

## The UN Security Council: 10 Lessons from Iraq on Regulation and Accountability<sup>1</sup>

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The UN Security Council sits at the apex of the institutional architecture designed to maintain international peace and security. Since the onset of the post-Cold War era, it has experimented with new objectives and instruments, generating vastly increased field activity by the UN and other international actors in support of Council mandates. No single country has burdened it with more difficult choices or more bitter outcomes than Iraq. The deadlock in the UN Security Council over Iraq policy in March 2003, followed by revelations of corruption and mismanagement in the UN's Iraq Oil-for-Food (OFF) Program, provide an opportunity to draw some lessons from the Council's broader experiences in Iraq, with a view to informing broader debates about coherence, accountability and responsibility within the UN.

In the past twenty-five years, when Iraq has been constantly on the Council's agenda (starting with the Iran-Iraq war), the Council has designed responses in two distinct directions: the politico-military approach and the legal-regulatory approach. These two approaches to managing peace and security provide the key to understanding many of the complexities facing the Council today. The Council's current predicament regarding Iraq results from problematic improvisation in mixing these two modes of security management; but at the same time, its experiences in Iraq may offer lessons enabling the Council—and the broader UN system—to become a more effective regulator of international peace and security.

When adopting a *politico-military* approach, the Council acts as a crisis manager and mediator: typically it authorizes a strategic approach to the resolution of an existing threat to international peace and security. This is a reactive management style. The Council typically designates actors (the Secretary-General or his agents, regional organizations, and member states) to whom it affords extensive discretion in the interpretation and implementation of a specified mandate. Political-military implementation generally involves embargoes, peace negotiations, and the observation and monitoring, and occasionally military enforcement, of peace settlements. Examples of the Council taking action in this mode in Iraq include its approach to the Iran-Iraq War after 1987 (resulting in a cease-fire and the eventual end of hostilities), the authorization in 1990 of a Coalition to respond with force to Iraq's invasion

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<sup>1</sup> This article draws on David Malone, *The International struggle over Iraq: Politics in the UN Security Council, 1980-2005* (Oxford University Press: 2006). We thank Ben Rowswell, the anonymous reviewers and the editors of the JILIR for their helpful comments. The views expressed here are ours alone.

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of Kuwait, and more recently, the political aspects of the UN Assistance Mission to Iraq following the 2003 invasion.

In the *legal-regulatory* approach, the Council acts more as a proactive risk manager than as a reactive crisis manager, sometimes even taking on the role of arbitrator or jury. Typically, the Council establishes detailed rules governing the behaviour of States, individuals, or other entities, then relies on a wide range of administrative agents to implement and to enforce the rules. The agents can include managers of programs created by the Council, States, specially-formed subsidiary bodies (such as investigative commissions, judicial tribunals and sanctions committees), UN agencies and programs such as the World Food Program or the International Atomic Energy Agency (IAEA), and even other organizations like the International Criminal Court (ICC). Activities typically involve fact-finding efforts, impositions of sanctions, and domestic regulation of prohibited transfers of goods, funds and persons. Examples of the Council acting in this mode in Iraq abound: the establishment of two weapons inspection commissions (UNSCOM, UNMOVIC), a complex sanctions regime, the OFF Program and the UN Compensation Commission (which reallocated US\$52.5 billion from Iraqi oil revenues to those harmed by Iraq's invasion of Kuwait over the years 1991-2005<sup>2</sup>).

During the Cold War, strategic and political realities seriously constrained the Council's freedom to manoeuvre. Council action was limited to the politico-military approach, because superpower rivalries prevented both the development of coherent and reasonably consistent rule-making in the Council and the development of the regulatory machinery necessary to enforce those rules. A sense of strategic coherence and apparent unity that emerged in the Council at the Cold War's end offered the basis for a more ambitious approach throughout the 1990s, beginning with the Council's experiments in Iraq. Drawing heavily on the powers provided to it under Chapter VII of the Charter, the Council established and underwrote a widening array of administrative and regulatory instruments to implement evolving norms, from the international criminal tribunals for the former Yugoslavia and Rwanda, to the committees overseeing counter-terrorism and non-proliferation efforts established in Resolutions 1373 and 1540 respectively.

The Council's regulatory approach to Iraq met with mixed success at best, despite the decline of the Cold War impasse: Iraq was effectively deprived of weapons of mass destruction (WMD), and UN agencies kept millions of Iraqis alive through OFF, which, as Kofi Annan noted, was "one of the largest, most complex and most unusual tasks [the Security Council] has ever entrusted to the Secretariat – the only humanitarian program ever to have been

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<sup>2</sup> See United Nations Compensation Commission, "The UNCC at a glance", online <<http://www2.unog.ch/uncc/ataglance.htm>>.

funded entirely from resources belonging to the nation it was designed to help”.<sup>3</sup> At the same time, however, Iraqi living-standards were massively depressed, generating strong international concern, a fracturing of the Security Council’s unity on Iraq policy and arguably a deep pool of resentment towards the Council—and especially the US and the UK—within the region.

The Council’s failure to understand the distinct challenges inherent in the legal-regulatory approach led it to establish weak management frameworks, creating the conditions for the OFF scandal and many other problems. In this article, we address the Council’s unsatisfactory sanctions oversight in the next section. Then, we demonstrate how the Council’s approach to weapons inspection in Iraq relied on similar legal-regulatory methods with findings (however accurate) that ultimately did not satisfy the political and security requirements of the US and UK. We then seek to draw lessons from these failures, which may be of utility as the Council moves forward—given the likelihood that the Council will rely increasingly on a legal-regulatory approach to deal with contemporary security threats. Some of these ideas are relevant to broader contemporary efforts to achieve meaningful reform of the UN.

## I THE IRAQI SANCTIONS EXPERIENCE

### Administering Sanctions

The Security Council’s response to the war between Iraq and Iran in the 1980s followed its classical politico-military pattern of crisis management. It set out to broker a solution to the crisis through diplomatic intervention, involving a great deal of mediation of differences between Iraq and Iran on the path to settlement. But as Operation Desert Storm, designed to reverse Iraq’s annexation of Kuwait, drew to a close in 1991, the Security Council set off on a new tack through Security Council Resolution (SCR) 687, designed to prevent Iraqi military capacity from causing future crises. The twin pillars of this approach were weapons inspections and strict economic sanctions designed to provide the inspections with teeth. Each limb of this strategy was implemented through the delegation of complex administrative activities to a range of agents, charged with ensuring Iraqi conduct did not breach standards laid down by the Council.

Economic sanctions were first imposed on Iraq under SCR 661, on 6 August 1990, as a response to the Iraqi invasion of Kuwait.<sup>4</sup> Following the ceasefire, the sanctions were left in place to ensure Iraqi compliance with the terms of

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<sup>3</sup> “On eve of its expiry, Annan hails ‘unprecedented’ Iraq Oil-for-Food program” *UN News Centre* (20 November 2003), online: United Nations News Service <<http://www.un.org/News/>>.

<sup>4</sup> *On Sanctions Against Iraq*, SC Res. 661, UN SCOR, 45<sup>th</sup> Sess., S/RES/661(1990).

