every resolution authorising a use-of-force mandate, the Security Council should affirm the obligation upon all actors involved to abide by international law, including humanitarian, human rights and refugee law.

**Recommendation 61.** When the Security Council authorises the use of force, it should express its readiness to terminate the use of force mandate for any actor that exercises

force in an unnecessary or disproportionate manner. At the same time the Council should request the Secretary-General to report to it any allegations that a use of force mandate is being implemented in an unnecessary or disproportionate manner.

**Recommendation 62.** When the Security Council authorises a use of force mandate, it should include a sunset clause. The sunset clause should identify a specific set of benchmarks tied to the mandate’s objectives, the achievement of which will trigger termination of the mandate. The sunset clause should also identify a specific date (for instance, three months hence) on which the use of force mandate will terminate.

### **Engagement**

**Recommendation 63.** Before adopting a new use-of-force mandate, the Security Council should hear and respond to the views of UN member states whose interests may be adversely affected by the proposed use of force.

**Recommendation 64.** Before adopting a new use-of-force mandate, the Security Council should request the Secretary-General to provide a detailed assessment of the potential impact of the proposed use of force on the local population, as well as on neighbouring and regional states. This impact assessment should consider the potential economic, environmental, human rights, humanitarian, political, security and social consequences of the proposed use of force.

**Recommendation 65.** When the Security Council reviews an existing use-of-force mandate, it should request the Secretary-General to provide a detailed assessment of the actual impact of the force on the local population, as well as on neighbouring and

regional states. This impact assessment should evaluate the actual economic, environmental, human rights, humanitarian, political, security and social consequences of the use of force.

**Recommendation 66.** The Security Council should consider making greater use of commissions of inquiry and fact-finding missions under Article 33 of the Charter as a preventive tool to collect information on emerging threats to international peace and security.

## II. Project workshops and participants

### Workshop 1: The United Nations Security Council, Peacekeeping and the Rule of Law (held at the Australian National University, 8 and 9 December 2011)

Roderic Broadhurst, Chief Investigator, ARC Centre of Excellence in Policing and Security (CEPS), ANU

Takele Bulto, Postdoctoral Fellow, Centre for International Governance and Justice, ANU

Róisín Burke, PhD candidate, Melbourne Law School

Hilary Charlesworth, Director, Centre for International Governance and Justice, ANU

Jeremy Farrall, Fellow, Asia-Pacific College of Diplomacy, ANU

Vera Gowlland, Emeritus Professor, Graduate Institute of International and Development Studies

Laura Grenfell, Senior Lecturer, University of Adelaide Law School

Machiko Kanetake, Postdoctoral Researcher, Faculty of Law, University of Amsterdam

Colin Keating, International Affairs Consultant

Pauline Kerr, Fellow and Director of Studies, Asia-Pacific College of Diplomacy, ANU

Marie-Eve Loiselle, Research Assistant, Centre for International Governance and Justice, ANU

William Maley, Director, Asia-Pacific College of Diplomacy, ANU

Karene Melloul, Senior Advisor, Australian Federal Police

Adrian Morrice, Political Affairs Consultant

Guillermo Puente Ordorica, Deputy Head of Mission, Embassy of Mexico

Bruce Oswald, Associate Professor, Melbourne Law School

Caitlin Reiger, Director, International Policy Relations International, Center for Transitional Justice

Susan Harris Rimmer, Research Officer, Australian Council for International Development

Jim Rolfe, Deputy Director, Asia Pacific Civil-Military Centre of Excellence

Amy Rosnell, Protection of Civilians Officer, Asia Pacific Civil-Military Centre of Excellence

Charles Sampford, Director, Institute for Ethics, Governance and Law Griffith University

