

## **RAISON D'ETRE OR IMPERIAL TOOL? THE UN SECURITY COUNCIL AND THE RULE OF INTERNATIONAL LAW**

*Comments by Dr. Jeremy Farrall at the plenary panel  
'Imperilled or Imperial? The rule of international law'  
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### **I. Introduction**

- On the international plane, many lawyers conflate the concepts of the rule of law and international law.
- This is understandable. In the domestic sphere, the law goes hand in hand with the rule of law and it is logical to assume that in the international sphere the rule of law should mean the rule of international law.
- But one pivotal international actor does not equate the rule of law with international law. That actor is the UN Security Council.
- The Security Council approaches the rule of law and international law so differently that one could be forgiven for thinking there was almost no connection between them. It supports the rule of law wholeheartedly, whilst waxing hot and cold on international law.
- In my comments I'll briefly compare the Council's different approaches to the rule of law and international law. Then I'll draw some quick conclusions and look forward to a rich discussion.

## II. The Security Council and the rule of law

- If you take the UN Security Council at its word, it has become an ardent supporter of the rule of law.
- The rule of law regularly rolls of the Security Council's collective tongue, along with other lofty abstract ideals such as good governance, democracy and national reconciliation.
- It is interesting that the Council has begun to take such an interest in the ROL, as the concept was effectively snubbed at the birth of the United Nations.
- Despite concerted efforts by some delegations (including China and Australia) at the San Francisco Conference to ensure that the principles of justice and the rule of law would guide the action of the UN Security Council,<sup>1</sup> the phrase 'rule of law' is conspicuously absent from the provisions of the United Nations Charter.
- The UN Charter established the Security Council as a political organ, with primary responsibility for the maintenance of international peace and security.<sup>2</sup>

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<sup>1</sup> Evatt, Herbert Vere, *The United Nations* (Cambridge MA, Harvard University Press, 1948) 36. See also *Documents of the UNCIO*, Vol. 1, 129-130 (statement by the Chinese delegate).

<sup>2</sup> See UN Charter, Chapters III and V, in particular Article 24.

- The Security Council did not take much interest in the rule of law until after the Cold War.
- In January 1992 world leaders gathered in New York for the first ever Security Council meeting at the summit level. At that landmark meeting, leaders from countries with a range of political and socio-economic traditions, from India to Ecuador and from France to Morocco, underlined the importance of the rule of law in international affairs.<sup>3</sup>
- Among them the President of the United States, George H.W. Bush, urged the Security Council to ‘expand the circle of nations committed to human rights and the rule of law’.<sup>4</sup>
- Global leaders have subsequently reinforced the importance of the rule of law on multiple occasions. The Millennium Declaration listed strengthening respect for the rule of law in international affairs as the first of its objectives of ‘special significance’.<sup>5</sup>
- The 2005 World Summit Outcome underlined that the rule of law belonged to ‘the universal and indivisible core values and principles of the United Nations’.<sup>6</sup> It also emphasised the commitment of UN member

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<sup>3</sup> See, e.g., S/PV.3046 (31 January 1992), pp. 8-9 (UNSG Boutros-Boutros Ghali), p. 18 (President Mitterand, France), p. 23 (President Borja, Ecuador), p. 36 (King Hassan II, Morocco), p. 47 (President Yeltsin, Russian Federation), pp. 50 (a-z) & 50 (President Bush, United States), pp. 59-60 (President Perez, Venezuela), p. 67 (Chancellor Vranitsky, Austria), pp. 78-9 (Prime Minister Veiga, Cape Verde), p. 97 (Prime Minister Rao, India), p. 107 (Prime Minister Miyazawa, Japan).

<sup>4</sup> *Ibid.*, p. 50.

<sup>5</sup> A/RES/55/2 (18 September 2000): *United Nations Millennium Declaration*, para. 9.