SCR 687.<sup>5</sup> SCR 661 prohibited states from importing all commodities originating in Iraq, and any activities relating to export or trans-shipment of any commodities or products to Iraq (except for medical supplies and, in humanitarian circumstances, foodstuffs).<sup>6</sup> This regime exacerbated the humanitarian crisis which confronted Iraq after Operation Desert Storm, described by one UN official as “near-apocalyptic”.<sup>7</sup> The Secretary-General’s Executive Delegate for Iraq proposed a “mechanism whereby Iraq’s own resources be used to fund” its humanitarian needs.<sup>8</sup> In SCR 706, adopted on 15 August 1991, the Council established an elaborate “oil-for-food” program, which allowed Iraq to export a quota of oil and to use the resulting export revenues to purchase humanitarian supplies, all under the controlling eye of the UN.<sup>9</sup> In creating this OFF Program, the Council decided to control a sovereign state’s revenues and direct its expenditures—not only to the benefit of its own population, but also for payment of costs incurred by the UN in the destruction of Iraqi arms, to compensate victims of Iraqi military action, and to fund the Iraq-Kuwait boundary settlement process.<sup>10</sup>

Not surprisingly, Iraq at first refused to cooperate with this system of international financial regulation. By 1995, a humanitarian crisis in Iraq had fuelled significant worldwide opposition to the continuation of sanctions. In March 1995, Russia, France and China circulated a draft SCR that, if passed, would have lifted sanctions on Iraq.<sup>11</sup> While the US and UK would have vetoed any such resolution had it been brought to a vote, the need to address the concerns of their Council partners had been made clear. Thus, in April 1996, the Council passed SCR 986, providing a rare concession to Baghdad.<sup>12</sup> It allowed Iraq to deal directly with suppliers of goods, bringing draft contracts to the Security Council’s 661 Sanctions Committee for approval, and gave Iraq the primary administrative responsibility for the distribution of humanitarian

<sup>5</sup> See *On Restoration of the Sovereignty, Independence and Territorial Integrity of Kuwait*, SC Res. 687, 46<sup>th</sup> Sess., S/RES/687(1991), Part F, at paras. 20-29.

<sup>6</sup> *Supra* note 3 at para. 3.

<sup>7</sup> See *Letter Dated 91/03/20 from the Secretary-General Addressed to the President of the Security Council*, UNOR S/22366, (1991), at para. 8.

<sup>8</sup> See *Letter Dated 91/07/15 from the Secretary-General Addressed to the President of the Security Council*, UNOR S/22799, (1991), Annex at para. 138.

<sup>9</sup> See also *Concerning the Release of Funds from the Escrow Account for the Purpose of Humanitarian Assistance to Iraq*, SC Res. 712, UN SCOR, 46<sup>th</sup> Sess., S/RES/712(1991).

<sup>10</sup> *Authorizing States to Permit the Import of Petroleum and Petroleum Products Originating in Iraq Sufficient to Produce a Sum to be Determined by the Council*, SC Res. 706, 46<sup>th</sup> Sess., S/RES/706(1991), at para. 3. See also *On the Proceeds of Sales of Iraqi Petroleum and Petroleum Products* SC Res. 778, 47<sup>th</sup> Sess., S/RES/778(1992), at para. 5(c)(ii).

<sup>11</sup> Sarah Graham-Brown, *Sanctioning Saddam: The Politics of Intervention in Iraq* (London: I.B. Tauris, 1999), at 80.

<sup>12</sup> *On Authorization to Import, Temporarily, Petroleum and Petroleum Products Originating in Iraq, as a Temporary Measure to Provide for Humanitarian Needs of the Iraqi People*, SC Res. 986, 50<sup>th</sup> Sess., A/RES/986 (1995).

goods under the OFF formula, except in the north where distribution was administered by the UN Inter-Agency Humanitarian Program.

This allowed the operational launch of the OFF Program—the largest humanitarian relief program the UN had ever managed.<sup>13</sup> Over its lifetime, OFF handled \$64 billion worth of Iraqi oil revenues, and served as the main source of sustenance for 60 percent of Iraq's estimated 27 million people, reducing malnutrition amongst Iraqi children by 50 percent.<sup>14</sup> Revenues from the sale of Iraqi petroleum were processed through an administrative arrangement between the Government of Iraq and the UN, and distributed according to a formula agreed upon by the Security Council. Assisted by independent experts, the 661 Committee had oversight responsibility for the approval of contracts under the OFF; but it failed to prevent the kickbacks and commissions that were, we now know, increasingly built into the draft contracts it approved. The final report of the Independent Inquiry Committee into the OFF Program under the leadership of former Chairman of the US Federal Reserve, Paul Volcker, detailed massive corporate corruption in pursuit of OFF contracts through Baghdad—139 out of 248 oil purchasers paid illicit surcharges, while 2,253 of the 3,614 companies that provided humanitarian goods paid kickbacks of various sorts.<sup>15</sup>

The US and UK attempted to exert some control over these contracts through the 661 Committee, but not very effectively.<sup>16</sup> By allowing Hussein's regime to exercise daily administrative control over the formation and performance of contracts, the OFF became, in Paul Volcker's words, "a compact

<sup>13</sup> For brief introductions to the OFF Program see Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Briefing Paper* (21 October 2004), online: Independent Inquiry Committee <[www.iic-offp.org/documents/Briefing%20Paper21October04.pdf](http://www.iic-offp.org/documents/Briefing%20Paper21October04.pdf)>; and see Kenneth Katzmman, Congressional Research Service, *Iraq: Oil-For-Food Program, International Sanctions, and Illicit Trade* (16 April 2003), online: Foreign Press Centres <<http://fpc.state.gov/documents/organization/19851.pdf>>.

<sup>14</sup> Oil-For-Food Facts, 'Oil-For-Food: FAQ', online: <[www.oilforfoodfacts.com](http://www.oilforfoodfacts.com)>/. See especially Independent Inquiry Committee into the United Nations Oil-for-Food Program, *The Impact of the Oil-for-Food Program on the Iraqi People: Report of an independent Working Group established by the Independent Inquiry Committee* (7 September 2005), online: Independent Inquiry Committee <[http://www.iic-offp.org/documents/Sept05/WG\\_Impact.pdf](http://www.iic-offp.org/documents/Sept05/WG_Impact.pdf)>, at 177 and 179, indicating that OFF reduced deaths from malnutrition, but suggesting that 661 Committee "holds" retarded this positive effect by impeding the distribution of medical goods; faulting the OFF for reliance on a "relief" rather than capacity-building approach.

<sup>15</sup> Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Report on the Manipulation of the Oil-for-Food Program*, 27 October 2005, online: <<http://www.iic-offp.org/documents/IIC%20Final%20Report%2027Oct2005.pdf>>.

<sup>16</sup> In 2002 the US General Accounting Office estimated that of the 2,100 contracts then on hold with the 661 Committee, 90 percent of the holds were placed by the US: U.S., General Accounting Office, *Weapons Of Mass Destruction: U.N. Confronts Significant Challenges in Implementing Sanctions against Iraq*, (GAO-02-625), (2002) at 20.

with the devil".<sup>17</sup> It allowed Hussein to direct the costs of sanctions onto the most vulnerable sections of Iraqi society, while his cadres extracted rents under the apparently guileless supervisory gaze of UN officials.<sup>18</sup> The Council, while dimly aware of these stark realities, never adequately confronted them.

### **The Costs and Lessons of Poor Administration of a Regulatory Regime**

Much has been made of the evils of the sanctions regime.<sup>19</sup> Concern over the humanitarian costs of sanctions eroded support for the containment strategy championed by the US and UK, increasingly seen as punitive rather than aimed at achieving the disarmament aims of Resolution 687. Increasingly, the regime itself was seen by many as an abuse of the Security Council's power. The Volcker Inquiry has, moreover, exposed many management deficiencies of the UN Secretariat. Just as important, however, it exposed faults in the Council's supervision, although the media has focused less on these faults than on other flaws. Together, these shortcomings allowed the manipulation and distortion of a massive international regulatory regime by the very targets of its regulation. In this section, we look briefly at the sinews of three regulatory failures within this system: an absence of administrative accountability; imprecision in administrative mandates and discretion; and a lack of systemic coordination.

