

The Austrian Rule of Law Initiative 2004 - 2008

– The Panel Series, the Advisory Group and the Final Report on the UN Security Council and the Rule of Law

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I. Introduction

The year 2004 marked the beginning of an unprecedented renaissance of the rule of law at the United Nations, which was ignited by then UN Secretary-General Kofi Annan and spurred by initiatives of several like-

* The views expressed in this article are the author’s personal views only and cannot be attributed to the Permanent Mission of Austria or the Austrian Federal Ministry for European and International Affairs.

mind UN Member States. Five years later, the rule of law has become a very popular term at the United Nations and a fast-growing field of activity of the UN system.

In August 2004, Secretary-General Kofi Annan issued a Report entitled *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*,¹ which aimed at articulating a “common language of justice for the United Nations” of the key concepts of justice, rule of law and transitional justice. In addition, on 21 September 2004, in his much-acclaimed address to the 59th UN General Assembly,² Kofi Annan highlighted the rule of law as the all-important framework and pledged to make the United Nations’ work to strengthen the rule of law and transitional justice a priority for the remainder of his tenure.

While it is true that the rule of law was not a new idea at the United Nations,³ it is only since a few years that the United Nations has started to develop comprehensive common concepts, coordinate, and give coherent policy direction to the manifold activities of the UN system in the field of rule of law. Until then, the rule of law activities of the United Nations followed a piecemeal approach, were limited in scope (e.g. only in conflict and post-conflict situations or in the field of human rights) and lacked coordination and a coherent policy.

The present article is an attempt from a practitioner’s point of view to shed light behind the scenes of the above-mentioned developments in the field of rule of law at the United Nations during the past five years, focusing in particular on the Austrian Rule of Law Initiative.

II. The Austrian Rule of Law Initiative

In her speech at the 59th UN General Assembly,⁴ then Austrian Foreign Minister Benita Ferrero-Waldner warmly welcomed Secretary-General Kofi Annan's address and his pledge to make the strengthening

¹ *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, Report of the Secretary-General, Doc. S/2004/616 of 23 August 2004.

² See UN Press Release SG/SM/9491 – GA/10258 dated 21 September 2004.

³ See the article by T. Fitschen in this Focus.

⁴ Statement by H.E. Dr. Benita Ferrero-Waldner, Federal Minister for Foreign Affairs of the Republic of Austria, at the 59th Session of the UN General Assembly, 23 September 2004, at <<http://www.un.org/webcast/ga/59/statements/auseng040923.pdf>>.

of the rule of law a priority of the United Nations. She stressed that in particular for smaller and medium sized countries an international order based on the rule of law was of paramount importance. As a contribution to the Secretary-General's efforts, Ferrero-Waldner announced to launch a discourse on the role and function of the Security Council in the strengthening of a rules-based international system.

This announcement was the starting point of the Austrian Rule of Law Initiative, which consisted of the following three main prongs:

- First, a series of seven panel discussions from 2004 to 2008 on the role of the Security Council in strengthening a rules-based international system and a retreat of experts at Alpbach, Austria, in August 2007.
- Second, the establishment of an Advisory Group, which over the years has become the Group of “Friends of the Rule of Law” at the United Nations in New York.
- Third, the publication of the Final Report and Recommendations on “The UN Security Council and the Rule of Law”, reflecting the outcome of the four years’ panel series.

1. The Panel Series and the Alpbach Retreat

Starting in November 2004 during the first International Law Week⁵ at the United Nations, the Austrian Permanent Mission in New York, in cooperation with the Institute for International Law and Justice at New York University School of Law,⁶ convened a series of panel discussions on various aspects of the central theme of “The Role of the Security Council in Strengthening a Rules-Based International System” at the Dag Hammarskjöld Library Penthouse at United Nations Headquarters in New York.

⁵ Based on an Austrian proposal, on 9 December 2003 the General Assembly had decided that the first week in which the report of the International Law Commission is discussed in the Sixth Committee should henceforth be known as “International Law Week”. See A/RES/58/77 of 9 December 2003, op. para. 11 and preambular para. 7.

⁶ The author would like to take this opportunity to thank Professor Simon Chesterman, Professor Benedict Kingsbury and Professor Thomas Franck at New York University School of Law for the excellent cooperation.

The panel discussions, which brought together experts from both theory and practice, including representatives of the diplomatic, United Nations and academic communities and civil society, focused on questions such as “The Security Council as World Legislator?” (4 November 2004), “Who needs Rules?” (5 May 2005), “The Security Council as World Judge?” (27 October 2005), “The Security Council as World Executive?” (26 October 2006) and “The Security Council and the Individual” (27 March 2007).⁷ The panels enjoyed great interest and wide participation of United Nations Member States.

The topics were also analyzed in depth at a retreat of key experts (including many members of the Advisory Group, see below under Chapter II. 2.) at Alpbach, Austria, on 25 – 27 August 2007, which was organized by the Austrian Federal Ministry for European and International Affairs and the Permanent Mission of Austria in conjunction with the European Forum Alpbach, as well as a public panel discussion on “The Security Council and the Rule of Law” at the Alpbach Conference Centre (27 August 2007).⁸ Some preliminary conclusions and recommendations that emerged from the panel series and the Alpbach Retreat were publicly presented and discussed at a wrap-up panel in New York during the International Law Week 2007 (1 November 2007).

As a result of this process, the Rapporteur of the Austrian Initiative, Dr. Simon Chesterman, Global Professor and Director of the New York University School of Law Singapore Programme, prepared a Final Report, which reflected the discussions and the recommendations that emerged on how the Council could support the rule of law in its various fields of activity in order to strengthen an international system based on rules. The Final Report and Recommendations on “The UN Security Council and the Rule of Law” were presented by Austrian State Secretary Dr. Hans Winkler and the Rapporteur Dr. Simon Chesterman at United Nations Headquarters in New York on 7 April 2008 (see below under Chapter II. 3.).

⁷ For further information on the panel series, including the agendas and lists of speakers see Doc. A/63/69 – S/2008/270, Appendix I. Electronic copies of reports of the panel discussions can be downloaded from the website of the Austrian Mission at <<http://www.bmeia.gv.at/newyorkov>>.

⁸ See Doc. A/63/69 – S/2008/270, Appendix II.

2. The Advisory Group – the Group of “Friends of the Rule of Law”

In order to supplement the panel series, at an inaugural meeting on 25 January 2005 a small Advisory Group was established, which was composed of Permanent Representatives of United Nations Member States from all regional groups and high-ranking officials from the UN Secretariat. The members of the Group, who all served in their personal capacity, informally met three to four times a year to provide strategic guidance to the initiative, discuss and analyze the topics of previous and future panels, and make substantive contributions to the work of the Rapporteur.

In the following years the personal and material scope of the Advisory Group was gradually expanded. In the beginning, the Group was rather small, but its personal scope was later enlarged when a number of members expressed their interest to participate in its work. Membership in the Group was always handled in an open, informal and flexible manner, while strictly maintaining its cross-regional balance and high-level participation. In the light of the personal character of the membership, some members resigned when they left New York or moved to new positions. In sum, during the past four years, representatives of more than 30 United Nations Member States⁹ from all regional groups have participated in meetings and supported the work of the Advisory Group.

Although the Advisory Group had initially been established to only deal with topics related to the Austrian panel series, it soon expanded its material scope and became a forum of like-minded United Nations Member States to discuss and take joint initiatives regarding various issues in the field of rule of law. Thus, over the years, the Advisory Group developed into an informal Group of “Friends of the Rule of Law” at the United Nations in New York, who all shared the view that international law and the rule of law are the foundations of the international system and that it is therefore imperative to strengthen the rule of

⁹ These UN Member States included Angola, Austria, Bahamas, Belgium, Canada, Cape Verde, Colombia, Costa Rica, Finland, Germany, Ghana, Jordan, Kenya, Latvia, Liechtenstein, Mexico, Morocco, Panama, Papua New Guinea, Paraguay, Romania, Republic of Congo, Republic of Korea, Senegal, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.

law in all its dimensions, i.e. at the national, international and institutional levels.