<sup>6</sup> GA Res. 60/1 (24 October 2005): *World Summit Outcome*, para. 119.

states to ‘an international order based on the rule of law and international law’.<sup>7</sup>

- Within the Security Council, mounting interest in the rule of law led to the establishment in September 2003 of a thematic agenda item entitled ‘Justice and the Rule of Law’.<sup>8</sup>
- The Council has adopted multiple presidential statements recalling the ‘repeated emphasis’ given to justice and the rule of law in its own work<sup>9</sup> and stressing the importance and urgency of the restoration of justice and the rule of law in post-conflict societies.<sup>10</sup>
- The most striking illustration of the transformation of the rule of law from curiosity to familiar friend lies in the term’s increasing appearance in the Council’s resolutions.
- During the Cold War, the rule of law featured in Security Council resolutions a mere handful of times.<sup>11</sup> By contrast, in the nine years from the beginning of 1998 until the end of 2006, the Security Council referred to the ‘rule of law’ no fewer than 88 times in its resolutions.<sup>12</sup>

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<sup>7</sup> *Ibid.*, para. 134.

<sup>8</sup> For meetings held under this new agenda item, see: S/PV.4833 (24 September 2003); S/PV.4835 (30 September 2003); S/PV.5052 (6 October 2004).

<sup>9</sup> S/PRST/2003/15 (24 September 2003), para. 1.

<sup>10</sup> S/PRST/2004/34 (6 October 2004), para. 3.

<sup>11</sup> See, e.g., SC Res. 161 (21 February 1961).

<sup>12</sup> For a list of Security Council resolution references to the rule of law, see Table 1.

- The Security Council has not articulated or endorsed any particular definition or model of the rule of law. However, five basic clusters of meaning can be identified from its use of the term.

**The first cluster is law and order.**

- The Council has used the term when mandating UN peace operations to support the (re)establishment of law and order institutions in the **Central African Republic, East Timor and Haiti.**

**The second cluster is ending impunity for crimes.**

- The Council has invoked the term when calling for an end to impunity for war crimes and human rights atrocities in **Sierra Leone, Burundi, and the Sudan.** It has also used the phrase when emphasizing the need to strengthen national courts in **Rwanda, the former Yugoslavia and Afghanistan.**

**The third cluster entails resolving international conflict through law.**

- In one instance, the Council expressed support for the efforts of the Former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia to resolve violence ‘in a manner consistent with the rule of law’.

**The fourth cluster is the protection and promotion of human rights.**

- The Council has used the ROL to stress the urgency of protecting vulnerable citizens and respecting human rights **in Angola and the**

**Democratic Republic of the Congo** and to denote government that respects human rights in **Liberia, Iraq and Guinea-Bissau**.

**The fifth and final cluster equates the rule of law with principled governance.**

- The Council has used the rule of law to underscore the importance of improving governance and eradicate corruption in Africa and **East Timor** and it has used the ROL as a metaphor for democratic, principled government in **Iraq**.
- What is striking about all this is that the Council overwhelmingly uses the “rule of law” when referring to domestic, predominantly post-conflict situations. The one exception is the dispute between the Former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia.

- The Security Council's attempts to bring the rule of law to fragile, failing or failed post-conflict states can be read in different ways. On the one hand it might be argued that the goal of strengthening the rule of law goes to the heart of the Council's *raison d'être*, which is to maintain international peace and security. For is it not in the interests of peace and security to encourage traumatized societies to resolve conflict by non-violent, legal means?
- But a different reading might also be drawn from the Council's attempts to strengthen the rule of law in post-conflict environments. For in many senses the Council's rule of law agenda entails quieting and – dare we admit it – **civilizing** unruly, savage or barbarian states and peoples. This is a classically imperialist endeavour.
- Indeed, valid questions can be raised about:
  - where the Council pursues its rule of law agenda (why in Kosovo, Haiti and Liberia and why not in Tibet, Chechnya or Burma?);
  - whose law is being used to constitute the rule of law (is law being derived from local and locally-welcomed sources or does it stem predominantly from European or Anglo-American legal traditions?); and
  - whether the construction of foreign, resource-intensive legal structures is the most effective way to promote sustainable peace and stability.