#### ***An Absence of Administrative Accountability***

The Security Council failed to appreciate that in moving to the legal-regulatory approach implicit in the OFF Program, it became highly dependent on agents who implemented, monitored, and enforced the rules it laid down, creating the opportunity for them to corrupt the regulatory regime, either intentionally or through negligence. What resulted was a pattern of "egregious lapses" – as the Volcker Inquiry termed them – in management, both by the UN Secretariat and, arguably, by Member States themselves.<sup>20</sup>

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<sup>17</sup> Mark Turner, "Annan accepts claim of failure on oil-for-food", Financial Times (FT.com), 7 September 2005.

<sup>18</sup> See *Adverse consequences of economic sanctions on the enjoyment of human rights*, (UN ECOSOCOR E/CN.4/Sub.2/RES/1997/35, (1997); David Cortright and George A. Lopez, 'Reforming Sanctions' and Peter van Walsum, 'The Iraq Sanctions Committee' in David Malone, ed., *The UN Security Council from the Cold War to the 21st Century*, (Boulder, CO: Lynne Rienner, 2004); Richard Garfield, "Health and Well-Being in Iraq: Sanctions and the Impact of the Oil-for-Food Program" (2001) 11 *Transnat'l L. & Contemp. Probs.* 277.

<sup>19</sup> See for example David Cortright et al., *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions* (Lanham, MD: Rowman and Littlefield, 1997); A. Shehabaldin and W. M. Laughlin Jr., "Economic Sanctions against Iraq: Human and Economic Costs" (1999) 3 *Int'l J.H.R.* 1; George E. Bisharat, "Sanctions as Genocide" (2001) 11 *Transnat'l L. & Contemp. Probs.* 379.

<sup>20</sup> Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Report on the Management of the Oil-for-Food Program*, I, 4.

*Mismanagement by the UN Secretariat*

Amongst the Secretariat staff, the most significant allegations of corruption were made against the former chief of the OFF Program, Benon Sevan. The Volcker Inquiry asserted that Sevan improperly solicited oil allocations worth \$1.5 million, and received illicit commissions of \$147,000 in cash between 1999 and 2003.<sup>21</sup> After first being suspended, Sevan eventually resigned.<sup>22</sup> The Inquiry also fingered a Russian UN procurement official, Aleksander Yakovlev, as being on the take in a wide number of UN transactions.<sup>23</sup> Other corruption within the Secretariat was also revealed.<sup>24</sup> The Volcker Inquiry also directed significant criticism at the Secretary-General, the Deputy Secretary-General, and Annan's former *Chef de Cabinet* for their failure adequately to supervise Sevan.<sup>25</sup> It also faulted UN audit processes.<sup>26</sup>

The Inquiry further criticized former Secretary-General Boutros-Ghali for his role in the political manipulation of OFF tenders. Boutros-Ghali responded by labeling the Inquiry's investigators "ignorant" and describing the allegations against him as "silly", seeming to suggest that such administrative decisions were, in the UN context, inevitably political. James Traub highlights how this played out in the establishment of the OFF:

In minutes of a meeting of the Iraq Steering Group from August 13, 1996, Chinmaya Gharekhan, one of then-Secretary-General Boutros Boutros-Ghali's closest advisers, said, "The Secretariat had come under terrible pressure from member-states; the selection of [oil] overseers, the bank, and the firm to supply oil inspection agents had all been political."<sup>27</sup>

Politics and contractual administration had become hopelessly entangled. Senior UN officials failed to understand that a regime which looked like a massive administrative program involving multibillion dollar contracts and

<sup>21</sup> Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Interim Report* (3 February 2005); Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Third Interim Report* (8 August 2005).

<sup>22</sup> Benon V. Sevan, *Letter of resignation*, 7 August 2005, copy on file with the authors.

<sup>23</sup> Independent Inquiry Committee, *Third Interim Report* (8 August 2005). Yakovlev subsequently pleaded guilty to money laundering charges in Manhattan Federal District Court. See Warren Hoge "Panel Accuses Former U.N. Official of Bribery" *New York Times* (9 August 2005).

<sup>24</sup> Julia Preston "Russian Held in Scheme to Launder U.N. Bribes" *New York Times* (3 September 2005) 8.

<sup>25</sup> Independent Inquiry Committee, *Report on the Management of the Oil-for-Food Program*, I at 44-8.

<sup>26</sup> See Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Briefing Paper* (9 January 2005).

<sup>27</sup> James Traub, "The Security Council's Role: Off Target", *The New Republic* (21 February, 2005) at 14-9.

operated as such would eventually be assessed—in the court of world public opinion, even if not in the corridors of power—against standards of impartial administration and public management, not politics. Only with the revelations of the Volcker Inquiry did the “painful” lessons, “deeply embarrassing” to the UN begin to sink in, as Kofi Annan’s remarks made clear:

The inquiry committee has ripped away the curtain, and shone a harsh light into the most unsightly corners of our organization.... Who among us can now claim that U. N. management is not a problem, or is not in need of reform?<sup>28</sup>

### *Mismanagement by the Member States*

While the UN Secretariat seems to be learning lessons from its own role in the maladministration of the OFF Program—perhaps under pressure from Member States—it is far from clear that Member States have done the same. And yet, they undermined the OFF Program in a number of ways: through politicization of the awarding of contracts; through inadequate supervision in the 661 Committee; through wilful blindness to oil smuggling; and through misuse of their administrative discretion.

The Volcker Inquiry criticized a UN official, Joseph Stephanides, for steering a large contract to Lloyd’s Register of London. A lower tender was submitted by a French rival, but the UN ultimately decided the deal should go to Lloyd’s—after it lowered its bid pursuant to obtaining confidential information from UN sources—in part because a French bank had been awarded another key contract. Stephanides was fired by Annan on 1 June 2005.<sup>29</sup> Significantly, however, those who had collaborated with Stephanides in the UK Mission to the UN saw nothing to apologize for. Sir John Weston, the UK Ambassador to the UN during the relevant years, made clear that the promotion of UK commercial interests was a standard part of his brief, and that he had been operating under “ministerial instructions” from London in advising Lloyd’s on how to win the contract. Suggestions of improper behaviour were based on “ignorance of the practices of diplomatic missions”.<sup>30</sup> Again, administrative probity lost out to diplomatic *realpolitik*. Carne Ross, a British diplomat assigned to the UN at the time, has described the OFF Program as “deeply politicized” and “carved up” between member states.<sup>31</sup> Council members thus seem to have failed at the first hurdle in providing credible

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<sup>28</sup> Warren Hoge, “Annan Failed to Curb Corruption in Iraq’s Oil-for-Food Program, Investigators Report” *New York Times* (7 September 2005) 6.

<sup>29</sup> “Annan fires Joseph Stephanides for “serious misconduct” linked to oil-for-food” *UN News Centre* (1 June 2005).

<sup>30</sup> Philip Sherwell and Charles Laurence “The scandal Kofi couldn’t cover up” *Sunday Telegraph* (6 February 2005) 17.

<sup>31</sup> *Ibid.*



leadership or even a basic sense of responsibility for proper administration of the OFF Program.