Mandira Sharma, Advocacy Forum-Nepal

Gabrielle Simm, Visitor, Regulatory Institutions Network, ANU

Veronica Taylor, Director, Regulatory Institutions Network, ANU

Amelia Telec, Senior Legal Officer, Attorney-General's Department

Ramesh Thakur, Professor, Asia-Pacific College of Diplomacy, ANU

Sue Thompson, Research Coordinator, Asia Pacific Civil-Military Centre of Excellence

Peter Thomson, Governance and Rule of Law Advisor, Asia Pacific Civil-Military Centre of Excellence

Rachel Wallbridge, Rule of Law Project Officer, Asia Pacific Civil-Military Centre of Excellence

Grant Wardlaw, Senior Fellow, ARC Centre of Excellence in Policing and Security, ANU

Natasha Yacoub, United Nations High Commissioner for Refugees

## **Workshop 2: The United Nations Security Council, Sanctions and the Rule of Law (held at the Australian National University, 14 and 15 December 2011)**

John Braithwaite, Founder, Regulatory Institutions Network, ANU

Takele Bulto, Postdoctoral Fellow, Centre for International Governance and Justice, ANU

Kiho Cha, Senior Political Affairs Officer, Security Council Subsidiary Organs Branch

Hilary Charlesworth, Director, Centre for International Governance and Justice, ANU

Stephen Clark, Executive Officer, Sanctions & Transnational Crime Section, International Legal Branch, Department of Foreign Affairs and Trade

Jeremy Farrall, Fellow, Asia-Pacific College of Diplomacy, ANU

Vera Gowlland, Emeritus Professor, Graduate Institute of International and Development Studies

Devika Hovell, Lecturer, University of Birmingham

Machiko Kanetake, Postdoctoral Researcher, Faculty of Law, University of Amsterdam

Colin Keating, International Affairs Consultant

Pauline Kerr, Fellow and Director of Studies, Asia-Pacific College of Diplomacy, ANU

Marie-Eve Loiselle, Research Assistant, Centre for International Governance and Justice, ANU

Emily Mackay, Senior Legal Officer, Office of International Law, Attorney-General's Department

William Maley, Director, Asia-Pacific College of Diplomacy, ANU

Christopher Michaelsen, Senior Lecturer, Faculty of Law, University of New South Wales

Hitoshi Nasu, Lecturer, ANU College of Law

Guillermo Puente Ordorica, Deputy Head of Mission, Mexican Embassy

Amy Rosnell, Protection of Civilians Officer, Asia Pacific Civil-Military Centre of Excellence

Peter Scott, Director, Sanctions & Transnational Crime Section, Department of Foreign Affairs and Trade

Mandira Sharma, Advocacy Forum-Nepal

Nicole Shearing, Legal Officer, Office of International Law, Attorney-General's Department

Jacqueline Shire, Expert, Panel of Experts, UN Security Council's Iran Sanctions Committee

Ramesh Thakur, Asia-Pacific College of Diplomacy, ANU

Peter Thomson, Governance and Rule of Law Advisor, Asia Pacific Civil-Military Centre of Excellence

Jeni Whalan, Manager, Research and Lessons learned, Asia Pacific Civil-Military Centre of Excellence

Ishola Williams, Expert, Panel of Experts, UN Security Council's Iran Sanctions Committee

Wenlei Xu, Expert, Panel of Experts, UN Security Council's Iran Sanctions Committee

Salome Zourabichvili, Coordinator, Panel of Experts, United Nations Security Council's Iran Sanctions

## **Workshop 3: The United Nations Security Council, Peacekeeping and the Rule of Law (held in New York City, 30 May 2012)**