### **III. The Security Council and international law**

- So how does the Council's attitude to international law differ from its approach to the rule of law?
- Interestingly, the Council refers to international law more frequently than it does to the rule of law. Between January 1998 and December 2006 there were 50 more references to international law (139) than there were to the rule of law.<sup>13</sup> Yet the context and substance of these references to international law is revealing.
- More than one-third (50) of the references to international law appear in general, thematic humanitarian resolutions which are uncontroversial and attract widespread support as they do not relate to specific, concrete, politically-contested circumstances. They encompass issues such as children affected by armed conflict (29); the protection of refugees, civilians and UN personnel (15); peace and security in Africa (2); weapons of mass destruction (2); women and peace and security (1); and peacekeeping reform (1).
- The most revealing references to international law are of course those that feature in resolutions addressing politically-contested issues. Here I'll briefly survey two such hot-button issues: terrorism and Iraq.

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<sup>13</sup> For a list of Security Council resolution references to international law, see Table 2.

## A. Terrorism

- Between 1998 and 2006 the Council referred to international law 31 times in resolutions addressing terrorism. Seventeen of these references appeared in resolutions addressing terrorism in general and a further 14 have featured in the Council's resolutions on the Taliban and Al Qaida.
- The Council's use of international law in counterterrorism resolutions reveals conflicting impulses.
- **On the one hand**, international law is used to appeal to states to take robust action against terrorists:
  - The Council typically reaffirms the need to combat by all means, in accordance with international law, threats to peace caused by terrorist acts [1455(pp3) 1526(pp3); 1617(pp4); 1735(pp4)].
  - It emphasises the need for states to cooperate fully in the fight against terrorism, in accordance with their obligations under international law, to find, deny safe haven to and bring to justice terrorists [1456(A(3)); 1566(2); 1624(pp15, 1)].
  - The Council has even gone so far as describing the fight against terrorism as **necessary in accordance with international law to protect the right to life** [1624(pp5)].

- **On the other hand**, however, international law is sometimes used to remind states to temper actions taken in the name fighting terrorism.
- Thus a number of resolutions, while on the one hand calling upon states to take robust action against terrorism and terrorists, on the other include the proviso that such action should be in accordance with international law, including human rights law, refugee law and humanitarian law [1377, Annex, pp8; 1456(Annex, preamble and para 6; 1535 (pp4); 1566(pp3, pp6); 1624(pp2; para 4)].

## **B. Iraq**

- In the case of Iraq, shortly after the outbreak of war in March 2003, the SC requested all parties to abide by their obligations under international law, in particular the G Convn and the Hague Regulations, including those relating to the essential civilian needs of the people of Iraq.
- Around the time of US President George Bush's declaration that the US mission had been accomplished, the SC recognized the obligations under IL of the US and UK as occupying powers [1483, pp13]; called on them, consistent with IL, to promote the welfare of the Iraqi people through the effective administration of the territory [1483(4)]; and again called on all parties to comply with their obligations under IL, including the Gen Convns and the Hague Regulations of 1907 [1483(5)].

- In 3 subsequent resolutions the Council affirmed the importance of, all forces promoting the maintenance of security and stability in Iraq acting in accordance with IL, including obligations under IHL.
- Here we have a series of trade-offs that might be characterised as caving in to Empire, on the one hand, and as seeking to restrain Empire, albeit modestly, on the other hand.
- Despite having steadfastly refused to endorse the use of force against Iraq, the Council nevertheless gives the US and UK legitimate cover for their actions by recognizing them as occupying powers and calling on them to engage in effective administration of the territory.
- The difference in the Council's approach to the invasion of Iraq by the US and the UK in March 2003, which was not authorized by the UN Security Council and was not justified by the doctrine of self-defence, and the Council's earlier response to the invasion of Kuwait by Iraq itself in August 1990, **could not be more stark.**

#### **IV. Conclusions**

- So might the Security Council's diverging approaches to the rule of law and international law some day converge?
- In all likelihood the Council will continue to extol the virtues of the ROL because it can be held at arm's length, in its rightful home in domestic, predominantly post-conflict, fragile, failed or failing states.
- IL, by contrast, will continue to be courted one day then ignored the next.
- The irony in all this is that the Council's very effectiveness depends upon its decisions being respected and implemented as binding under the UN Charter and thus under IL.
- By sending mixed messages about IL, the Council invites ambivalence and cynicism about its own contributions to IL. When UN member states see the SC undermining or abusing international law, they are less likely to take seriously the legal obligations contained in SC resolutions.
- Until the Council's rhetorical commitment to the ROL can be said to extend to the rule of IL, the Council will continue to represent as much a threat to as a guardian of IL.
- IL, for its part, will remain a handmaiden rather than a handbrake when it comes to the exercise of power through the SC.