Further damage was done by Member States' wilful blindness to Iraqi oil smuggling to Turkey, Jordan, and Syria. While Hussein received only \$1.8 billion from kickbacks, he amassed a staggering \$11 billion from oil smuggling outside the OFF.<sup>32</sup> Both the Clinton and George W. Bush administrations made formal decisions, notified to Congress, allowing much of the oil smuggling to continue, despite its prohibition by both SCRs and prior US law, since it was in the US "national interest".<sup>33</sup> According to Carne Ross, "too little energy was exerted on enforcing controls. While in New York we argued ourselves hoarse in negotiation, Washington and London rarely lifted a finger to pressure Iraq's neighbours to stem the illegal flows."<sup>34</sup>

The Secretariat's Office of the Iraq Program (OIP) raised concerns over suspicious pricing on OFF contracts with the 661 Committee on at least seventy occasions, yet not one of these contracts was blocked by the Committee.<sup>35</sup> The reason seems clear: the Sanctions Committee was willing to tolerate some corruption of the Program by Hussein, as the price of its very existence. A former Ambassador to the UN with Security Council has commented:

[U]nder Resolution 986 Saddam Hussein exercised so much control over the program ... that it was only to be expected that he would find ways of turning his wide discretionary powers into money. ... A total of \$2bn over the whole period [1999-2000] does not seem that extravagant. Just compare this with the money Saddam would have had at his disposal if the sanctions had been lifted.<sup>36</sup>

Similarly, the Volcker Inquiry has written of "uncertain, wavering direction from the Security Council", and of how "differences among member

<sup>32</sup> Independent Inquiry Committee, *Report on the Management of the Oil-for-Food Program*, I, Ch. 2.

<sup>33</sup> Elise Labott and Phil Hirschhorn, "Documents: US condoned Iraq oil smuggling" *CNN.com* (3 February 2005), online: CNN <<http://edition.cnn.com/2005/WORLD/meast/02/02/iraq.oil.smuggle>>; Mark Turner, "US and Congress knew Saddam was smuggling oil" *FT.com* (19 January 2005), online: <<http://www.informationclearinghouse.info/article7760.htm>>. Security Council members were not alone here: other UN Member States also appear to have accorded secondary importance to OFF strictures. In 2006, the Australian government was subjected to a high-profile inquiry over its failure to thoroughly test assurances offered by its monopoly wheat exporter, the Australian Wheat Board, that it was not paying kickbacks to Hussein's government.

<sup>34</sup> Carne Ross "War Stories" *Financial Times* (29 January 2005) 21.

<sup>35</sup> Traub, 'Off target', 14-17. The 661 Committee did take some steps to curtail surcharges, including moving from the proactive to the reactive pricing mechanism. It remains unclear what measures, if any, it adopted against illegal commissions.

<sup>36</sup> Confidential correspondence with the authors, 11 February 2005.

states impeded decision-making, tolerated large-scale smuggling, and aided and abetted grievous weaknesses in administrative practices within the Secretariat.”<sup>37</sup> Notwithstanding these condemnations, officials of Council Member States have largely refused to acknowledge their countries’ roles in the scandal. The exception—and all the more notable for it—was US Secretary of State Colin Powell, who acknowledged, prior to leaving office, “The secretary-general will have to be accountable for those management problems ... [but] the responsibility does not rest entirely on Kofi Annan. ... It also rests on the membership, and especially on the Security Council, and we are a member of the Security Council”.<sup>38</sup>

The Council Members who sat on the 661 Committee exercised their administrative discretion without any sense of responsibility to the wider UN membership. This allowed them, in unintentional connivance with Saddam Hussein, to pervert the Program, not least thanks to confused lines of accountability. As the Volcker Inquiry recognizes, in the OFF,

[n]either the Security Council nor the Secretariat was clearly in command. That turned out to be a recipe for the dilution of Secretariat authority and evasion of personal responsibility at all levels. When things went awry—and they surely did—when troublesome conflicts arose between political objectives and administrative effectiveness, decisions were delayed, bungled or simply shunned.<sup>39</sup>

### *Imprecision in Administrative Mandates and Discretion*

A second lesson for the Security Council from the Iraq sanctions experience involves the need for precision in the establishment of delegated regulatory or administrative mandates. This raises issues about the proper object and purpose for which delegated discretion should be exercised, the appropriate duration of delegated mandates and discretionary powers, and the limits of an agent’s enforcement powers.

The object and purpose of the Iraq sanctions regime gave rise to numerous disputes within the Council. The goal of “regime change”, so often articulated in Washington (and occasionally London) after 1997 was unpopular amongst many governments at the UN, who suggested it shifted SCR 687’s goalposts and its focus on disarmament.<sup>40</sup> When Washington and London moved to implement

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<sup>37</sup> Independent Inquiry Committee, *Report on the Management of the Oil-for-Food Program*, I at 2.

<sup>38</sup> See Nicholas Kralev “Powell urges UN Council to take blame for scandal” *Washington Times* (12 January 2005) A11.

<sup>39</sup> Independent Inquiry Committee into the United Nations Oil-for-Food Program, *Report on the Management of the Oil-for-Food Program*, I at 3.

<sup>40</sup> See for example U.S., *Department of State, Preserving Principle And Safeguarding Stability: United States Policy Toward Iraq* (Washington D.C.: Secretary of State

regime change in Baghdad in 2002 and 2003, this long-running and sour debate handicapped their advocacy.

The dispute over the nature of the mandate underpinning sanctions and the discretion it afforded Member States purporting to 'enforce' the sanctions regime was exacerbated by the open-ended nature of the enforcement mandates created by SCR 687. A so-called *reverse veto* allowed any permanent member of the Council to block a resolution terminating the sanctions regime.<sup>41</sup> As the humanitarian toll of the Iraq sanctions grew, Russia, France, and China increasingly criticized the indefinite duration and rigidity of the regime.

The confusion over the goal of the sanctions regime was also in part a result of the Council's early acquiescence in the unilateralist enforcement action (relating to SCRs 661, 678, 687 and 688) by the US and the UK, mostly acting with France until the latter's defection in 1996. France then became the center of gravity of a majority of Member States voicing increasingly strident criticism of the sanctions regime. But the underlying dispute over whether Member States were entitled to take military action to enforce the Council's inspections-plus-sanctions strategy, without explicit and case-by-case approval from the Council, remained unresolved. This dispute over Member States' power to interpret and enforce earlier SCRs set the stage for the ambiguous language of "serious consequences" in SCR 1441 in November 2002, which ultimately failed to bridge the divide in the Council over the propriety of military action to overthrow Saddam Hussein.

### *A Lack of Systemic Coordination*

The third major lesson of the sanctions experience is that the UN system must work increasingly hard to ensure the coordination of a variety of global regulatory regimes falling within its own bailiwick. The complex regulatory schemes established by the Council rapidly came into conflict with the ethos and objectives of key UN programs relevant to the welfare and development of the Iraqi population. In brief, the Council, without much forethought, set the security interests of the UN system against its humanitarian and development objectives. As a former Ambassador on the Council has commented:

[T]he sanctions committee's brief was non-proliferation, not the development of Iraq. The more we cared about the latter, the more we could be blackmailed by Saddam. It was a lose-lose situation. If you are dealing with a dictator who has no qualms about exacerbating the suffering of his own people, you just can't win.<sup>42</sup>

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Madeleine K. Albright, 26 March 1997), online: U.S. Department of State <<http://secretary.state.gov/www/statements/970326.html>>.

<sup>41</sup> See Cortright and Lopez, *supra* note 17 at 175-6.

<sup>42</sup> Correspondence with author, 11 February 2005.

As a result, UN officials, not least those on the ground in Iraq, argued against sanctions and advocated programs to blunt their impact on the population.<sup>43</sup> Inevitably, perhaps, the failure to reconcile the mechanisms of the sanctions regime with the broader purposes of the UN translated into institutional divisions, setting the Security Council against members of the Secretariat. That division itself slowly eroded the legitimacy of the Council's regulatory approach in Iraq.