Among the many rule of law issues considered by the Advisory Group, the following three topics merit particular attention.

a. The 2005 World Summit Outcome

After Secretary-General Kofi Annan in his address in September 2004 had highlighted the rule of law as the all-important framework of the United Nations and pledged to make the strengthening of the rule of law a priority for the organization (see above under Chapter I.), many were disappointed that in their December 2004 Report the High-level Panel of eminent persons, who had been asked by the Secretary-General to make recommendations for strengthening the United Nations in preparation of the 2005 World Summit, failed to call attention to the strengthening of the rule of law among the means to address the current threats to peace and security.¹⁰

In order to raise awareness to the importance of the rule of law as a precondition for lasting peace and stability, in early 2005 the Permanent Mission of Austria prepared a non-paper¹¹ on the Report of the High-level Panel with recommendations on the strengthening of the rule of law. The non-paper was circulated and discussed among the members of the Advisory Group and transmitted to Secretary-General Kofi Annan on 1 March 2005. Not least as a result of this input, the Secretary-General in his March 2005 Report *In Larger Freedom* devoted a whole chapter to the rule of law, in which he *inter alia* announced his intention to create a special rule of law assistance unit (see below under Chapter II. 2. c.).¹²

¹⁰ See *Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, Doc. A/59/565 of 2 December 2004. The High-level Panel had been asked to assess current threats to international peace and security; to evaluate how existing policies and institutions have done in addressing those threats; and to make recommendations for strengthening the United Nations so that it can provide collective security for all in the twenty-first century.

¹¹ See Austrian Non-Paper of 11 February 2005 (not published, on file with the author).

¹² See *In Larger Freedom: Towards Development, Security and Human Rights for All*, Doc. A/59/2005, Report of the Secretary-General, paras 133-139.

In the ensuing informal consultations and negotiations of the General Assembly to prepare the 2005 World Summit, the group of like-minded United Nations Member States through their statements¹³ and by submitting concrete drafting suggestions¹⁴ continued their lobbying for the inclusion of language on the rule of law in the outcome document. As a consequence of these joint efforts, a number of specific references to international law and the rule of law were included in the World Summit Outcome adopted by the heads of state and government on 16 September 2005.¹⁵ In particular, in para. 134 the World Summit Outcome:

- Recognized the need for universal adherence to and implementation of the rule of law at both the national and international levels (Chapeau);
- Reaffirmed the commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among states (lit. a); and
- Supported the idea of establishing a Rule of Law Assistance Unit within the Secretariat, in accordance with existing relevant procedures, subject to a Report by the Secretary-General to the General Assembly, so as to strengthen United Nations activities to promote the rule of law, including through technical assistance and capacity-building (lit. e).

¹³ See informal thematic consultations of the General Assembly to discuss Cluster III (Freedom to live in Dignity) contained in the report of the Secretary-General (*In Larger Freedom*): cf. Statement by H.E. Ambassador Gerhard Pfanzelter, Permanent Representative of Austria to the United Nations, 20 April 2005, at <<http://www.bmeia.gv.at/en/austrian-mission/austrian-mission-new-york/news/statements-and-speeches/2005/informal-thematic-consultations-of-the-general-assembly-on-reform-cluster-freedom-to-live-in-dignity.html>>; Statement by H.E. Ambassador Christian Wenaweser, Permanent Representative of the Principality of Liechtenstein to the United Nations, 19 April 2005, at <<http://www.liechtenstein.li/en/pdf-fl-aussenstelle-newyork-dokumente-uno-04-19-2005-statement-cluster-3.pdf>>.

¹⁴ Informal papers with drafting suggestions on the rule of law were submitted, *inter alia*, by Austria, Liechtenstein, Mexico and Switzerland.

¹⁵ World Summit Outcome, A/RES/60/1 of 16 September 2005. For further details see also the article by S. Barriga/ A. Alday in this Focus, there under II. 1.

The inclusion of these references in the 2005 World Summit Outcome was the first important achievement in the efforts of the “Friends of the Rule of Law” to strengthen the rule of law at the United Nations.

b. The New General Assembly Agenda Item on *The Rule of Law at the National and International Levels*¹⁶

While the idea of a new agenda item on the rule of law had already emerged in the spring of 2005 during the preparations for the World Summit,¹⁷ it did not materialize until a meeting of the Advisory Group on 8 December 2005, in which the follow-up to the 2005 World Summit Outcome in the field of rule of law was discussed. At that meeting the Group endorsed the idea of a new General Assembly agenda item on the rule of law and agreed that the Permanent Missions of Liechtenstein and Mexico would take the lead to prepare the necessary steps for inclusion of this new item in the agenda of the next General Assembly, whereas the Permanent Mission of Austria would focus on the implementation of the World Summit regarding the establishment of the Rule of Law Unit.

Based on various suggestions made during the discussions in the Group, Liechtenstein and Mexico prepared a draft explanatory memorandum regarding the inclusion of the new item in the agenda of the 61st session of the General Assembly, which was circulated to all members of the Advisory Group on 1 March 2006. By a letter dated 11 May 2006 the Permanent Representatives of Liechtenstein and Mexico formally submitted the request for inclusion of the new agenda item on

¹⁶ For further details see also the article by S. Barriga/ A. Alday in this Focus, there under II. 2.

¹⁷ Cf. e.g. the Statement by the Austrian Ambassador Gerhard Pfanzelter on 20 April 2005, see note 13, in which he *inter alia* proposed the following: “In order to reflect the importance of the rule of law for the work of the UN, we believe that during the International Law Week, when Legal Advisers of the Member States are present, the Sixth Committee should hold a general debate on a new agenda item on ‘The state of the rule of law and international law’ on the basis of a report prepared by the Secretariat”; see also the statement by the Liechtenstein Ambassador Christian Wenaweser on 19 April 2005, *ibid.*

*The Rule of Law at the National and International Levels*¹⁸ with an explanatory memorandum to the Secretary-General.¹⁹

At a meeting of the Advisory Group on 6 June 2006 future steps regarding the proposed new agenda item were discussed and coordinated among the members of the Group, including ideas regarding a Report of the Secretary-General analyzing the concept of the rule of law, an inventory of all rule of law activities of the United Nations and the selection of an annual sub-topic to focus the debate, some of which were later also discussed and adopted by the Sixth Committee of the General Assembly. The members of the Group also agreed to lobby for broad support of the initiative of Liechtenstein and Mexico in their own regional groups.

The subsequent inclusion of the new item on *The Rule of Law at the National and International Levels* in the agenda of the General Assembly in the fall of 2006 marked another important achievement in the efforts of the “Friends of the Rule of Law”.

c. The Establishment of the Rule of Law Unit

In his March 2005 Report *In Larger Freedom*, Secretary-General Kofi Annan for the first time announced his intention:

“to create a dedicated Rule of Law Assistance Unit, drawing heavily on existing staff within the United Nations system, in the proposed Peacebuilding Support Office [...] to assist national efforts to re-establish the rule of law in conflict and post-conflict societies.”²⁰

During the preparations of the 2005 World Summit the group of like-minded United Nations Member States strongly supported the Secretary-General’s intention and stressed the need for a new coordinating unit for all rule of law activities of the United Nations with a broad mandate that would not be limited to conflict and post-conflict situations.²¹

¹⁸ For further details see also the article by S. Barriga/ A. Alday in this Focus, there note 16.

¹⁹ See Doc. A/61/142 of 22 May 2006 and Annex.

²⁰ Doc. A/59/2005, see note 12, para. 137.

²¹ See Statement by the Austrian Ambassador Gerhard Pfanzelter on 20 April 2005, see note 13, advocating a broad approach of the rule of law: “We welcome the proposal to create a Rule-of-Law Assistance Unit in the Peacebuilding Support Office. However, the numerous other important efforts of the United Nations to promote the rule of law in national legal systems

As a consequence, the 2005 World Summit Outcome, while keeping the term “Rule of Law Assistance Unit” proposed by the Secretary-General, did no longer refer to the placement of the Unit in the Peacebuilding Support Office and to conflict and post-conflict situations, but followed the broad approach and supported:

“the idea of establishing a Rule of Law Assistance Unit *within the Secretariat* [...] so as to strengthen *United Nations activities to promote the rule of law*, including through technical assistance and capacity-building.”²²

In the fall of 2005, as a contribution to the follow-up and implementation of the World Summit Outcome in the field of rule of law, the Permanent Mission of Austria prepared a non-paper on the establishment of the Rule of Law Assistance Unit, which was discussed at the meeting of the Advisory Group on 8 December 2005. At that meeting the Group endorsed the non-paper and tasked Austria to draft a joint letter to the Secretary-General on the basis of the non-paper and the various comments and suggestions made during the discussions.