**TABLE 1: Security Council resolution references to the rule of law (1998-2006)**<sup>14</sup>

<i>Agenda Item</i>	<i>Provisions referring to the rule of law</i>
Afghanistan	SC Res. 1536 (26 March 2004), paras. 10, 13. SC Res. 1589 (24 March 2005), paras. 9, 11. SC Res. 1662 (23 March 2006), paras. 8, 11.
Situation in Africa	SC Res. 1170 (28 May 1998), preambular para. 13.
Angola	SC Res. 1149 (27 January 1998), para. 4. SC Res. 1157 (20 March 1998), para. 11. SC Res. 1173 (12 June 1998), para. 8. SC Res. 1180 (29 June 1998), preambular para. 6. SC Res. 1202 (15 October 1998), para. 11. SC Res. 1213 (3 December 1998), para. 6. SC Res. 1433 (15 August 2002), para. 3B(i).
Bosnia and Herzegovina	SC Res. 1168 (21 May 1998), para. 4. SC Res. 1396 (5 March 2002), para. 3.
Burundi	SC Res. 1040 (29 January 1996), para. 2. SC Res. 1545 (21 May 2004), preambular para. 9. SC Res. 1577 (1 December 2004), preambular para. 9. SC Res. 1602 (31 May 2005), preambular para. 12. SC Res. 1606 (20 June 2005), preambular para. 3. SC Res. 1719 (25 October 2006), preambular para. 2(d).
Central African Republic	SC Res. 1159 (27 March 1998), para. 14(e).
Côte d'Ivoire	SC Res. 1528 (27 February 2004), para. 6(q). SC Res. 1609 (24 June 2005), para. 2(x).
Dispute between the Former Yugoslav Republic of Macedonia and the FRY	SC Res. 1345 (21 March 2001), para. 5.
Democratic Republic of the Congo	SC Res. 1417 (14 June 2002), para. 5. SC Res. 1493 (28 July 2003), paras. 5, 11. SC Res. 1621 (6 September 2005), preambular para. 3. SC Res. 1635 (28 October 2005), preambular para. 3. SC Res. 1649 (21 December 2005), preambular para. 2. SC Res. 1671 (25 April 2006), preambular para. 3. SC Res. 1693 (30 June 2006), preambular para. 3. SC Res. 1711 (29 September 2006), preambular para. 4, para. 9.
Great Lakes region	SC Res. 1653 (27 January 2006), para. 4.
Guinea-Bissau	SC Res. 1580 (22 December 2004), preambular para. 5, paras. 2(a), 2(h).
Haiti	SC Res. 1529 (29 February 2004), para. 4. SC Res. 1542 (30 April 2004), preambular para. 4, para. 7(I)(d). SC Res. 1608 (22 June 2005), preambular para. 5. SC Res. 1658 (14 February 2006), preambular paras. 8, 12 (two references), 14. SC Res. 1702 (15 August 2006), preambular paras. 5, 8, paras. 11, 14-15.
ICTY and ICTR	SC Res. 1503 (28 August 2003), preambular para. 10. SC Res. 1534 (26 March 2004), para. 9.
Iraq	SC Res. 1483 (22 May 2003), preambular para. 5. SC Res. 1546 (8 June 2004), preambular para. 10, para. 7(b)(iii).

<sup>14</sup> Source: Farrall, *UN Sanctions and the Rule of Law*, Table A.