## II THE IRAQI WEAPONS INSPECTION EXPERIENCE

The second pillar of the legal-regulatory approach the Security Council took to Iraq after 1991 was the weapons inspection regime. Iraqi possession of weapons of mass destruction (WMD) had long been a source of international concern,<sup>44</sup> prompting Israel's bombing of the nuclear reactor at Osiraq in June 1981.<sup>45</sup> Iraq's nuclear weapons program was discovered, in the wake of Operation Desert Storm, to have been quite advanced. Iraqi use of chemical weapons throughout the 1980s was well known and had been addressed by the Security Council. By 1991, Iraqi possession of WMD posed a widely appreciated threat to the region, to Iraq's own people, and to global security. SCR 687 consequently made disarmament the centrepiece of a formal end to hostilities. The system of inspection and monitoring it established was, in the words of US Vice President Richard Cheney, "the most intrusive system of arms control in history".<sup>46</sup> This was another step towards the international administration of Iraq, and, in turn, towards Council-established global security regulation like that later created for counter-terrorism by SCR 1373.

The key trade-off envisaged in SCR 687 was the lifting of economic sanctions in return for "progress towards the control of armaments in the region", the latter to be evaluated by unimpeded monitoring of Iraqi weapons programs.<sup>47</sup> To oversee Iraqi disarmament, the Council took the unprecedented step of creating a subsidiary organ charged with monitoring the destruction, removal, or neutralisation of all Iraqi chemical and biological weapons, including the stocks of agents, related subsystems, components and all research, development, support, and manufacturing facilities. This organ was the United

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<sup>43</sup> See for example Denis J. Halliday "End The Catastrophe Of Sanctions Against Iraq," Editorial, *Seattle Post-Intelligencer* (12 February 1999) A17; H. C. Graf Sponeck, "Sanctions and Humanitarian Exemptions: A Practitioner's Commentary" (2002) 13 E.J.I.L. 1.

<sup>44</sup> See Richard Butler, *Talk* (September 1999), 198.

<sup>45</sup> Unanimously condemned by the Security Council in SC Res. 487, UN SCOR, 1981,

<sup>46</sup> U.S., White House Office of the Press Secretary, *Vice President Honors Veterans of Korean War*, (2002).

<sup>47</sup> SC Res. 687, UN SCOR, 1991 at paras. 22, 28.

Nations Special Commission (UNSCOM). The Security Council charged the IAEA with similar responsibilities in relation to Iraqi nuclear capability and activity. After initial resistance by Iraq to the inspections regime, in SCR 715 the Council established the even more intrusive Ongoing Monitoring and Verification (OMV) regime. The Resolution directed that Iraq must “accept unconditionally the inspectors and all other personnel” designated by UNSCOM, and that OMV would remain in place until the Security Council decided to remove it.<sup>48</sup>

Several years of sparring between Iraq and UNSCOM, which do not require retelling here, came to a head in 1998. On 13 January 1998, Iraq withdrew its cooperation from international inspectors, on the pretext that they included too many US and UK nationals. A serious US military build-up in the Gulf followed, with token support from a few allies. In contrast to the French and Soviet cooperation that the coalition had enjoyed in 1990, America was now confronted by Russian and French opposition. Paris and Moscow deplored the threat of force and pressed for change in the sanctions regime.<sup>49</sup> Washington nevertheless seemed set for war until a disastrous town hall meeting set up by the Clinton administration to sell military action to the American public backfired, creating a “self-inflicted ... public relations disaster”.<sup>50</sup> Washington gave way as Kofi Annan stepped in and brokered a resolution to the crisis based on compromise by the Council and by Hussein.

But when the pattern of Iraqi brinksmanship recurred at the end of 1998, Washington afforded Annan no such opportunity. Instead, the US and UK moved swiftly following a 15 December report by Richard Butler, the Executive Chairman of UNSCOM, detailing Iraqi non-cooperation. In undertaking a unilateral bombing campaign against Baghdad (Operation Desert Fox), they asserted their own right to interpret and enforce earlier Resolutions. This action weakened UNSCOM’s legitimacy, and Hussein launched a campaign of complete defiance and obstruction. Soon UNSCOM was dead.

A report of 27 March 1999 to the Council concluded that “although important elements still have to be resolved, the bulk of Iraq’s proscribed weapons programs has been eliminated”. It nevertheless endorsed the continuation of inspections-based monitoring as the best way to guard against rearmament.<sup>51</sup> In its wake, the Council adopted Resolution 1284, which established the UN Monitoring, Verification, and Inspection Commission (UNMOVIC), as a successor to UNSCOM. UNMOVIC’s brief period of operation in Iraq, following the passage of SCR 1441 in November 2002, also

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<sup>48</sup> SC Res. 715, UN SCOR, 1991.

<sup>49</sup> John M. Goshko, “Security Council Debate Reflects Continued Split on Iraq” *Washington Post* (19 December 1997), A20.

<sup>50</sup> Martin Kettle, “Iraq Crisis: The debate: White House scores a PR own goal” *The Guardian* (19 February 1998), 13.

<sup>51</sup> UN SCOR, 54<sup>th</sup> Year, UN Doc. S/1999/356 (1999).

does not require detailed recounting here. Instead, what is important is two specific lessons that UNSCOM and UNMOVIC provide about how the Security Council should approach the management of such regulatory regimes.

### **Unclear Lines of Administrative Accountability**

The triangular reporting relationship between UNSCOM, the Secretary-General, and the Security Council established by SCR 687 was unusual. The Executive Chairmen—first Rolf Ekéus, later Richard Butler—were appointed by the Secretary-General, after consultation with the Council, and they formally reported to the Council through the Secretary-General. Otherwise, though, the Secretary-General exercised no control over UNSCOM. While this arrangement worked well in UNSCOM's early years, it was to prove highly problematic in 1998, when Kofi Annan and Richard Butler differed on issues of substance.<sup>52</sup> The lack of clarity on the basic question of whom UNSCOM ultimately answered to created significant tensions. With claims that Butler had at least acquiesced in American manipulation of UNSCOM, weapons inspection became another wedge that Hussein could drive between members of the Security Council, and between the Council and the Secretariat.<sup>53</sup>

### **Undermining Regulatory Independence Through Resource Dependence**

Throughout its existence, UNSCOM was heavily dependent on Member States for the provision of the resources it needed to discharge its regulatory responsibilities, particularly analytical expertise and intelligence. This exposed UNSCOM to charges that it was not exercising its regulatory discretion impartially or independently, but rather was serving as a vehicle for the realization of the foreign policy goals of the strongest members of the Security Council. This became particularly acute after evidence emerged of CIA infiltration of UNSCOM, using it not only to mount intelligence operations inside Iraq, but perhaps to progress a (failed) coup attempt against Hussein by a group of army generals.<sup>54</sup> This allowed Iraq to undermine support for UNSCOM's work within the Security Council, driving a final wedge between members of the P-5, resulting in the rift of late 1998 and early 1999 that killed off UNSCOM.

In designing UNMOVIC, the Security Council clearly learned the lesson of the importance of operational independence—an important signal that the Council is capable of improving its regulatory practice over time. SCR 1284 introduced measures that helped ensure UNMOVIC's administrative

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<sup>52</sup> See David M. Malone, "Goodbye UNSCOM: A Sorry Tale in US-UN Relations" (1999) 30 *Secur. Dialogue* at 400-401.

<sup>53</sup> See David M. Malone, "Goodbye UNSCOM: A Sorry Tale in US-UN Relations" (1999) 30 *Secur. Dialogue* at 400-401.

