



## HIGHLIGHTS FROM THE WORKSHOP ON

### Accountability and Fact-finding Mechanisms for Violations of International Humanitarian Law and Human Rights Law:

#### The Role of the Security Council – Past and Future 1 November 2011

*Co-organised by the Permanent Mission of Portugal to the United Nations  
and the United Nations Office for the Coordination of Humanitarian Affairs*

#### Background

Ensuring accountability for violations of international humanitarian law and human rights law, both for individual perpetrators and for parties to the conflict, is one of the five core challenges to achieving more effective protection of civilians in armed conflict, identified by the United Nations Secretary-General in his 2009 and 2010 reports on this topic. As the Secretary-General noted, “in many conflicts, it is to a large degree the absence of accountability and, worse still, the lack in many instances of any expectation thereof, that allows violations to thrive”.

The Security Council has an important role to play in enhancing accountability for violations of international humanitarian and human rights law. It has set significant precedents in terms of promoting individual criminal responsibility; requesting the establishment of fact-finding mechanisms to investigate alleged violations and providing reparations for victims.

On the occasion of the open debate on the protection of civilians in armed conflict on 9 November 2011 during the Portuguese Presidency of the Security Council, the Permanent Mission of Portugal and the Office for the Coordination of Humanitarian Affairs co-hosted a workshop on the Security Council’s role in enhancing accountability. The workshop brought together representatives of Member States, the United Nations and NGOs.

The workshop focused on three key aspects of accountability: individual criminal responsibility, fact-finding mechanisms and reparations. In relation to each of these three issues, participants reviewed past Security Council practice as well as relevant national and international experience and reflected on the possible future role of the Council. This paper presents highlights from the discussions.

#### Individual Criminal Responsibility

The panel started by a review of the positive and important precedents of Security Council action in the last 20 years in promoting individual criminal responsibility, including the establishment of International Criminal Tribunals for the former Yugoslavia and Rwanda and the Council’s referral of the situations in Darfur and Libya to the International Criminal Court (ICC).

The discussions then turned to the relationship between the Security Council — a political body and the ICC — a judicial body. Some areas of concern were flagged, including questions of consistency or selectivity as to which situations the Security Council referred to the ICC; the exemptions for the nationals of certain States in the referrals to date; and the possibility for Article 16 deferrals. There was also a positive assessment of the limited interference to date and in particular of the judicious restraint from making Article 16 deferrals.

It was suggested that an indicative checklist could be drawn up to guide the Security Council’s engagement with the ICC at the time it was considering referrals and more generally. This could include reflections on when a situation constitutes a threat to international peace and security that warrants a referral to the ICC; considerations of funding for cases referred to by the Court; exceptions in the referrals; the Council’s role in promoting cooperation with the Court by relevant States; and the issue of Article 16 deferrals. Such a checklist should not be prescriptive but rather enable a well-informed debate and promote consistency in Council practice.

With regard to hybrid tribunals, what emerged clearly from the presentations was not just their value in bringing perpetrators of war crimes to justice but also in terms of national ownership and the positive impact such mechanisms could have

on the affected community more broadly. The panel reflected in particular on the experience of the Special Court for Sierra Leone and its impact on the national legal system, the involvement and ownership of the Sierra Leonean community in the proceedings and also the longer-lasting legacy of the tribunal. In the case of Sierra Leone, practical and positive examples of this legacy were noted, including building the capacities of the court staff and the use of the tribunal premises for the law faculty.

The challenges of funding ICC proceedings and hybrid tribunals were raised by a number of speakers both in terms of the need for it but also the sensitivities surrounding the sources of funding. It was pointed out that although one possible way of addressing the issue was to resort to voluntary donations in multi-donor funds, this could give negative impressions of politicisation of judicial processes, and that ways had to be found for the funding to come from the organisation's regular budget.

It was recalled that the primary obligation to investigate and prosecute lies with national authorities and that international tribunals have a subsidiary role. The discussion noted the small numbers of prosecutions at the national level to date, and that the Security Council needed to find ways of encouraging, and possibly assisting States to do more in this field. There was also a strong call for more efforts to empower national authorities in the broad sense, including not just the courts, but also the necessity of taking earlier steps in terms of ensuring States have the necessary legislation to bring proceedings and in terms also of commencing prosecutions. In terms of next steps for enhancement of the Council's engagement with the ICC, there were some queries as to a possible role of peacekeeping missions in promoting accountability.