Yasser Baki, Permanent Mission of the United Kingdom to the UN

Giovanni Bassu, Rule of Law Unit, UN Executive Office of the Secretary-General

Michele Brandt, Independent Consultant  
Shane Chalmers, Australian National University  
Hilary Charlesworth, Australian National University  
Annemarie Devereux, UN Office of the High Commissioner for Human Rights  
Erika De Wet, University of Pretoria  
Jeremy Farrall, Australian National University  
Dorota Gierycz, Webster University  
Terence Halliday, American Bar Foundation  
Annika Hansen, Office of the Rule of Law and Security Institutions, UN Department of Peacekeeping Operations  
Marie-Eve Loiselle, Australian National University  
Odd Malme, Permanent Mission of Norway to the UN  
Olivier Nduhungirehe, Permanent Mission of Rwanda to the UN  
Staffan Ocusto, Permanent Mission of Sweden to the UN  
Robert Pulver, Office of Rule of Law & Security Institutions, UN Department of Peacekeeping Operations  
Jothie Rajah, American Bar Foundation  
Ricardo Rizzo, Permanent Mission of Brazil to the UN  
Richard Zajac Sannerholm, Folke Bernadotte Academy  
Lisa Sharland, Permanent Mission of Australia to the United Nations  
Leanne Smith, Policy and Best Practices Service UN Department of Peacekeeping Operations  
Bruno Stagno Ugarte, Security Council Report  
Antonios Tzanakopoulos, University College, London  
Guglielmo Verdirame, King's College, London  
Jeni Whalan, Australian Civil-Military Centre

#### **Workshop 4: The United Nations Security Council, Sanctions and the Rule of Law (held in New York City, 31 May 2012)**

Movses Abelian, Security Council Affairs Division, UN Department of Political Affairs  
Stefan Barriga, Permanent Mission of Liechtenstein to the UN  
David Biggs, Security Council Subsidiary Organs Branch  
Shane Chalmers, Australian National University  
Hilary Charlesworth, Australian National University  
David Cortright, Kroc Institute for International Peace Studies  
Erika De Wet, University of Pretoria  
Sue E Eckert, Watson Institute for International Studies, Brown University  
Jeremy Farrall, Australian National University  
Lisa Ginsborg, New York University School of Law  
Terence Halliday, American Bar Foundation  
Themobile Joyiu, Permanent Mission of South Africa to the UN  
Marie-Eve Loiselle, Australian National University  
George A Lopez, Kroc Institute for International Peace Studies  
Aleksandar Martinovic, Security Council Subsidiary Organs Branch  
Kimberly Prost, Office of the Ombudsperson  
Catherine Quidenus, Permanent Mission of Austria to the UN  
Jothie Rajah, American Bar Foundation  
Sue Robertson, Permanent Mission of Australia to the UN  
Richard Zajac Sannerholm, Folke Bernadotte Academy

Svenja Strobel, Permanent Mission of Germany to the UN

Nikolas Stürchler, Permanent Mission of Switzerland to the UN

Gerhard Thallinger, Permanent Mission of Austria to the UN

Antonios Tzanakopoulos, University College, London

Bruno Stagno Ugarte, Security Council Report

Guglielmo Verdirame, King's College, London

Kristen Wall, Kroc Institute for International Peace Studies

Jeni Whalan, Australian Civil-Military Centre

### **Workshop 5: The United Nations Security Council, Force and the Rule of Law (held at the Australian National University, 21 and 22 June 2012)**