<sup>54</sup> Dilip Hiro, *Iraq: In the Eye of the Storm*, (New York: Thunder's Mouth Press, 2002) at 81-8.

independence, primarily by ensuring that it was not dependent on particular Member States for resources, and by allowing only a one-way flow of intelligence into UNSCOM from national intelligence agencies. In addition, control over UNMOVIC was given to a college of commissioners, rather than being left to the already overtaxed Council principals.<sup>55</sup> UNMOVIC inspectors were to be recruited independently, and they would work for the United Nations (UNSCOM inspectors had often been “on loan” from their home governments, raising questions about divided loyalties). This staffing independence was secured by a 0.8 percent share of funds raised by the OFF Program—totalling roughly \$100 million per year.<sup>56</sup>

### III LESSONS FROM THE SECURITY COUNCIL’S IRAQ EXPERIENCE

#### Revise or Reverse?

The Security Council’s experiments with a legal-regulatory approach in Iraq in the form of economic sanctions, the OFF Program and weapons inspections met with mixed success. That raises the very serious question whether, as James Cockayne and Cyrus Samii have put it, the Council should not simply *revise* its growing legal-regulatory practice, but rather *reverse* it.<sup>57</sup> The key lesson of the Council’s Iraq experience might be that the Council is simply not cut out to establish and give unambiguous direction to legal-regulatory programs, but should stick to the broad policy-making role of the political-military approach. The veto powers of the five permanent members, in particular, appear to jeopardize the ability of the Council to work consistently as an impartial and responsive overseer of complex legal-regulatory programs.<sup>58</sup> Even where the Council can achieve broad consensus on an appropriate legal-regulatory mechanism, such as the OFF Program, the Iraqi experience seems to call into question whether the Secretariat and the agencies and programs of the UN are adequately equipped to effectively administer those mechanisms.

However valid these concerns, to date they have not impeded the Council’s increasing embrace of the legal-regulatory approach. In fact, the Council has expanded the ambition and scope of the regulatory arrangements it

<sup>55</sup> See Pascal Teixeira da Silva, “Weapons of Mass Destruction: The Iraqi Case”, in Malone, *The UN Security Council from the Cold War to the 21st Century* (place published: publisher, year) at 213.

<sup>56</sup> Hans Blix, *Disarming Iraq: Hans Blix’s Story. A Vernon Center Conversation and Spring Break Special Event*, New York University, (2004) [unpublished] - Blix put a great deal of effort into ensuring that UNMOVIC did not repeat UNSCOM’s organizational flaws: see Note [transmitting the organizational plan for the UN Monitoring, Verification and Inspection Commission (UNMOVIC) prepared by the Executive Chairman], UN Secretariat OR, UN Doc, S/2000/292 (2000).

<sup>57</sup> James Cockayne and Cyrus Samii, “Conclusion: Structural and Normative Challenges” in W. Pal Sidhu and Cyrus Samii, eds., *Iraq and World Order* (place published: United Nations University Press, forthcoming 2006).

<sup>58</sup> We are indebted to Ben Rowsell for highlighting this point.

institutes, moving from the country-specific mechanisms it relied upon in Iraq to global counter-terrorism and non-proliferation arrangements in SCRs 1373 and 1540. We can expect this trend to continue, for two clear reasons. First, Iraq since 2003 has demonstrated the limits of US politico-military power—and by extension, the politico-military power of the Security Council. Second, the very nature of contemporary threats, from pandemics, to nuclear proliferation, to terrorism, to crimes against humanity—diffuse, global, propagated through non-state actors—encourages a turn to the legal-regulatory approach, because they necessitate a collaborative, proactive risk management approach rather than a responsive crisis management approach. Moreover, even if they do not share American perceptions of risk—recalibrated by the events of 9/11, other UN Member States seem likely to consent often to legal-regulatory mechanisms organized through the Security Council in order to forestall unilateral American intervention.

Acceptance by the broader membership of this legal-regulatory approach (which would translate in political terms into legitimacy) will depend particularly upon whether the Council fills a legislative (or administrative) lacuna (as it did with the counter-terrorism and non-proliferation regimes it established) or whether it purports to override existing treaty obligations (as arguably occurred when the Council sought to immunize UN peacekeepers from ICC jurisdiction).<sup>59</sup> To buttress the legitimacy of such an approach, the Council will need to pay more attention to the procedural aspects of its maintenance of international peace and security. Serious reflection is now required on how legal-regulatory approaches developed in the context of national law may need to be adapted at the international level, particularly in the Security Council's practice. In the final section of this paper, we suggest ten basic lessons from the Council's Iraq experience that may help fuel this reflection.

### **Ten Lessons From the Iraq Experience**

The Security Council should draw ten basic lessons from its experience with the legal-regulatory approach in Iraq. Four of these pertain to regulatory discretion, four to accountability and two to resources.<sup>60</sup>

#### ***Four Lessons on Discretion***

In the politico-military mode, Council agents exercise substantial policy discretion: so long as they work towards the objectives established by the Council, they generally have broad discretion on tactics and methods. The boundaries of that discretion may be expressly or implicitly defined; for

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<sup>59</sup> On the legislative aspect, see especially Paul C. Szasz. "The Security Council Starts Legislating" (2002) 96 AJIL 90; and see Gaetano Arrangio-Ruiz, "On the Security Council's 'Law-Making'" (2000) 83 *Rivista di Diritto Internazionale* 609.

<sup>60</sup> We are indebted to Ben Rowsell for comments on earlier articulations of these lessons.



example, the discretion of the Multinational Force (MNF) that executed Operation Desert Storm in 1991 was bound by its UN Charter obligations, the mandate it was given under Chapter VII, and its obligations to abide by international humanitarian law. However, within those broad parameters, the agent has substantial room to manoeuvre.

In the legal-regulatory mode, the Council delegates substantive decision-making power on narrow, and often highly technical issues to independent agents, such as UNSCOM and the UN Compensation Commission, or the various UN agencies that were charged to implement the sanctions regime and OFF. These agents have very narrow powers, but their decisions are either binding on the Council (as in the case of the UNCC and later the ICTY, the ICTR, and arguably, in exceptional cases, the ICC), or at least highly authoritative (because of their technical expertise).

Shifting to a legal-regulatory mode therefore requires a different approach to the way in which the Council delegates discretion to its agents. The Iraq experience highlights four lessons in particular.

*Regulatory agencies require independent discretion*

Problems can arise when the Council establishes what it seems to intend as an independent delegate, but then fails to allow that delegate to exercise truly independent discretion. In Iraq, this problem arose with political interference on a number of levels in the administration of the OFF, UNSCOM, and during the US-UK contestation of UNMOVIC's work in 2003. The mandate and operations of the 661 Committee proved particularly problematic.

*Regulatory mandates should avoid ambiguity as to purpose and as to the authority of interpretation and enforcement*

Resolutions adopted in the politico-military mode can afford to use vague or at least purposive language, essentially setting out the broad strategic objectives of the Council. In contrast, Resolutions adopted in the legal-regulatory mode must be much more precise, specifying what rules the Council's delegated agents are expected to implement, the powers available in implementing them, and the process by which they should be enforced. Of course, a certain deliberate vagueness or even combination of the two approaches may be likely: but such ambiguity can become problematic, as SCRs 687 and 1441 demonstrated.

SCR 687 provided the basis for extensive legal-regulatory machinery, structured around the twin pillars of inspections and sanctions; but its incorporation of the contract and treaty-law terminology of "material breach" left many questions open about what constituted substantial performance by Iraq, who could determine Iraqi compliance, and what enforcement powers were available to what actors. Over time, the Council specified more precise rules for determining Iraqi compliance. But by acquiescing in the creeping unilateralist enforcement of the US, UK, and France (which came to a head

with Operation Desert Fox in 1998), the Council sowed confusion about its intentions on both interpretation and enforcement. This state of play became particularly problematic further to SCR 1441 in 2002, with many different actors involved, including individual member states, the Council as a whole, the Secretary-General, and independent agencies such as UNMOVIC and the IAEA. Above all, the uncertain nature, timing, and trigger of the “serious consequences” threatened by the Council in SCR 1441—a classic case of the creatively ambiguous drafting used in the politico-military mode—compounded the confusion of a Council attempting to act in legal-regulatory mode.