The joint letter dated 31 January 2006, which was signed by 13 Permanent Representatives to the United Nations,²³ was sent to Secretary-General Kofi Annan with a number of concrete proposals regarding the future role and mandate of the Rule of Law Assistance Unit. In that letter the group of like-minded countries reaffirmed that the Unit should have a broad mandate that is not limited to conflict and post-conflict

irrespective of a conflict situation should not be neglected. Such measures include national capacity-building to strengthen domestic criminal law systems and international legal cooperation to counter transnational threats, technical assistance to ratify and implement international treaties for the fight against terrorism, organized crime, drugs and corruption or the drafting of model legislation for the harmonization of national legislation. Given the wide range of activities and the involvement of various organizations and UN-bodies, we believe that there is a need for better coordination and streamlining of the rule of law assistance activities of the UN in general. In order to promote synergy, efficiency and coherence it would thus be useful to identify all UN-bodies active in this field and establish a coordinating unit for their assistance activities.” Cf. also the statement by the Liechtenstein Ambassador Christian Wenaweser on 19 April 2005, *ibid.*

²² A/RES/60/1, see note 15, para. 134 (e) (*italics added*).

²³ The joint letter dated 31 January 2006 was signed by the Permanent Representatives of Austria, Canada, Costa Rica, Finland, Germany, Jordan, Liechtenstein, Mexico, Morocco, Slovenia, Spain, Sweden and Switzerland. For the text of the joint letter see Annex I to this article.

situations. Moreover, its mandate should include the coordination and streamlining of all UN activities to promote the rule of law, the facilitation of technical assistance (it should, however, not provide technical assistance itself), making of recommendations and cooperation with other organizations, funds and programs. Finally, the Unit should be established at an adequately high level in the Secretariat in order to effectively coordinate among the various departments, funds and programs of the UN system.

However, while the idea of the establishment of such a new Unit enjoyed wide-spread support among the UN membership, it met with unexpected skepticism and opposition within the Secretariat of the United Nations. At a meeting on 6 June 2006 the Advisory Group was informed that the joint letter had been received by the Secretary-General as a most welcome contribution, but that the Executive Office of the Secretary-General was faced with serious difficulties and delays to establish the Unit due to internal turf battles and disputes regarding competences and mandates between various parts of the UN system.²⁴

In the light of the lingering stalemate within the UN Secretariat, on 25 October 2006 the Permanent Mission of Austria arranged for a personal meeting of 11 Permanent Representatives with Secretary-General Kofi Annan,²⁵ in which they expressed their concern that more than a year after the 2005 World Summit the establishment of the Rule of Law Assistance Unit still remained to be implemented. Reminding the Secretary-General of his pledge at the 59th General Assembly, the Group reiterated its call for the establishment of the Unit as outlined in the joint letter without any further delay. In addition, in the Sixth Committee of the General Assembly, the members of the Group pressed for the inclusion of a paragraph in General Assembly resolution 61/39 on *The Rule of Law at the National and International Levels*, urging the Secretary-General, as a matter of priority, to submit the Report on the establish-

²⁴ Apparently, some of the concerns were caused by the name “Rule of Law Assistance Unit”, as originally proposed by the Secretary-General, which had given rise to the impression that the new Unit itself would provide technical assistance. However, according to the proposals of the group of like-minded countries, it was always envisaged that the Unit would only have a coordinating role and rather serve as a “Rule of Law *Coordination* Unit”. Thus, in order to avoid any misunderstandings, the expression “Rule of Law Unit” was subsequently used.

²⁵ The meeting on 25 October 2006 was attended by the Permanent Representatives of Austria, Costa Rica, Finland, Germany, Liechtenstein, Mexico, Morocco, Slovenia, Spain, Sweden and Switzerland.

ment of a Rule of Law Assistance Unit within the Secretariat, in conformity with para. 134 (e) of the 2005 World Summit Outcome.²⁶

As a result of these persistent calls, on 14 December 2006, only a few days before the end of his tenure, Secretary-General Kofi Annan issued his long-awaited Report *Uniting our Strengths: Enhancing United Nations Support for the Rule of Law*²⁷, in which he highlighted the centrality of the rule of law to the work of the United Nations and announced his decision to establish a Rule of Law Coordination and Resource Group within the Secretariat, chaired by the Deputy Secretary-General and supported by a small Secretariat Unit, to act as focal point for coordinating system-wide rule of law activities.

While the establishment of the Rule of Law Coordination and Resource Group and the Rule of Law Unit can be seen as a crowning achievement of the efforts of the Group of “Friends of the Rule of Law” to strengthen the rule of law at the United Nations, two issues that were left open in the Secretary-General’s Report have continued to require the attention of the Group:

- First, the Report left open the decision as to where the Rule of Law Unit would be located, noting that this would be addressed by the incoming Secretary-General. However, given the broad remit of the new entity, the Report also noted that it would not be appropriate to place it within the Peacebuilding Support Office.²⁸
- Second, the Unit was established “within existing resources” without any funding from the regular UN budget. According to the Report, during the initial phase the staff of the Unit of up to four professionals would be seconded from key United Nations actors.

With regard to the question of the location of the Unit, at a meeting on 13 February 2007 to discuss the follow-up to the above-mentioned Report, the Advisory Group tasked Austria to draft another letter addressed to the new Secretary-General to state its views on this matter. In a joint letter dated 26 February 2007 addressed to Secretary-General Ban Ki-Moon, which was signed by 24 Permanent Representatives to

²⁶ A/RES/61/39 of 4 December 2006, op. para. 4.

²⁷ Doc. A/61/636–S/2006/980 of 14 December 2006.

²⁸ Ibid., para. 49.

the United Nations,²⁹ the “Friends of the Rule of Law” expressed their strong support for the establishment of the Rule of Law Coordination and Resource Group and its Secretariat Unit and reaffirmed that in order to effectively coordinate all rule of law activities of the UN system the Unit would be best located at the highest level in the Secretariat, i.e. the Executive Office of the Secretary-General.

Since this issue nevertheless remained undecided,³⁰ a passage was included in A/RES/62/70 of 6 December 2007 on *The Rule of Law at the National and International Levels*, which expressly referred to “the rule of law unit in the Executive Office of the Secretary-General”.³¹ In the end, more than a year after the issuance of the December 2006 Report, the question of the location of the Unit in the Executive Office was finally settled in the spring of 2008.

On the other hand, the question of staffing and funding from the regular UN budget remains a serious challenge for the future of the Rule of Law Unit. Since according to the above-mentioned Report of the Secretary-General, during the initial phase, the Unit was set up “within existing resources” with staff seconded from other UN entities, no provision has been made in the regular UN budget for posts, adequate offices and appropriate financial, technical and administrative resources of the Unit. The absence of a budget line has seriously hampered the Unit’s ability to fulfill its mandate and become fully operational. In order to ensure the sustainability of the Unit and to enable it to properly carry out its functions, the “Friends of the Rule of Law” have repeatedly requested to provide the Unit with staffing and funding from the regular UN budget.³²

²⁹ The joint letter dated 26 February 2007 was signed by the Permanent Representatives of Angola, Austria, Bahamas, Belgium, Canada, Cape Verde, Finland, Germany, Latvia, Liechtenstein, Mexico, Morocco, Panama, Papua New Guinea, Paraguay, Romania, Senegal, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. For the text of the joint letter see Annex II to this article.

³⁰ Reportedly, the Executive Office of the Secretary-General was hesitant to host the Rule of Law Unit, since this would entail an increase of 5 to 7 staff in the Executive Office, contrary to the Secretary-General’s declared goal to maintain a small Executive Office.

³¹ A/RES/62/70 of 6 December 2007, para. 4.