	SC Res. 1637 (8 November 2005), preambular para. 15. SC Res. 1723 (28 November 2006), preambular para. 17.
Liberia	SC Res. 1509 (19 September 2003), preambular para. 7. SC Res. 1626 (19 September 2005), preambular para. 7.
Protection of civilians in armed conflict	SC Res. 1265 (17 September 1999), preambular para. 6. SC Res. 1674 (28 April 2006), paras. 2, 11. SC Res. 1738 (23 December 2006), preambular para. 9.
Role of the Security Council	SC Res. 1318 (7 September 2000), Annex, Section I.
Sierra Leone	SC Res. 1346 (30 March 2001), preambular para. 4. SC Res. 1370 (18 September 2001), preambular para. 5. SC Res. 1400 (28 March 2002), preambular para. 9. SC Res. 1436 (24 September 2002), preambular para. 5. SC Res. 1470 (28 March 2003), preambular para. 6. SC Res. 1508 (19 September 2003), preambular para. 5. SC Res. 1562 (17 September 2004), preambular para. 9. SC Res. 1610 (30 June 2005), preambular para. 6. SC Res. 1620 (31 August 2005), preambular para. 7, para. 1(a)(v). SC Res. 1688 (16 June 2006), preambular paras. 4, 9. SC Res. 1734 (22 December 2006), preambular para. 10.
Strengthening peace operations	SC Res. 1327 (13 November 2000), Sections V, VI.
Sudan	SC Res. 1590 (24 March 2005), para. 4(a)(viii). SC Res. 1593 (31 March 2005), para. 4. SC Res. 1706 (31 August 2006), para. 8(k).
The Congo	SC Res. 161 (21 February 1961), preambular para. 2.
Threats to international peace and security	SC Res. 1625 (14 September 2005), preambular para. 6.
Timor Leste	SC Res. 1473 (4 April 2003), para. 1(iii). SC Res. 1599 (28 April 2005), preambular para. 9, para. 3.

**TABLE 2: Security Council resolution references to international law (1998-2006)**

<b>Agenda item</b>	<b>Provisions referring to international law</b>
Afghanistan	SC Res. 1214 (8 December 1998), para. 5
	SC Res. 1333 (19 December 2000), preambular para. 13
Brahimi report on peacekeeping operations	SC Res. 1327 (13 November 2000), Annex I, Preambular para. 3
Causes of conflict in Africa	SC Res. 1209 (19 November 1998), preambular para. 7
Children affected by armed conflict	SC Res. 1261 (30 August 1999), preambular para. 2; paras 2, 3, 13, 15, 18
	SC Res. 1314 (11 August 2000), preambular para. 5; paras 3, 16(f)
	SC Res. 1379 (20 November 2001), preambular para. 5; paras 8 (a), 9(c), 12(a), 13(d)
	SC Res. 1460 (30 January 2003), preambular para. 4, para. 7 (two references)
	SC Res. 1539 (22 April 2004), preambular para. 3; paras 2, 5, 6, 15(a)
	SC Res. 1612 (26 July 2005), preambular paras 2, 9; paras 2(a), 5, 9, 16, 20(a)
Côte d'Ivoire	SC Res. 1572 (15 November 2004), para. 8(d)
Counterterrorism	SC Res. 1189 (13 August 1998) Para. 5
	SC Res. 1269 (19 October 1999), preambular para. 4; para. 4
	SC Res. 1373 (28 September 2001), paras 3(f), 3(g)
	SC Res. 1377 (12 November 2001), Annex, preambular para. 8,
	SC Res. 1456 (20 January 2003), Annex, sole preambular para.; paras 3, 6 (two references)
	SC Res. 1535 (26 March 2004), preambular para. 4 (two references)
Democratic People's Republic of Korea (DPRK)	SC Res. 1695 (15 July 2006), para. 3
	SC Res. 1718 (14 October 2006), para. 8(f)
Democratic Republic of the Congo (DRC)	SC Res. 1291 (24 February 2000), para. 15
	SC Res. 1355 (15 June 2001), para. 19
	SC Res. 1445 (4 December 2002), para. 3
	SC Res. 1649 (21 December 2005), para. 10
	SC Res. 1698 (31 July 2006), para. 13 (two references)
Ethiopia and Eritrea	SC Res. 1177 (26 June 1998), preambular para.6
	SC Res. 1320 (15 September 2000), para. 1
	SC Res. 1369 (14 September 2001), preambular para. 3
	SC Res. 1398 (15 March 2002), preambular para. 4
	SC Res. 1430 (14 August 2002), preambular para. 6
	SC Res. 1466 (14 March 2003), preambular para. 4
Georgia	SC Res. 1150 (30 January 1998), para. 7
	SC Res. 1187 (30 July 1998), para. 3
	SC Res. 1225 (28 January 1999), para. 7
	SC Res. 1255 (30 July 1999), para. 7
	SC Res. 1287 (31 January 2000), para. 8
	SC Res. 1311 (28 July 2000), para. 7
	SC Res. 1339 (31 January 2001), para. 7
	SC Res. 1364 (31 July 2001), para. 11