*Regulatory mandates should have a clear termination point*

In the end, the ambiguity and confusion sowed by SCRs 678 and 1441 appeared to serve the purposes of the US and the UK. That said, one of the most persuasive criticisms of the argument that Operation Iraqi Freedom was authorized by SCRs 678 and 687 was that even if those authorizations to use force were revived by Resolution 1441 and subsequent events, those resolutions never authorized regime change and occupation of the country. But the US and UK argued that regime change had become necessary to effect the objectives set out in those earlier Resolutions.<sup>61</sup> The open-ended nature of SCRs 678 and 687 thus became a serious bone of contention a dozen years after their adoption. The delegation of enforcement powers they appeared to encompass, when married with wide discretion for the Council’s agents, opened the door to very broad interpretation of how changing circumstances can redefine enforcement powers.

The discretion of the US and UK was, of course, further enlarged in the Iraqi case by the *reverse veto*, which allowed them unlimited discretion to block attempts to terminate their own mandates earlier delegated by the Council.<sup>62</sup> The resulting creation of an “ongoing” authorization for the use of force has probably cemented the practice of the Council specifying an end-date for delegated mandates: since the late 1990s, France has asserted that it would never again accept open-ended sanctions regimes.<sup>63</sup>

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<sup>61</sup> A related argument concerned the question of whether the US and UK in 2003 could be said to be “Member States co-operating with the Government of Kuwait” – the phrase used in SC Res. 678, UN SCOR (1990) to delimit the set of states mandated to carry out delegated enforcement action.

<sup>62</sup> See David D. Caron, “The Legitimacy of the Collective authority of the Security Council” (1993) 87/4 A.J.I.L.; Lutz Oette, “A Decade of Sanctions Against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the UN Security Council” (2002).13 E.J.I.L. 93.

<sup>63</sup> See for example UN SCOR, 55th Year, 4128th Mtg., UN Doc. S/PV.4128) (2000) at 9 for French views.

*The Council should ensure coherence of multiple regulatory objectives, if necessary through coordination with other global regulators*

Perhaps the greatest failure of the Council's experimentation with the legal-regulatory approach in Iraq was its inability fully to alleviate the human devastation caused by its sanctions arrangements. The sanctions approach inevitably set the Council's objectives of securing Iraqi disarmament against the developmental, humanitarian and arguably human rights objectives of the broader UN system. While the Council sought to find ways to balance these objectives, for example through the creation of the OFF Program, its work often occurred in something of a bubble. The Council would do well to learn, from its Iraq experience, the legitimacy and effectiveness pay-offs that come from close coordination and consultation with other sources of authority and expertise, both within the UN system and beyond, when it takes the intrusive measures implied by the legal-regulatory approach. The Council should reflect upon the fact that while Chapter VII gives it a special role in global rule-making and a monopoly on authorizing the coercive enforcement of those rules through military action, it does not give it a monopoly on rule-making itself. The Council needs to reach out more meaningfully to other global bodies, whose cooperation is sometimes vital to the success of its legal-regulatory strategies; for example, the international financial institutions, the World Health Organization, and the International Criminal Court. Improving management of the collective security system will require reaching an understanding about the limits of the Council's *own* discretion, and how it should interface with these other organizations. The new Peacebuilding Commission, in particular, may provide lessons for how the Council can take a more inclusive approach in its decision-making.

#### ***Four Lessons on Accountability***

The second major challenge for the Council arising from its Iraq experience relates to accountability of its agents. In the politico-military mode, accountability is less of an issue, because the discretion afforded to agents is both more open-ended and more targeted to one specific outcome than in the legal-regulatory setting. In the legal-regulatory mode, agents often act on a variety of objectives and following a number of criteria established by the Council, but with a broad discretion on the application of the criteria in a particular case. When the Council delegates substantial authority for the interpretation and implementation of a regulatory and administrative regime to an agent, it follows that this agent should be accountable to the Council, to ensure its decisions in any given case align with the Council's broader policy objectives, and that the regulatory processes involved do not violate fundamental values protecting individuals (such as human rights) and do not unduly offend states (for example, regarding their sovereignty).

*The Council must improve arrangements ensuring the accountability of its regulatory agents, including self-correction mechanisms*

All too often accountability systems were lacking in the Council's handling of Iraq. The issue arose as early as 1990, while the Council was still operating in an essentially politico-military mode, with a number of states voicing concerns about the absence of meaningful feed-back mechanisms in the resolutions which authorized military enforcement action by the Multinational Force.<sup>64</sup> Those concerns led to stricter controls on the Council's military agents in later actions,<sup>65</sup> but the Council did not take to heart the lesson drawn by Sir Frank Berman:

In practical terms, a process of 'authorization' presupposes some form of continuing exchange between the mandated member states and the Council over both the realization of the stated objectives and, where necessary, the means granted to them to achieve them.<sup>66</sup>

Accountability of regulatory agents clearly requires the original empowerment of the agent being expressed in such a way that such a "continuing exchange" is established. In SCR 678, the coalition forces were required only to "keep the Security Council regularly informed". This led, perhaps unsurprisingly, to bland and un-detailed reporting by the concerned member states.<sup>67</sup> This, in turn, induced the Council to step up reporting requirements to monthly or bi-monthly in subsequent resolutions authorizing Member States to take military enforcement action.<sup>68</sup> The sense of effective oversight of the Coalition Provisional Authority in Iraq outlined in SCR 1511 authorizing the multinational force in Iraq in 2003 was, however, so slight that the Council requested the US to report merely "as appropriate and not less than every six

<sup>64</sup> See for example the statement of the Malaysian delegation on adoption of Resolution 678 in UN SCOR, 45<sup>th</sup> Year, UN Doc. S/PV.2963 at 58. For related academic criticism see N.D. White, *The Law of International Organisations* (publishing info, 1996) at 191-199; J. Quigley, "The United States and the United Nations in the Persian Gulf War: New Order or Disorder" (1992) 25 Cornell Int'l. L.J. 1.

<sup>65</sup> Helmut Freudenthuß, 'Between Unilateralism and Collective Security: Authorizations of the Use of Force by the Security Council' (1994) 5 E.J.I.L. 492.

<sup>66</sup> Frank Berman, 'The Authorization Model: Resolution 678 and Its Effects' in Malone, *The UN Security Council: From the Cold War to the 21<sup>st</sup> Century* (Boulder: Lynne Rienner, 2004) at 158.

<sup>67</sup> See United Nations, *The United Nations and the Iraq-Kuwait Conflict 1990-1996* (New York: United Nations Department of Public Information: 1996) 159.

<sup>68</sup> Monthly: IFOR and SFOR. Bi-monthly: UN SC Res. 1080 (1996), UN SCOR, 3713th Mtg., S/RES/ 1080 (1996) (Eastern Zaire), UN SC Res. 1101(1997), UN SCOR, 3758th Mtg., S/RES/1101(1997) and UN SC Res. 1114 (1997), UN SCOR, 3791st Mtg., S/RES/1114 (1997) (Albania), UN SC Res. 1125 (1997), UN SCOR, 3808th Mtg., S/RES/1125 (1997) (Central African Republic).

months".<sup>69</sup> Partly as a consequence, the Council has often lacked the information needed to interact meaningfully with parties on the ground in Iraq since 2003.

When the Council shifted to a legal-regulatory mode, with its open-ended discretion, broad and often highly intrusive regulatory reach, it failed to appreciate the resulting proliferation of opportunities for manipulation and corruption (in the broadest sense) of its program. Avoidable failures of the sanctions regime, OFF and of UNSCOM detailed in the earlier sections of this article ensued, in part because the Council failed to exercise adequate oversight, and in part because it failed to build in adequate self-correction mechanisms, such as robust internal auditing.