³² In its views submitted to the Secretary-General pursuant to General Assembly resolution 61/39 in the spring of 2007 Austria called “upon the Secretary-General and Member States to provide all the necessary assistance and support to the Unit, including through voluntary contributions and

By a letter dated 22 October 2007 addressed to all members of the Advisory Group the Austrian Permanent Representative appealed to all “Friends of the Rule of Law” to make a statement in the Sixth Committee calling for adequate staffing and funding of the Unit from the regular UN budget and supporting the inclusion of a respective paragraph in the annual rule of law resolution. Although this view enjoyed very broad support, no consensus could be reached on this issue.³³ After difficult negotiations chaired by Liechtenstein and Mexico, it was finally agreed that the General Assembly in A/RES/62/70 of 6 December 2007 would request:

“the Secretary-General to provide details on the staffing and other requirements for the unit without delay to the General Assembly for its consideration during the sixty-second session in accordance with existing relevant procedures.”³⁴

While, initially, it was intended that the requested Budget Report on the Rule of Law Unit would be considered by the Fifth Committee at its resumed session in spring 2008 during the 62nd session of the General Assembly, due to internal discussions within the Executive Office of the Secretary-General and the Controller’s Office the Budget Report was delayed. Thus, on 28 May 2008, six months after the request by the General Assembly, the Permanent Mission of Austria arranged for a personal meeting of 16 Permanent Representatives³⁵ with Secretary-General Ban Ki-Moon. At that meeting the “Friends of the Rule of Law” expressed their concern that the UN Secretariat had failed to

the secondment of personnel and, after the initial phase, financing from the regular budget, in order to ensure that it can fulfil its important functions in a proper and sustainable manner.” See *The Rule of Law at the National and International Levels: Comments and Information received from Governments*, Report of the Secretary-General, Doc. A/62/121 of 11 July 2007, para. 35. In November 2007 Austria was the first country to make a voluntary contribution of USD 55,000.- to the budget of the Unit and is currently financing an Associate Expert/Junior Professional Officer in order to help alleviate the staffing situation of the Unit.

³³ The United States and Japan were opposed to any additional funding from the regular UN budget.

³⁴ A/RES/62/70, see note 31. This paragraph was a joint proposal by the Member States of the European Union and the Non-Aligned Movement.

³⁵ The meeting on 28 May 2008 was attended by the Permanent Representatives of Angola, Austria, Bahamas, Canada, Cape Verde, Finland, Liechtenstein, Mexico, Morocco, Panama, Papua New Guinea, Paraguay, Senegal, Slovenia, Spain and Switzerland.

meet the deadline set by the General Assembly and expressed their hope that the Budget Report requested by the General Assembly would soon be issued. It was further agreed that the “Friends of the Rule of Law” would continue an informal exchange of views with the Secretary-General on rule of law matters on a periodic basis. The long-awaited Budget Report was finally issued on 21 July 2008³⁶ and will be considered by the Fifth Committee during the 63rd session of the General Assembly in the fall of 2008.

3. The Final Report on *The UN Security Council and the Rule of Law*

Apart from the panel series and the achievements of the Advisory Group, the most important outcome of the Austrian Rule of Law Initiative was the Final Report on *The UN Security Council and the Rule of Law*,³⁷ which was presented in New York on 7 April 2008. The Report, which was prepared by the Rapporteur of the Austrian Initiative, Dr. Simon Chesterman, reflects the discussions that emerged during the Austrian panel series from 2004 to 2008 and contains 17 concrete recommendations how the Security Council could support the rule of law in its various fields of activity in order to strengthen an international system based on rules.

The recommendations contained in the Report are intended to be pragmatic and realistic, although some might be more difficult to implement than others. They attempt to take into account the interests of all states, large and small, developing and developed, as well as permanent and non-permanent members of the Security Council. The Report should contribute to further discussions to support the role of the Security Council in promoting a rules-based international system and maintaining international peace and security under the rule of law.

³⁶ *Revised Estimates Relating to the Programme Budget for the Biennium 2008-2009 related to the Rule of Law Unit*, Report of the Secretary-General, Doc. A/63/154 of 21 July 2008.

³⁷ *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System*, Final Report and Recommendations from the Austrian Initiative, 2004-2008, at <<http://www.bmeia.gv.at/newyorkov/rolreport>> (printed English version) or Doc. A/63/69 – S/2008/270 (translated in all official UN languages).

The following Chapter gives a brief summary of the Final Report and recommendations.³⁸ The full text of the set of recommendations is reproduced in Annex III to this article.

a. The International Rule of Law³⁹

Many high-level documents, including the 2005 World Summit Outcome⁴⁰ and the Millennium Declaration⁴¹, contain references to the rule of law at the national and international levels. This consensus on the rule of law is possible in part because of relative vagueness as to its meaning.⁴² Within national legal systems, in common law and civil law systems and other legal traditions, there are significant differences of what is understood by the rule of law. Further complications arise when one applies the rule of law to the international level. In a national legal order, the sovereign exists in a vertical hierarchy with other subjects of law; at the international level, however, sovereignty remains with states, existing in a horizontal plane of sovereign equality.

From the definition of the rule of law in the 2004 Report by Secretary-General Kofi Annan⁴³ and a survey of legal traditions, the Report identifies three basic elements of the rule of law: (i) a government of laws; (ii) the supremacy of the law; and (iii) equality before the law. The “international rule of law” may be understood as the application of these rule of law principles to relations between states, as well as other subjects and objects of international law. Not all concepts will translate directly, however. Applying the rule of law to the international level thus requires an examination of the functions that it is intended to serve. Strengthening a rules-based international system by applying these principles at the international level would increase predictability of behavior, prevent arbitrariness, and ensure basic fairness.

³⁸ This Chapter is based on the Final Report on *The UN Security Council and the Rule of Law* prepared by Professor Simon Chesterman. Due to space constraints, several parts of the report have been considerably shortened. For a full picture of the issues involved it is therefore highly recommended to read the Final Report in its entirety.

³⁹ See also generally S. Chesterman, “An International Rule of Law?”, *American Journal of Comparative Law* 56 (2008), 331 et seq.

⁴⁰ A/RES/60/1, see note 15, para. 134.

⁴¹ A/RES/55/2 of 8 September 2000, para. 9.

⁴² See also the article by T. Fitschen in this Focus.

⁴³ Doc. S/2004/616, see note 1, para. 6.

Applying these principles to the Security Council, the Report recommends that the Security Council should emphasize the importance of the rule of law in dealing with matters on its agenda, including by reference to upholding and promoting international law, and ensuring that its own decisions are firmly rooted in that body of law (Recommendation 1). Moreover, as part of a commitment to the rule of law, the Council should adopt formal rules of procedure rather than continuing to rely on provisional rules (Recommendation 2).

b. Strengthening the Rule of Law within States

Supporting the rule of law when it breaks down within states is an important function of the Security Council. Apart from a preambular reference in relation to the Congo in 1961,⁴⁴ the Council first used the words “rule of law” in S/RES/1040, referring to “national reconciliation, democracy, security and the rule of law in Burundi”.⁴⁵ Many peacekeeping operations have subsequently had important rule of law components (e.g. Guatemala, Democratic Republic of the Congo, Liberia, Côte d’Ivoire and Haiti), with broad mandates calling for the “re-establishment” or “restoration and maintenance” of the rule of law. In practice, activities have included the training of police, justice, and prison personnel; assisting institution-building; advising on law reform issues; and monitoring the judicial sector and human rights law. In Kosovo and East Timor the United Nations has had direct responsibility for the administration of territory, including control of police and prison services and the administration of the judiciary.

In addition to traditional post-conflict peacebuilding, more recently the Security Council has also promoted the rule of law as a tool for preventing or resolving conflicts. The Security Council has created international criminal *ad hoc* tribunals for the former Yugoslavia and Rwanda. The Special Court for Sierra Leone was set up at the “request” of the Council in S/RES/1315 (2000) of 14 August 2000, while the Special Tribunal for Lebanon was established with Council authority substituting for agreement of one of the parties.⁴⁶ The Council has also exercised its power under the Rome Statute to refer a matter to the International Criminal Court, as it did in March 2005 with respect to the situation in

⁴⁴ S/RES/161 B (1961) of 21 February 1961, preamble.

⁴⁵ S/RES/1040 (1996) of 29 January 1996, para. 2. Note that the French text rendered rule of law as “*le rétablissement de l’ordre*”.

⁴⁶ S/RES/1757 (2007) of 30 May 2007.