Suzanne Akila, Australian National University

Michael Bliss, Department of Foreign Affairs and Trade

Shane Chalmers, Australian National University

Hilary Charlesworth, Australian National University

Ada Cheung, Department of Foreign Affairs and Trade

Olivia Cribb, Australian Civil-Military Centre

Imelda Deinla, Australian National University

Jeremy Farrall, Australian National University

Gina Heathcote, University of London

Seung-Hun Hong, Australian National University

Colin Keating, International Affairs Consultant

Nathan Kensey, Office of International Law, Attorney-General's Department

Marie-Eve Loiselle, Australian National University

William Maley, Australian National University

Sarah McCosker, Attorney-General's Department

Robert McLaughlin, Australian National University

Guillermo Puente Ordorica, Mexican Embassy

Andrew Rose, Department of Foreign Affairs and Trade

Alan Ryan, Australian Civil-Military Centre

Amy Sheridan, Australian Civil-Military Centre

Gabrielle Simm, Australian National University

Gerry Simpson, Melbourne Law School

Dale Stephens, University of Adelaide

Peter Thomson, Australian Civil-Military Centre

Megan Watson, Department of Foreign Affairs and Trade

Natasha Yacoub, United Nations High Commissioner for Refugees

### **Workshop 6: The United Nations Security Council, Force and the Rule of Law (held in New York City, 13 June 2013)**

Karine Bannelier, CESICE, Université Grenoble II

Alex Bellamy, Griffith Asia Institute

Michael Bliss, Permanent Mission of Australia to the UN

Carolyn Bull, Office of National Assessments

Shane Chalmers, Australian National University

Théodore Christakis, CESICE, Université Grenoble II

Jesse Clarke, Permanent Mission of the United Kingdom to the UN

Jeremy Farrall, Australian National University  
Michele Griffin, Executive Office of the Secretary-General  
Joanna Harrington, University of Alberta  
Andrew Hyslop, UN Department of Peacekeeping Operations  
Thembile Joyini, Permanent Mission of the Republic of South Africa to the UN  
Dino Kritsiotis, University of Nottingham  
Marie-Eve Loiselle, Australian National University  
Julia O'Brien, Permanent Mission of Australia to the UN  
Mary Ellen O'Connell, Notre Dame University  
Madalene O'Donnell, UN Department of Peacekeeping Operations  
Bruce Oswald, University of Melbourne  
Daniel Pfister, Executive Office of the Secretary-General  
Adriana Murillo Ruin, Permanent Mission of Costa Rica  
Alan Ryan, Australian Civil-Military Centre  
Mark Simonoff, Permanent Mission of the United States to the UN  
Leanne Smith, UN Department of Peacekeeping Operations  
Nikolas Stürchler, Permanent Mission of Switzerland to the UN  
Kelisiana Thynne, Australian Civil-Military Centre  
Bruno Stagno Ugarte, Security Council Report  
Jeni Whalan, University of New South Wales  
Ralph Wilde, University College London

## **Workshop 7: Strengthening the Rule of Law through the Security Council (held at the Australian National University, 17 and 18 September 2012)**

Michael Bliss, Department of Foreign Affairs and Trade  
Shane Chalmers, Australian National University  
Hilary Charlesworth, Australian National University  
Robert Cryer, University of Birmingham  
Peter Danchin, University of Maryland  
Annemarie Devereux, Australian National University  
Jeremy Farrall, Australian National University  
Chris Gevers, University of KwaZulu-Natal  
Marlies Glasius, University of Amsterdam  
Colin Keating, International Affairs Consultant  
Pauline Kerr, Australian National University  
Martin Krygier, University of New South Wales  
Emma Larking, Australian National University  
Marie-Eve Loiselle, Australian National University  
William Maley, Australian National University  
Sarah McCosker, Attorney-General's Department  
Frédéric Mégret, McGill University  
Usha Natarajan, American University in Cairo  
Guillermo Puente Ordorica, Mexican Embassy  
Alan Ryan, Australian Civil-Military Centre  
Bruno Stagno Ugarte, Security Council Report  
Peter Thomson, Attorney-General's Department  
Kelisiana Thynne, Australian Civil-Military Centre