	SC Res. 1393 (31 January 2002), para. 11
	SC Res. 1427 (29 July 2002), para. 12
	SC Res. 1462 (30 January 2003), para. 14
	SC Res. 1494 (30 July 2003), para. 14
	SC Res. 1524 (30 January 2004), para. 15
	SC Res. 1554 (29 July 2004), para. 15
	SC Res. 1582 (28 January 2005), para. 17
	SC Res. 1615 (29 July 2005), para. 18
Great Lakes	SC Res. 1653 (27 January 2006), para. 10
Guinea-Bissau	SC Res. 1216 (21 December 1998), para. 5
	SC Res. 1233 (6 April 1999), para. 11
Haiti	SC Res. 1529 (29 February 2004), para. 7
ICTR	SC Res. 1165 (30 April 1998), Annex, Article 12
	SC Res. 1431 (14 August 2002), Annex I, Article 12
ICTR & ICTY	SC Res. 1329 (30 November 2000), Annex I, Article 13; Annex II, Article 12
ICTY	SC Res. 1166 (13 May 1998), Annex, Article 13
	SC Res. 1207 (17 November 1998), para. 2
Iran	SC Res. 1696 (31 July 2006), para. 5
Iraq	SC Res. 1472 (28 March 2003), para. 1
	SC Res. 1483 (22 May 2003), preambular para. 13; paras 4, 5
	SC Res. 1511 (16 October 2003), para. 1
	SC Res. 1546 (8 June 2004), preambular para. 17
	SC Res. 1637 (8 November 2005), preambular para. 14
	SC Res. 1723 (28 November 2006), preambular para. 16
Kosovo	SC Res. 1199 (23 September 1998), para. 11
Liberia	SC Res. 1509 (19 September 2003), preambular para. 6; para. 8
Liberia/Sierra Leone	SC Res. 1688 (16 June 2006), preambular para. 4
Middle-East	SC Res. 1544 (19 May 2004), preambular para. 3
Peace and security in Africa	SC Res. 1170 (28 May 1998), preambular para.10
Prevention of armed conflict	SC Res. 1366 (30 August 2001), para. 10
Protection of civilians in armed conflict	SC Res. 1265 (17 September 1999), para. 2
	SC Res. 1296 (19 April 2000), preambular para. 7; para. 8
	SC Res. 1502 (26 August 2003), preambular paras 4, 5, 7; para. 3
	SC Res. 1674 (28 April 2006), preambular para. 7, 6
Protection of refugees	SC Res. 1208 (19 November 1998), paras 4, 5
Protection of UN personnel	SC Res. 1738 (23 December 2006), paras 4, 5, 7.
Rwanda (International Commission of Inquiry)	SC Res. 1161 (9 April 1998), para. 4
Sudan	SC Res. 1590 (24 March 2005), para. 9
	SC Res. 1706 (31 August 2006), preambular para. 9
Taliban & Al Qaida	SC Res. 1267 (15 October 1999), preambular para. 3
	SC Res. 1455 (17 January 2003), preambular para. 3
	SC Res. 1526 (30 January 2004), preambular para. 3
	SC Res. 1617 (29 July 2005), preambular para. 4
	SC Res. 1624 (14 September 2005), preambular paras 2 (two references), 5, 15; paras 1, 3, 4
	SC Res. 1735 (22 December 2006), preambular para. 4
Weapons of mass destruction	SC Res. 1540 (28 April 2004), paras 3(c), 10
Women and peace and security	SC Res. 1325 (31 October 2000), para. 9