Darfur, Sudan.⁴⁷ The preparedness of the Council to act in support of law within states was also endorsed at the 2005 World Summit, which embraced the Responsibility to Protect.⁴⁸

In the light of these developments, the Report recommends that when establishing UN operations, the Security Council should give greater weight to establishing or re-establishing the rule of law, including transitional justice mechanisms and mechanisms for peaceful resolutions of disputes (Recommendation 3). The Security Council should, working together with the Peacebuilding Commission,⁴⁹ the Rule of Law Coordination and Resource Group and the Rule of Law Unit, pay particular regard to ensuring the sustainability of rule of law assistance measures after the end of a UN operation (Recommendation 4). Moreover, the Council should support criminal justice mechanisms and confirm its opposition to impunity. Where local institutions are unwilling or unable to prosecute those responsible for international crimes, the Council should consider appropriate measures to encourage or compel prosecution, including referral of a matter to the International Criminal Court as foreseen under the Rome Statute, as well as to ensure cooperation in order to bring perpetrators to justice (Recommendation 5). The Council should also be prepared to act for the international community in exercising the Responsibility to Protect, as stated at the 2005 World Summit (Recommendation 6).

In addition, the Report recommends that the Security Council should draw more effectively on two sets of actors in supporting its efforts to prevent conflict or establish peace: first, the Council should seek to strengthen its cooperation with regional arrangements and organizations, such as the African Union, the OSCE, and the Council of Europe, that can support the rule of law at the regional level (Recommendation 7).⁵⁰ Second, the Council should pay special attention to the impact of armed conflict on women and their important role in conflict resolution, including peace negotiations and peacebuilding, and ensure the more effective and coherent implementation of S/RES/1325 (2000) of 31 October 2000 on Women, Peace, and Security. The Council should reiterate its call upon the Secretary-General to appoint more

⁴⁷ S/RES/1593 (2005) of 31 March 2005, para. 1.

⁴⁸ A/RES/60/1, see note 15, para. 139. See also S. Barriga/ A. Alday in this Focus, there note 8.

⁴⁹ A/RES/60/180 of 20 December 2005, para. 16.

⁵⁰ Cf. S/PRST/2007/7.

women as Special Representatives or Special Envoys, including as heads of UN operations (Recommendation 8).⁵¹

Finally, the rule of law must also apply to those who intervene. Abuses by those who are sent by the Security Council to protect vulnerable populations have seriously undermined the credibility of the United Nations. After-the-fact investigations of misconduct of UN personnel are an important element to strengthen accountability, but remain an inadequate response if not complemented by appropriate preventive action and measures to support the victims. The Council has an interest in ensuring the existence of effective institutions and procedures to prevent and prosecute abuse and, while ensuring appropriate safeguards are in place to protect the rights of both victim and accused, to offer effective remedies against individuals who do wrong.

The Report therefore recommends that the Security Council should ensure that all UN efforts to restore peace and security themselves respect the rule of law. When authorizing a UN operation the Council should take appropriate measures to support the implementation of the Secretary-General's zero-tolerance policy on sexual exploitation and abuse by UN personnel, the recommendations in the Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations⁵² as well as the Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse⁵³ (Recommendation 9).

c. The Security Council as a Creature of Law

The Security Council has played a central role in the expansion of the rule of law as an instrument at the international level, a role that raises the question of how the rule of law might apply to the Council itself. The Council is a creature of law but there is no formal process for reviewing its decisions; the ultimate sanctions on its authority are political. The Council today does not act as a world government, but its powers have grown significantly through practice. It is generally ac-

⁵¹ Cf. S/PRST/2007/40. The first female special representative of the Secretary-General (SRSG) was appointed in 1992. In 2002 the Secretary-General set a target of fifty percent of women in high-level positions (cf. Doc. S/2002/1154, para. 44). By 2005 there were two female SRSGs. In late 2007 there was only one.

⁵² Doc. A/59/710.

⁵³ A/RES/62/214 of 21 December 2007; cf. also Doc. A/62/595 (2007).

knowledged that the Security Council's powers are subject to the UN Charter and norms of *jus cogens*.

Despite the absence of formal review mechanisms, the Report identifies some checks on the Council's expansive interpretation of its powers: these include (i) the Council's own voting rules, (ii) challenges to the Council's authority by the General Assembly through a censure resolution, by requesting an advisory opinion of the International Court of Justice or curtailing the Council's actions through its control of the UN budget, (iii) incidental questions in cases before national and international courts (e.g. the *Lockerbie* case, the *Tadic* case or the *Yusuf* and *Kadi* cases); and, ultimately, (iv) individual or collective refusal to comply with the Council's decisions.

The Report recommends that the Security Council should limit itself to using its extraordinary powers for extraordinary purposes. The exercise of such powers should be limited in time and it should be subject to periodic review; as a rule the Council should allow for representations by affected states and, where possible, individuals. In general the Council should not decide that which does not need to be decided; it should err on the side of provisional responses rather than permanent solutions (Recommendation 10).

d. The Security Council as Legislator⁵⁴

The tension between effectiveness and legitimacy of Security Council actions plays out most clearly in the passage of quasi-legislative resolutions. The most prominent of such resolutions were adopted in response to a specific crisis, but drafted in language of general application: S/RES/1373 (2001) of 28 September 2001 on terrorism was passed in response to the 11 September 2001 attacks on the United States; S/RES/1540 (2004) of 28 April 2004 on proliferation of weapons of mass destruction came after revelations concerning the A.Q. Khan network.

⁵⁴ See also generally A. Marschik, *The Security Council as World Legislator?: Theory, Practice & Consequences of an Expanding World Power*, IILJ Working Paper 2005/18; id., "Legislative Powers of the Security Council", in: R. St. John Macdonald/ D.M. Johnston (eds), *Towards World Constitutionalism*, 2005, 457 et seq.; E. Rosand, "The Security Council as 'Global Legislator': Ultra Vires or Ultra Innovative?", *Fordham Int'l L. J.* 28 (2005), 101 et seq.

Legislation by Council decisions under Chapter VII of the UN Charter is a tantalizing short-cut to law. Years of negotiations over international instruments related to the prevention and suppression of international terrorism and the proliferation of weapons of mass destruction may be contrasted with the swift adoption of resolutions 1373 (2001) and 1540 (2004). The same holds true for the Rome Statute establishing the International Criminal Court as compared to the swift creation of the International Criminal Tribunal for the former Yugoslavia and its counterpart for Rwanda, or the establishment of the Special Tribunal for Lebanon.⁵⁵

The temptations of legislation by the Security Council must be balanced, however, by a recognition that implementation depends on compliance by Member States. And if the effectiveness of the implementation of Council decisions depends on participation by Member States, the legitimacy of those decisions may depend on participation by Member States through their involvement in the decision-making process. As the Council is not a representative body, any “legislative” resolution should be adopted only after a process that seeks to address the legitimate concerns of the wider membership of the United Nations. Any such resolution should, moreover, be acknowledged by the Council as an exception to the normal law-making process.

The Report therefore recommends that when the Security Council adopts a resolution of a legislative character that is general rather than particular in effect, the legitimacy of and respect for that resolution will be enhanced by a process that ensures transparency, participation, and accountability, which should include (i) the holding of open debates on any such proposals; (ii) wide consultation with the membership of the United Nations and other specially affected parties; and (iii) a procedure to review the resolution within an appropriate timeframe. (Recommendation 11). Moreover, as any “legislative resolution” is an exceptional matter, it should, as a rule, terminate after a period of time set by the Council in the resolution (a “sunset clause”) unless there is an affirmative decision by the Council to renew it (Recommendation 12).

⁵⁵ S/RES/1757 (2007) of 30 May 2007 provided for the Lebanon Tribunal to be created by Council authority under Chapter VII in the event that Lebanon did not execute within eleven days an “agreement” with the United Nations to establish that tribunal.

e. The Security Council as Judge

As the Security Council's powers have expanded it is arguable that it has also taken on judicial functions: the Council has established international tribunals with criminal jurisdiction over individuals, created exceptions to the jurisdiction of the International Criminal Court, ruled on border disputes between Iraq and Kuwait and established a compensation commission to award damages, and set up an international criminal investigation commission. This increasing scope of powers raises questions of competence, applicable safeguards, and the Security Council's relationship to other organs.