## Workshop 8: Strengthening the Rule of Law through the Security Council (held in New York City, 14 June 2013)

Philip Alston, New York University

Karine Bannelier, Université Grenoble II

Stefan Barriga, Permanent Mission of Liechtenstein to the UN

David Biggs, Security Council Subsidiary Organs Branch

Michael Bliss, Permanent Mission of Australia to the UN

Carolyn Bull, Office of National Assessments

Kiho Cha, Security Council Subsidiary Organs Branch

Shane Chalmers, Australian National University

Théodore Christakis, Université Grenoble II

Jeremy Farrall, Australian National University

Terence Halliday, American Bar Foundation

Joanna Harrington, University of Alberta

Thembile Joyini, Permanent Mission of South Africa to the UN

Marie-Eve Loisel, Australian National University

Paul McKell, Permanent Mission of the United Kingdom

Ray Murphy, National University of Ireland

Pernilla Nilsson, Permanent Mission of Sweden to the UN

Julia O'Brien, Permanent Mission of Australia to the UN

Staffan Ocusto, Permanent Mission of Sweden

Bruce Oswald, University of Melbourne

Alan Ryan, Australian Civil-Military Centre

Edric Selous, Rule of Law Unit, Executive Office of the Secretary-General

Diana Sutikno, Permanent Mission of Indonesia to the UN

Kelisiana Thynne, Australian Civil-Military Centre

Jeni Whalan, University of New South Wales

Ralph Wilde, University College London

### III. Project working papers

Available online at <http://regnet.anu.edu.au/research/research-projects/details/536/strengthening-rule-law-through-united-nations-security>

#### A. The UN Security Council and the rule of law

Annemarie Devereux, Strengthening human rights policy coherence within Security Council approaches to the rule of law: Recommendations for action (WP 6.3)

Martin Krygier, What's the rule of law got to do with it? (WP 6.1)

Usha Natarajan, Accounting for the absence of rule of law: History, culture and causality (WP 6.5)

Alan Ryan, 'We sit in the mud and reach for the stars': Building complex interagency relationships to assist the United Nations Security Council support the rule of law (WP 6.4)

Bruno Stagno Ugarte, Enhancing UNSC cooperation with the International Criminal Court (WP 6.2)

#### B. Peacekeeping and the rule of law

Roisin Burke, Troop-discipline and sexual offences by UN military peacekeepers: The UN's response— moving beyond the current status quo? (WP 1.5)

Annemarie Devereux, Human rights vis-à-vis rule of law: Unruly cousin or bedrock of the family? (WP 3.1)

Laura Grenfell, The UN and 'rule-of-law' constitutions (WP 1.6)

Machiko Kanetake, The UN zero tolerance policy's whereabouts: On the discordance between politics and law on the internal-external divide (WP 1.8)

Guillermo Puente Ordorica, The relationship between the UN Security Council, the rule of law and peacekeeping: the role of Mexico as an elected member in 2009-2010 (WP 1.7)

Bruce Oswald, Informal justice and UN peace operations: Principles for military members (WP 1.3)

Charles Sampford, The rule of law begins at home (WP 1.1)

Richard Zajac Sannerholm, Securitisation, sectorisation and goal displacement: Rule of law assistance in UN peace operations (WP 3.2)

Mandira Sharma, Transitional justice and vetting from the perspective of TCC (WP 1.4)

Gabrielle Simm, Aid for sex: Humanitarian NGO workers in West Africa (WP 1.2)

#### C. Sanctions and the rule of law

Kiho Cha, Tilo Stolz and Maarten Wammes, Ensuring fairness in the listing and delisting process of individuals and entities subject to sanctions (WP 2.1)

David Cortright, Sanctions, society and law in the struggle against violent extremism (WP 4.1)

Vera Gowlland-Debbas, The Security Council and issues of responsibility under international law (WP 2.2)

Machiko Kanetake, The interfaces between the national and international rule of law: The case of UN targeted sanctions (WP 2.4)

Kimberly Prost, The Office of the Ombudsperson: A case for fair process (WP 4.3)

Guillermo Puente Ordorica, Mexico's role and contribution to the UNSC's Subsidiary Organs (WP 2.3)

Erika de Wet, Judicial Challenges to the United Nations Security Council's use of sanctions with some references to national implementation (WP 4.2)

## D. Force and the rule of law

Karine Bannelier and Théodore Christakis, Strengthening oversight of use of force mandates by the UN Security Council: a set of 9 proposals (WP 8.1)

Alex Bellamy, Protecting responsibly: UNSC and the use of force for human protection purposes (WP 7.1)