Finally, the session underlined the need to work towards the establishment of comprehensive systems, ensuring links between the International Criminal Court, any possible future hybrid court and the national level to make sure they mutually reinforce each other.

## Fact-finding mechanisms

The panel on fact-finding mechanisms highlighted the breadth and variety of UN experience in this area and the value of such diversity. Fact-finding mechanisms have been established at the request of a number of different entities, including the Security Council, Human Rights Council, Secretary-General, Member States, and at the initiative of the High Commissioner for Human Rights. The session reflected on the increased use by the international community of such mechanisms to ascertain disputed facts and responsibilities and put forward recommendations to pursue accountability. Fact-finding mechanisms have, in certain cases, led to further action, such as the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda or a Security Council referral to the ICC.

The discussion raised a number of the challenges fact-finding bodies face, in particular regarding questions of selectivity in terms of what contexts are considered and the need for greater consistency in their establishment and mandates. The panel highlighted the need to link fact-finding bodies with other judicial processes to ensure they inform each other. Especially where fact-finding investigations are conducted in parallel with other national and international judicial or investigative processes, it is important to ensure they do not hamper these other processes but, where possible, assist them.

The panel also considered in detail the methodological and operational issues

surrounding the work of fact-finding bodies. A number of factors necessary to ensure their success were noted, including in terms of expertise, capacity, time, adequate funding and, crucially, access. Another element that emerged in the discussion was the importance of the timing of the establishment of these mechanisms. A key recommendation was that fact-finding inquiries should take place sufficiently early in a crisis to enable them to contribute to the prevention of further violations.

A further recommendation put forward was for the Security Council to be more systematically apprised of the reports of the non-Council mandated commissions/missions which had investigated countries on the Council agenda. The information on a particular context they maintain and their findings could be a useful complement to the information already at the Security Council's disposal. Participants also emphasised the need for more consistent follow up to the recommendations of fact-finding mechanisms in order to ensure their effectiveness and credibility and to meet the expectations their establishment raises, especially among victims.

The possible role of the Security Council in reinforcing and supporting the work of non-Council mandated fact-finding mechanisms by requesting States and other relevant actors to cooperate during the investigation and, crucially, in the implementation of recommendations was also raised.

## Reparations

The third and final panel emphasised that while individual criminal responsibility brings those accused of violations to justice and may have a deterrent effect, in the vast majority of cases, it does not provide redress to the victims of violations. The panel stressed the need for a greater focus on supporting the victims of violations through reparations. There was broad consensus among the participants that this is an area of accountability that is all too frequently overlooked, despite a number of precedents at the international and national level.

The panel reflected on past practice, including the Security Council's role in establishing the the United Nations Compensation Commission, and its value as a precedent for further Council action in this regard.

The discussion highlighted the wealth of experience that exists at the international and national levels and called for the exchange of expertise and best practices in the area of victims reparations. Panelists reflected on lessons

learned from various international and national reparations schemes, including the Eritrea-Ethiopia Claims Commission.

It was noted that all too frequently reparations are thought of too narrowly, exclusively in terms of financial compensation. Participants emphasised the broad range of other forms of reparations that could be adopted (including restitution and rehabilitation). The practice of the Commission for Real Property Claims of Displaced Persons and Refugees (Bosnia and Herzegovina) and the Housing and Property Claims Commission (Kosovo) were discussed as important examples of reparations schemes addressing disputes to title to property. In terms of recipients of reparations, the discussion highlighted the need to look beyond individual victims and the importance of also considering affected communities.

Lastly, it was noted that the Council could play a significant role in supporting the establishment of national reparations programmes.

## Contact

*For further information, please contact:*

- The Permanent Mission of Portugal to the United Nations / E-mail: [Portugal@missionofportugal.org](mailto:Portugal@missionofportugal.org)
- The UN Office for the Coordination of Humanitarian Affairs / Policy Development and Studies Branch Protection and Displacement Section / E-mail: [Gillard@un.org](mailto:Gillard@un.org)