While the UN Charter establishes the ICJ as the "principal judicial organ" of the United Nations, the Charter is not conclusive as to whether the Security Council, in carrying out its specific duties under its primary responsibility to maintain international peace and security, might also assume judicial functions, or as to its relationship to international courts. The lack of a separation of powers in the Charter is compounded by the fact that each United Nation organ determines the scope of its own competence under the Charter. The International Criminal Tribunal for Yugoslavia confirmed in the 1995 *Tadic* case the Security Council's competence to create a tribunal of its kind; today it is generally accepted that the Security Council has the power to establish such tribunals.

The need for a swift and effective response to a threat to international peace and security might preclude the application of the same safeguards that would apply to domestic courts. Questions of legitimacy are raised when the Council intercedes in the exercise of jurisdiction by duly constituted tribunals and when the Council itself acts in a manner that affects the rights and obligations of individuals or states. Distinct problems arise when considering the relationship between the Security Council and its creations. Once a judicial tribunal comes into being, it enjoys certain powers of its own that make it independent of the organ that created it. Other concerns relate to the International Criminal Court, set up as a separate international organization, whose independence was tested by efforts by the Security Council to create exemptions from its jurisdiction through the operation of S/RES/1422 (2002) of 12 July 2002 and 1487 (2003) of 12 June 2003.

The tendency to create new, *ad hoc* judicial institutions has been inefficient and has contributed to the fragmentation of international law. There are existing institutions to which the Security Council could turn, but precedents for the Council drawing on such institutions are

scarce: only once the Council referred a matter to the ICJ (S/RES/22 (1947) of 9 April 1947 regarding the Corfu Channel case), requested an advisory opinion from the ICJ (S/RES/284 (1970) of 29 July 1970 on Namibia); and referred a matter to the International Criminal Court (S/RES/1593 (2005) of 31 March 2005 on Darfur, Sudan).

In the light of the above, the Report recommends that the Security Council should support and draw more frequently on existing judicial institutions of international law, including by (i) promoting peaceful settlement of disputes before the ICJ; (ii) requesting advisory opinions from the ICJ; and (iii) referring matters to the International Criminal Court (Recommendation 13). Furthermore, the Council should establish *ad hoc* judicial institutions only in exceptional circumstances in order to avoid the proliferation of costly new courts and tribunals and the fragmentation of international law (Recommendation 14).

f. The Security Council and Individual Rights

One area of particular concern in relation to Security Council action has been the use of targeted sanctions against individuals. While such measures successfully reduced the humanitarian consequences of sanctions, they have been criticized for the manner in which individuals were selected without transparency or the possibility of formal review. Challenges have arisen in national and regional courts, most prominently the *Yusuf* and *Kadi* cases currently on appeal before the European Court of Justice.⁵⁶

In the 2005 World Summit Outcome, Member States called upon the Security Council, with the support of the Secretary-General, to ensure that “fair and clear” procedures exist for the listing and delisting of individuals and entities on targeted sanctions lists.⁵⁷ Secretary-General Kofi Annan responded in June 2006 with a non-paper, in which he

⁵⁶ Cf. *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (Court of First Instance of the European Communities, Case T-306/01, 21 September 2005); *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* (Court of First Instance of the European Communities, Case T-315/01, 21 September 2005). See also the Opinion of Advocate General Poiares Maduro regarding the case of *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* (Case C-402/05 P, 16 January 2008).

⁵⁷ A/RES/60/1, see note 15, para. 109.

noted four basic elements as minimum standards required to ensure fair and clear procedures:⁵⁸

- (a) A person against whom measures have been taken by the Security Council has the right to be informed of those measures and to know the case against him or her as soon as, and to the extent, possible. The notification should include a statement of the case and information as to how requests for review and exemptions may be made. An adequate statement of the case requires the prior determination of clear criteria for listing.
- (b) Such a person has the right to be heard (via submissions in writing) within a reasonable time by the relevant decision-making body. That right should include the ability to directly access the decision-making body, possibly through a focal point in the Secretariat, as well as the right to be assisted or represented by counsel. Time limits should be set for the consideration of the case.
- (c) Such a person has the right to review by an effective review mechanism. The effectiveness of this mechanism will depend on its impartiality, degree of independence and ability to provide an effective remedy (lifting of the measure and/or, under specific conditions to be determined, compensation).
- (d) The Security Council should, possibly through its committees, periodically review on its own initiative “targeted individual sanctions”, especially the freeze of assets, in order to mitigate the risk of violating the right to property and related human rights. The frequency of such review should be proportionate to the rights and interests involved.

Subsequent Security Council resolutions marked significant progress towards achieving the goal set by the World Summit. S/RES/1730 (2006) of 19 December 2006 strengthened procedural safeguards to protect the rights of individuals by establishing a focal point to receive delisting requests, and adopted specific procedures to govern the handling of delisting requests.⁵⁹ In S/RES/1732 (2006) of 21 December 2006 the Council welcomed the recommendations and best practices in the Re-

⁵⁸ The unpublished letter by the Secretary-General dated 15 June 2006 addressed to the President of the Security Council was referred to in the Security Council debate on 22 June 2006, Doc. S/PV.5474 (2006), page 5.

⁵⁹ Doc. S/2007/178.

port of the Informal Working Group on General Issues of Sanctions.⁶⁰ S/RES/1735 (2006) of 22 December 2006 and, most recently S/RES/1822 (2008) of 30 June 2008, further improved procedures for listing and delisting of the Al-Qaida/Taliban sanctions committee established pursuant to S/RES/1267 (1999) of 15 October 1999.

It has been questioned, however, whether these measures have satisfied the need for “fair and clear procedures” in this area. Recent and pending cases in national and regional courts will prove instructive to future implementation of targeted sanctions and the protection of individual rights. The alternative is that sanctions will become ineffective and not be applied rigorously. The fact that some states are hesitant to submit names to be included on sanctions lists and others are not seeking formal humanitarian exemptions may be evidence that this is happening already.⁶¹

There has been much discussion inside and outside the United Nations of possible mechanisms to review listing and delisting decisions of the Council. Such a mechanism could, theoretically, take numerous forms.⁶² Given the political sensitivities involved, however, in practice the establishment of an independent quasi-judicial or administrative review seems difficult to achieve. In the short term, the most likely advance would be to support the decision-making process of the relevant sanctions committees in conducting their own review of listing and delisting decisions. This might include establishment of a small panel of experts to examine delisting requests and make a recommendation to the Security Council committee.⁶³

The Report recommends that the Security Council should be proactive in further improving “fair and clear procedures” to protect the rights of individuals affected by its decisions, which should include, as

⁶⁰ Doc. S/2006/997.

⁶¹ See e.g. Doc. S/2007/677, para. 26; Doc. S/2006/154, Annex, para. 57.

⁶² See generally Watson Institute for International Studies (ed.), *Strengthening UN Targeted Sanctions Through Fair and Clear Procedures*, 30 March 2006 at <<http://www.watsoninstitute.org/TFS>>.

⁶³ Cf. e.g. the Discussion Paper on improving the implementation of sanctions regimes through ensuring “fair and clear procedures” submitted by Denmark, Germany, Liechtenstein, the Netherlands, Sweden and Switzerland, Doc. A/62/891-S/2008/428 of 2 July 2008. An earlier version of the Discussion Paper with Supplementary Guidelines for the Review of Sanctions Committees’ Listing Decisions and Explanatory Memorandum was presented at a Roundtable in New York on 8 November 2007.

minimum standards, the four basic elements listed in the above-mentioned 2006 non-paper of the Secretary-General (Recommendations 15 and 16). Finally, building on recent innovations, such as the creation of the focal point, the Council should invite the Secretary-General to present it with options to further strengthen the legitimacy and effectiveness of sanctions regimes, paying particular regard to the need to protect sources and methods of information, as well as to protect the rights of individuals by upholding the minimum standards, including the right to review (Recommendation 17).

The Report concludes that the Security Council is most legitimate and most effective when it submits itself to the rule of law. Though the Council does not operate free of legal limits, the most important limit on the Council is self-restraint. Member States' preparedness to recognize the authority of the Council depends in significant part on how responsible and accountable it is – and is seen to be – in the use of its extraordinary powers. All Member States and the Security Council itself thus have an interest in promoting the rule of law and strengthening a rules-based international system.