Joanna Harrington, Use of force, rule of law restraints, and process: Unfinished business for the responsibility to protect concept (WP 7.2)

Gina Heathcote, UNSC and rule of law: Use of force, robust peacekeeping and gender perspectives (WP 5.5)

Guillermo Puente Ordorica, Use of force and the rule of law: The approach of Mexico during its membership as an elected member of the Security Council, 2009-2010 (WP 5.2)

Alan Ryan, Panel comments on 'responsibility while protecting' (WP 5.3)

Gerry Simpson, Humanity, law, force (WP 5.4)

Dale Stephens, The accommodation, disjunction and felt experience of law in military operations (WP 5.1)

Natasha Yacoub, Protecting Civilians at the Security Council: Responsibility or Politics? (WP 5.6)

## IV. Additional resources on the Security Council and the rule of law

### A. Selected Security Council decisions

UN Security Council Presidential Statement, ‘The promotion and strengthening of the rule of law in the maintenance of international peace and security’, UN Doc. S/PRST/2014/5 (21 February 2014).

UN Security Council Presidential Statement, ‘The promotion and strengthening of the rule of law in the maintenance of international peace and security’, UN Doc. S/PRST/2012/1 (19 January 2012).

UN Security Council Presidential Statement, ‘The promotion and strengthening of the rule of law in the maintenance of international peace and security’, UN Doc. S/PRST/2010/11 (29 June 2010).

UN Security Council Presidential Statement, ‘Strengthening international law: Rule of law and maintenance of international peace and security’, UN Doc. S/PRST/2006/28 (22 June 2006).

UN Security Council Presidential Statement, ‘Justice and the Rule of Law: the United Nations Role’, UN Doc. S/PRST/2004/34 (6 October 2004).

UN Security Council Presidential Statement, ‘Justice and the Rule of Law: the United Nations Role’, UN Doc. S/PRST/2003/15 (24 September 2003).

### B. Selected General Assembly decisions

UN General Assembly Resolution, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, UN Doc. A/RES/70/1 (25 September 2015).

UN General Assembly Resolution, ‘World Summit outcome’, UN Doc. A/RES/60/1 (24 October 2005).

UN General Assembly Resolution, ‘United Nations Millennium Declaration’, UN Doc. A/RES/55/2 (18 September 2000).

### C. Secretary-General’s Reports, Guidance Notes, Bulletins and Policies

#### **Reports**

UN Secretary-General’s Report, ‘Special measures for protection from sexual exploitation and sexual abuse’, UN Doc. A/69/779 (13 February 2015).

UN Secretary-General’s Report, ‘Fifth annual report on strengthening and coordinating United Nations rule of law activities’, UN Doc. A/68/213 (29 July 2013).

UN Secretary-General’s Report, ‘Measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations’, UN Doc. S/2013/341 (11 June 2013).

UN Secretary-General’s Report, ‘Human rights due diligence policy on United Nations support to non-United Nations security forces’, UN Doc. A/67/775-S/2013/110 (5 March 2013).

UN Secretary-General’s Report, ‘Fourth annual report on strengthening and coordinating United Nations rule of law activities’, UN Doc. A/67/290 (10 August 2012).

UN Secretary-General's Report, 'Delivering justice: Programme of action to strengthen the rule of law at the national and international levels' UN Doc. A/66/749 (16 March 2012).

UN Secretary-General's Report, 'The rule of law and transitional justice in conflict and post-conflict societies' UN Doc. S/2011/634 (12 October 2011).

UN Secretary-General's Report, 'Third annual report on strengthening and coordinating United Nations rule of law activities', UN Doc. A/66/133 (8 August 2011).

UN Secretary-General's Report, 'Second annual report on strengthening and coordinating United Nations rule of law activities', UN Doc. A/65/318 (20 August 2010).

UN Secretary-General's Report, 'Annual report on strengthening and coordinating United Nations rule of law activities', UN Doc. A/64/298 (17 August 2009).