III. Conclusion

As was outlined in the previous Chapters, the Austrian Rule of Law Initiative has in many ways contributed to the recent developments in the field of rule of law at the United Nations:

- First, the series of seven panel discussions from 2004 to 2008 and the Alpbach Retreat in August 2007 have stimulated a lively and fruitful discourse among experts from both theory and practice, including representatives of the diplomatic, United Nations and academic communities and civil society, on various aspects of the role of the Security Council in strengthening a rules-based international system. In addition, the panel discussions have contributed to the revitalization of the discussions during the International Law Week.
- Second, the Advisory Group of the Austrian Initiative, which over the years has become the Group of “Friends of the Rule of Law” at the United Nations in New York, through its joint efforts and initiatives, has contributed to many important achievements to strengthen the rule of law at the United Nations, such as the inclusion of specific references to international law and the rule of law in the 2005 World Summit Outcome, the

inclusion of a new General Assembly agenda item on *The Rule of Law at the National and International Levels* and the establishment of the Rule of Law Unit.

- Third, the Final Report on *The UN Security Council and the Rule of Law* with its 17 concrete recommendations, which reflects the manifold discussions, ideas and proposals that had emerged during the four years' panel series, the Alpbach Retreat and the meetings of the Advisory Group, has set a fundamental yardstick for Security Council action to support the rule of law and to strengthen an international system based on rules.

While the panel series and the Final Report on *The UN Security Council and the Rule of Law* were concluded in 2008, the Austrian Rule of Law Initiative remains an ongoing process. For the "Friends of the Rule of Law" much work lies still ahead, be it the implementation of the recommendations of the Final Report, the debates under the General Assembly agenda item, or the staffing and funding of the Rule of Law Unit from the regular UN budget.

Finally, and most importantly, the Austrian Rule of Law Initiative has always been a truly joint project of all "Friends of the Rule of Law" at the United Nations who have accompanied and supported the initiative since its inception. Their loyal friendship, continuous interest and invaluable contributions have propelled the initiative over the years. Thus, the words of Austrian State Secretary Dr. Hans Winkler on the occasion of the presentation of the Final Report in New York on 7 April 2008 hold true not only for the Final Report, but for the entire initiative:

"The report prepared by Professor Chesterman has many authors and represents the outcome of a collective effort. And that had always been our goal. The rule of law is not an 'Austrian' issue. And although we are proud of having taken this initiative, the result reflected in this report is as much a global effort as the United Nations has ever seen. It includes the input of delegates from States large and small, of experts from the UN and civil society, and of renowned academics. This report not only has many fathers – and mothers – it has a family tree rooted in our shared values and beliefs."⁶⁴

⁶⁴ Statement by State Secretary Dr. Hans Winkler on the occasion of the Presentation of the Final Report and Recommendations from the Austrian Initiative 2004-2008 on "The UN Security Council and the Rule of Law", New York, 7 April 2008, at <<http://www.bmeia.gv.at/en/austrian->

In this spirit, all “Friends of the Rule of Law” are “parents” of the initiative and it is hoped that they will continue to foster their child and join their forces to strengthen the rule of law at the United Nations and promote an international order based on the rule of law and international law.

Annex I:

Joint Letter dated 31 January 2006 signed by the Permanent Representatives to the United Nations of Austria, Canada, Costa Rica, Finland, Germany, Jordan, Liechtenstein, Mexico, Morocco, Slovenia, Spain, Sweden and Switzerland addressed to Secretary-General Kofi Annan

Excellency,

The undersigned Permanent Representatives to the United Nations have the honor to share with you the following ideas and suggestions regarding the implementation of the World Summit Outcome in the field of international law and the rule of law:

1. In our view, the strengthening of the rule of law is an important element of United Nations reform. It is essential that the international system is governed by international law and the rule of law. Clear and foreseeable rules and a system to prevent or sanction violations of rules are preconditions for lasting peace and security. It is therefore imperative that the rule of law is strengthened in all its dimensions, i.e. on a national, international and institutional level.

2. We are pleased to note the special attention given to international law and the rule of law in the World Summit Outcome Document adopted by the Heads of State and Government on 16 September 2005. We welcome that in order to strengthen the United Nations activities to promote the rule of law, including through technical assistance and capacity-building, the Heads of State and Government supported the idea of establishing a rule of law assistance unit within the Secretariat (World Summit Outcome, paragraph 134 (e)).

3. It has been suggested to create such a rule of law assistance unit in the new Peacebuilding Support Office. Thereby, the mandate of the new unit would be limited to conflict and post-conflict situations. In our view, however, the efforts of the United Nations promoting the rule of law are much broader in nature and irrespective of a conflict situation. The rule of law assistance unit should therefore have a broad mandate that is not limited to conflict or post-conflict situations. This mandate should encompass the following functions

- Coordination and streamlining of all rule of law assistance of the United Nations;

- Facilitation of technical assistance in the field of rule of law;
- Making of recommendations to strengthen the rule of law; and
- Cooperation with other organizations, funds and programs active in this field.

4. The broad mandate of the rule of law assistance unit is particularly warranted in view of the variety of rule of law activities by the United Nations and its organs, bodies, departments, funds and programs, such as the International Court of Justice and other international courts and tribunals, the Sixth Committee of the General Assembly, the International Law Commission, the Office of Legal Affairs, the Department of Peacekeeping Operations, the UN Office on Drugs and Crime, the UN Development Program, the UN High Commissioner for Human Rights, etc.

5. Through its mandate, the rule of law assistance unit could assist in further strengthening and promoting the rule of law, particularly in the following areas:

- Provide and facilitate technical assistance to Member States to implement international rules, emanating from treaties or custom, mandatory decisions adopted by United Nations organs, in their national legal systems (e.g. implementation in the field of counterterrorism and sanctions, etc.), as well as decisions of international courts and tribunals (e.g. ICJ, ITLOS, ICC, etc.).
- Support the strengthening of domestic legal systems, especially the establishment of an independent judiciary, in post-conflict situations, situations of “new democracies”, new successor States and in the context of development.
- Prepare guidelines and model legislation to enhance the uniform implementation of international rules.
- Prepare and disseminate digests of State practice (national legislation, judicial decisions, etc.) of the core international legal instruments to facilitate more consistency in their interpretation and application.
- Disseminate information, including decisions and advisory opinions, of international courts and tribunals (ICJ, ITLOS, ICC, etc.) to all UN organs, other organizations and bodies in the UN system and Member States.
- Promote peaceful settlement of disputes by recourse to international courts and tribunals.

- Build national capacity for the implementation of international law through establishment of best practices and training and exchange programs for government officials, judges, prosecutors, lawyers, etc.
- Promote global dissemination, education and outreach programs to gain grass roots understanding, support and involvement by civil society and NGO's for the strengthening of the rule of law, including education programs at universities and schools.

6. We believe that the rule of law assistance unit should be established at an adequately high level in the Secretariat in order to effectively coordinate among the various departments, funds and programs of the UN system, taking into account the central role and function of the United Nations Office of Legal Affairs in this field to advise the United Nations on substantive legal matters.

7. We are convinced that the creation of a rule of law assistance unit as outlined above would be the best way to implement the World Summit Outcome and increase the visibility of the determination of the United Nations to make the strengthening of the rule of law a priority of the organization.

We hope that you might find the above ideas useful and worth considering.

Please accept, Excellency, the assurances of our highest consideration.

[Signatures]

Annex II:

Joint Letter dated 26 February 2007 signed by the Permanent Representatives to the United Nations of Angola, Austria, Bahamas, Belgium, Canada, Cape Verde, Finland, Germany, Latvia, Liechtenstein, Mexico, Morocco, Panama, Papua New Guinea, Paraguay, Romania, Senegal, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland and United Kingdom addressed to Secretary-General Ban Ki-Moon

Excellency,

1. The undersigned Permanent Representatives to the United Nations represent a group of like-minded countries from various regional groups. We all share the view that international law and the rule of law are the foundations of the international system. It is essential that the international system is governed by international law and the rule of law. Clear and foreseeable rules and a system to prevent or sanction violations of rules are preconditions for lasting peace and security. In our view, it is therefore imperative to strengthen the rule of law in all its dimensions, i.e. at the national, international and institutional levels.

2. We warmly welcome the specific references to international law and the rule of law in the World Summit Outcome Document adopted by the Heads of State and Government on 16 September 2005. In order to strengthen the United Nations activities to promote the rule of law, including through technical assistance and capacity-building, the World Summit supported the idea of establishing a Rule of Law Assistance Unit within the Secretariat (paragraph 134 (e)).

3. Over the past years, we have repeatedly called for the establishment of a Rule of Law Unit within the Secretariat with a broad mandate for the coordination, streamlining and promotion of all activities of the United Nations system to strengthen the rule of law. We were therefore very pleased that at the end of last year the Secretary-General in his Report "Uniting our strengths: Enhancing United Nations support for the rule of law" (UN Doc. A/61/636-S/2006/980) highlighted the centrality of the rule of law to the work of the United Nations and announced his decision to establish a Rule of Law Coordination and Resource Group within the Secretariat, chaired by the Deputy Secretary-General and

supported by a small Secretariat Unit, to act as focal point for coordinating system-wide rule of law activities.

4. The undersigned Permanent Representatives would like to take this opportunity to express their strong support for the establishment of the Rule of Law Coordination and Resource Group and its Secretariat Unit. We consider the establishment of the Group and Unit an important step to implement the World Summit Outcome, which demonstrates the determination to make the strengthening of the rule of law a priority of the United Nations. We hope that the Group and the Unit will soon become fully operational.

5. In this context, we note that the question as to where the Group and its small Secretariat Unit will be located was not decided in the above-mentioned Report. We believe that in order to effectively coordinate all rule of law activities of the UN system, the Group and the Unit would be best located at the highest level in the Secretariat, i.e. the Executive Office. This seems most practical, since the Group and the Unit will be chaired and supervised by the Deputy Secretary-General, and would also show the importance which the United Nations attaches to this matter.

6. In order to raise awareness and garner support among the wider membership and the general public, we believe it might be useful to organize an informal briefing of the General Assembly, preferably before the end of March, following the model of the recent launching of the Online Counter-Terrorism Handbook, in which you and the Deputy Secretary-General might wish to present the above-mentioned Report and the steps envisaged or already undertaken by the Secretariat to implement it. At this initial stage, however, before the Group and the Unit have started their work, it would seem premature to hold a General Assembly debate or consider a General Assembly Resolution on this matter.

7. We hope that you might find the above suggestions worth considering. We fully trust that you will lend your full support to the Group and the Unit and will continue to make the strengthening of the rule of law as a key priority of the United Nations.

Please accept, Excellency, the assurances of our highest consideration.

[Signatures]

Annex III:

**The UN Security Council and the Rule of Law
Final Report and Recommendations from the
Austrian Initiative, 2004-2008
(UN Doc. A/63/69 – S/2008/270)**

Summary of Recommendations

Recommendation 1.

The Security Council should emphasize the importance of the rule of law in dealing with matters on its agenda. This embraces reference to upholding and promoting international law, and ensuring that its own decisions are firmly rooted in that body of law, including the Charter of the United Nations, general principles of law, international human rights law, international humanitarian law, and international criminal law.

Recommendation 2.

Acknowledging that the Council's powers derive from and are implemented through law will ensure greater respect for Council decisions. As part of a commitment to the rule of law, the Council should adopt formal rules of procedure rather than continuing to rely on provisional rules.

Recommendation 3.

When establishing UN operations, the Council should give greater weight to establishing or re-establishing the rule of law. Such efforts may include transitional justice mechanisms but also efforts to build mechanisms for peaceful resolutions of disputes. In a period of transition, it may be necessary to establish temporary institutions to combat impunity, prevent revenge killings, and lay the foundations of more sustainable order.

Recommendation 4.

The Council should, working together with other parts of the UN system, in particular the Peacebuilding Commission, the Rule of Law Co-

ordination and Resource Group, and the Rule of Law Unit, pay particular regard to ensuring the sustainability of rule of law assistance measures after the end of a UN operation.

Recommendation 5.

When taking measures to maintain international peace and security, the Council should support criminal justice mechanisms and confirm its opposition to impunity. Where local institutions are unwilling or unable to prosecute those responsible for international crimes, the Council should consider appropriate measures to encourage or compel prosecution, including referral of a matter to the International Criminal Court as foreseen under the Rome Statute, as well as to ensure cooperation in order to bring perpetrators to justice.

Recommendation 6.

The Council should be prepared to act for the international community in exercising the Responsibility to Protect. As stated at the 2005 World Summit, this should be in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

Recommendation 7.

In order to prevent conflict, as well as to stabilize a post-conflict environment, the Council should seek to strengthen its cooperation with regional arrangements and organizations that can support the rule of law at the regional level.

Recommendation 8.

The Council should pay special attention to the impact of armed conflict on women and their important role in conflict resolution, including peace negotiations and peacebuilding, and ensure more effective and coherent implementation of resolution 1325 (2000) on Women, Peace, and Security. The Council should reiterate its call upon the Secretary-General to appoint more women as Special Representatives or Special Envoys, including as heads of UN operations.

Recommendation 9.

The Council should ensure that all UN efforts to restore peace and security themselves respect the rule of law. When authorizing a UN operation the Council should take appropriate measures to support the implementation of the Secretary-General's zero-tolerance policy on sexual exploitation and abuse by UN personnel, the recommendations in the Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations as well as the Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse. In particular:

- (i) the Council should encourage Member States contributing or seconding personnel to take appropriate preventative action, including the conduct of pre-deployment training, and to be in a position to hold their nationals accountable for criminal conduct;
- (ii) the Council should support the Secretary General's efforts to seek formal assurances from troop contributing countries (TCCs) that they will exercise jurisdiction over their personnel;
- (iii) the Council should affirm its commitment to put victims at the centre of its attention by expressing its support for the Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse.

Recommendation 10.

The Council should limit itself to using its extraordinary powers for extraordinary purposes. The exercise of such powers should be limited in time and it should be subject to periodic review; as a rule the Council should allow for representations by affected States (such as under Articles 31 and 32 of the UN Charter) and, where possible, individuals. In general the Council should not decide that which does not need to be decided; it should err on the side of provisional responses rather than permanent solutions.

Recommendation 11.

When the Council adopts a resolution of a legislative character that is general rather than particular in effect, the legitimacy of and respect for that resolution will be enhanced by a process that ensures transparency, participation, and accountability. This should include:

- (i) the holding of open debates on any such proposals;
- (ii) wide consultation with the membership of the United Nations and other specially affected parties; and
- (iii) a procedure to review the resolution within an appropriate time-frame.

Recommendation 12.

As any “legislative resolution” is an exceptional matter, it should, as a rule, terminate after a period of time set by the Council in the resolution (a “sunset clause”) unless there is an affirmative decision by the Council to renew it.

Recommendation 13.

The Council should support and draw more frequently on existing judicial institutions of international law. This includes:

- (i) promoting peaceful settlement of disputes before the International Court of Justice (ICJ);
- (ii) requesting advisory opinions from the ICJ; and
- (iii) referring matters to the International Criminal Court.

Recommendation 14.

The Council should establish ad hoc judicial institutions only in exceptional circumstances in order to avoid the proliferation of costly new courts and tribunals and the fragmentation of international law.

Recommendation 15.

The Security Council should be proactive in further improving “fair and clear procedures” to protect the rights of individuals affected by its decisions. These should include, as minimum standards:

- (i) the right to be informed of measures taken by the Council and to know the case against him or her, including a statement of the case and information as to how requests for review and exemptions may be made;

- (ii) the right to be heard (via submissions in writing) within a reasonable time by the relevant decision-making body and with assistance or representation by counsel; and
- (iii) the right to review by an effective, impartial, and independent mechanism with the ability to provide a remedy, such as the lifting of the measure or compensation.

Recommendation 16.

The Council should itself, on its own initiative, periodically review targeted individual sanctions, especially the freezing of assets. The frequency of such review should be proportionate to the rights and interests involved.

Recommendation 17.

Building on recent innovations, such as the creation of the focal point, the Council should invite the Secretary-General to present it with options to further strengthen the legitimacy and effectiveness of sanctions regimes, paying particular regard to the need to protect sources and methods of information, as well as to protect the rights of individuals by upholding the minimum standards, including the right to review.