UN Secretary-General's Report, 'Strengthening and coordinating United Nations rule of law activities', UN Doc. A/63/226 (6 August 2008).

UN Secretary-General's Report, 'Uniting our strengths: Enhancing United Nations support for the rule of law', UN Doc. A/61/636-S/2006/980 (14 December 2006).

UN Secretary-General's Report, 'In larger freedom: Towards development, security and human rights for all', UN Doc. A/59/2005 (21 March 2005).

UN Secretary-General's Report, 'The rule of law and transitional justice in conflict and post-conflict societies' UN Doc. S/2004/616 (23 August 2004).

## **Guidance Notes**

UN Secretary-General's Guidance Note, 'UN approach to assistance for strengthening the rule of law at the international level' (May 2011).

UN Secretary-General's Guidance Note, 'UN assistance to constitution-making processes' (April 2009).

UN Secretary-General's Guidance Note, 'UN approach to rule of law assistance' (April 2008).

## **Bulletins**

UN Secretary-General's Bulletin, 'Observance by United Nations forces of international humanitarian law, UN Doc. ST/SGB/1999/13 (6 August 1999).

## **Policies**

Human Rights Due Diligence Policy on UN support to non-UN security forces, UN Doc. A/67/775-S/2013/110 (5 March 2013).

Policy on Human Rights Screening of UN Personnel, Decision No 2012/18 (11 December 2012).

Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual), UN Doc. A/C.5/60/26 (11 January 2006), amended by UN General Assembly, 'Revised Draft Model Memorandum of Understanding', UN Doc. A/61/19 (Part III) (11 June 2007).

## D. Other United Nations policy documents

High-level Independent Panel on Peace Operations, 'Uniting our strengths for peace: politics, partnership and people', UN Doc. A/70/95-S/2015/446 (17 June 2015).

Senior Advisory Group, 'Civilian capacity in the aftermath of conflict', UN Doc. A/65/747-S/2011/85 (22 February 2011).

United Nations, The United Nations rule of law indicators: Implementation guide and project tools (2011).

United Nations Development Programme, 'Strengthening the rule of law in conflict and post-conflict situations' (2008-2011).

United Nations Development Programme, 'Global programme on strengthening the rule of law in conflict and post-conflict situations: Annual report 2010' (2011).

Panel on United Nations Peace Operations, 'Comprehensive review of the whole question of peacekeeping operations in all their aspects', UN Doc. A/55/305-S/2000/809 (21 August 2000).

## E. Non-United Nations policy documents

Michele Brandt, et al, Constitution-Making and Reform: Options for the Process (Interpeace, 2011).

Centre on International Cooperation, Robust Peacekeeping: The Politics of Force (New York University, 2009).

Simon Chesterman, 'Taking stock: The UN Security Council and the rule of law', keynote address, Dialogue with Member States on the

rule of law at the international level (October 2010).

Bruce Jones and Camino Kavanagh, 'Shaky foundations: An assessment of the UN's rule of law support agenda', Report from the Center on International Cooperation, (New York University, 2011).

International Peace Institute, 'Advancing the rule of law agenda at the 67th General Assembly', Issue Brief (IPI, 2012).

Report from the Austrian Initiative 2004-2008, The UN Security Council and the Rule of Law: The role of the Security Council in Strengthening a Rules-Based International System (Austrian Federal Ministry for European and International Affairs and New York University, 2008).

Security Council Report, 'Third Report on the Rule of law: The Institutional Framework: International Criminal Courts and Tribunals' (New York: Security Council Report, 20 August 2015).

Security Council Report, 'Second Report on the Rule of law: The Security Council and Accountability' (New York: Security Council Report, 18 January 2013).

Security Council Report, 'Cross-cutting Report on the Rule of law' (New York: Security Council Report, 28 October 2011).

World Bank, World Development Report 2011: Conflict, Security and Development (World Bank, 2011).