In short, the Council's experiences in Iraq indicate that the Council must build effective feedback mechanisms into the regulatory programs it establishes. These mechanisms should anticipate the probability—and not simply the possibility—of corruption of objectives and perhaps even officials, and take robust steps of both prevention and accountability.

*The Council must accept responsibility for the outcomes of regulatory regimes it establishes*

A related lesson, simply stated, but absolutely essential to the effective operation of Council regulatory mechanisms, is that the Council members must accept responsibility for the outcomes of those mechanisms. Council members were quick to blame the UN for the failures of sanctions, of the OFF and the perceived failures of weapons inspection. The UN Secretariat has been excoriated for mismanagement and worse but, so far, Security Council members have largely enjoyed a free ride.<sup>70</sup> They took little responsibility for their own contributions to the costs of the regulatory regimes they established in Iraq. What the Council must learn, if the regimes it establishes are to sustain their effectiveness, is that scapegoats rarely make effective or legitimate deputies.

*Council decision-making should promote transparency*

The intrusive nature of the legal-regulatory approach also prompts calls for increased Security Council transparency, particularly from countries affected by Council decision-making.<sup>71</sup> These concerns are not merely procedural; they also affect the substantive outcomes of Security Council decision-making. Greater clarification of the procedural aspects of the exercise of Council discretion, greater care in establishing regulatory and administrative frameworks, and

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<sup>69</sup> UN SC Res. 1511(2003), UN SCOR, 4844th Mtg., S/RES/1511 (2003).

<sup>70</sup> See Nicholas Kralev, "Powell urges UN Council to take blame for scandal", *Washington Times* (12 January 2005) A11.

<sup>71</sup> See Bardo Fassbender, "Uncertain Steps Into a Post-Cold War World: The Role and Functioning of the UN Security Council After a Decade of Measures Against Iraq", (2002) 13 E.J.I.L. at 289.

enhanced transparency of Council deliberations, will buttress its legitimacy. Confidentiality, some of which is required for negotiating processes is, in any event, over-rated at the UN, where pretty well all information to which more than two actors are party leaks. Securing greater support from the membership at large through enhanced *performance legitimacy* related to the quality of its decisions is now an urgent priority for the Council, which it can promote through more transparent working methods, including more flexible membership and representation arrangements. Wholesale membership reform now seems unlikely in the short term. As a consequence, the burden on the Council to ensure adequate participation opportunities through flexible working methods will only increase.

*Regulatory mechanisms with potentially adverse impacts on individual interests should provide for adequate representation and due process*

Even with reforms improving the transparency of Council decision-making to affected states and the broader public, legitimacy concerns dictate that the Council should take steps to ensure improved opportunities for participation in decision-making by those whose interests may be adversely affected by the decisions of the Council or its regulatory agents. The increasingly intrusive nature of the legal-regulatory approach, with the freezing of individuals' assets and the naming and shaming of corporations involved in misconduct, gives an increased urgency to questions of the limitation of Security Council discretion by human rights<sup>72</sup> or humanitarian<sup>73</sup> law, or customary international law<sup>74</sup> or *jus cogens*.<sup>75</sup>

In a recent case involving Iraq, for example, the UK High Court decided that SCR 1546, authorizing UK control of Iraqi territory following the end of major military operations there, overrode the UK *Human Rights Act*, and on that basis denied an applicant's claim for review of his detention in Iraq by UK military forces under that Act.<sup>76</sup> The Council's failure to incorporate due process

<sup>72</sup> See Cohen-Jonathan, 'Le Conseil de Sécurité et les droits de l'homme', in J.-F. Flauss and P. Wachsmann (Eds.), *Le droit des organisations internationales. Recueil d'études à la mémoire de Jacques Schwob* (1997) 40; de Wet, « Human Rights Limitations to Economic Enforcement Measures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime », (2001) 14 *Leiden J. Int'l L.* at 279.

<sup>73</sup> Judith Gardam, "Legal Restraints on Security Council Military Enforcement Action" (1996) 17 *Michigan J. Int'l L.* at 302; David Scheffer, "Beyond Occupation Law" (2003) 97 *A.J.I.L.* at 844-846.

<sup>74</sup> Abdullah El Erian, "The Legal Organization of the International Society", in Max Sørensen (Ed.), *Manual of Public International Law* (London: MacMillan & Co. Ltd, 1968) at 79-80.

<sup>75</sup> Alexander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions" (2005) 16 *E.J.I.L.* at 59; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004) 187-191.

<sup>76</sup> *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence* (2005), [2005] E.W.H.C. 1809 (Admin). See also *Yassin Abdullah Kadi v.*

standards into its decision authorizing the UK's activities risks exposing it not only to political and academic criticism, but also to litigation and refusal to enforce its decisions.<sup>77</sup> As the UK High Court noted in *Al Jedda*, the Council's use of its Chapter VII powers to create intrusive regulatory regimes has a "stark effect on ... domestic law. Enforceable rights [can be] displaced by a resolution unconsidered by Parliament, the effect of which might well have passed unnoticed until long after the resolution was promulgated."<sup>78</sup> National judicial deference in such circumstances will only last so long, and refusal by just a small number of courts to accept certain Security Council decisions over domestic legal protections might have a rapid chilling effect on other states' willingness to implement the measures in question, and perhaps to support the Council's new and often sweeping legal-regulatory approach. Following protests by Member States over poorly framed decisions, the Council now takes such issues more seriously, ensuring, for example, that individuals are afforded a right to contest their listing by sanctions committees through the mechanism of diplomatic protection.<sup>79</sup> But this in itself may be inadequate in the absence of judicial review, and many individuals will not be able to avail themselves of the protection of their state, which may have caused their listing in the first place.<sup>80</sup> This highlights the clear need for further consideration of how national and global due process requirements apply to the decision-making of the Council and its regulatory agents.

### *Two Lessons on Resources*

Adequate (in quality and quantity) resources are essential for effective regulation. If the Council delegates to UN agencies and programs tasks for which it will not provide adequate resources, then one option remains, as the Volcker Inquiry suggested: that these bodies "simply put their collective feet down and refuse".<sup>81</sup> If the Council, in other words, decides not to reverse the trend towards the legal-regulatory approach, adequate resourcing is a *sine qua non* of sustainability in this regard, let alone success.

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*Council of the European Union and Commission of the European Communities* (2005) Ct. of First Instance of the European Communities, Case T-315/01, [Kadi]

<sup>77</sup> See David Dyzenhaus, "The Rule of (Administrative) Law in International Law", IILJ Working Paper 2005/1, Global Administrative Law Series, Institute for International Law and Justice, New York University School of Law, online: <[http://www.iilj.org/papers/documents/10120505\\_Dyzenhaus.pdf](http://www.iilj.org/papers/documents/10120505_Dyzenhaus.pdf)>.

<sup>78</sup> *Al Jedda*, supra note 75 at para. 74.

<sup>79</sup> See e.g. UN SC Committee established pursuant to resolution 1267(1999) concerning Al-Qaida and the Taliban and associated individuals and entities, *Guidelines of the Committee for the Conduct of its Work* (adopted 7 November 2002, amended 10 April 2003, revised 21 December 2005), online: <[http://www.un.org/Docs/sc/committees/1267/1267\\_guidelines.pdf](http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf)>.

<sup>80</sup> Compare *Kadi*, supra note 75 at paras. 261-288.

<sup>81</sup> Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Report on the Management of the Oil-for-Food Program* (2005) I at 5.

*Regulatory agencies must be adequately resourced to avoid becoming beholden to interested parties*

Adequate resourcing is also essential to ensure that agents do not become dependent on partial interests, or even susceptible to corruption by those they are attempting to regulate. In the absence of adequate resources, regulators are likely to become beholden to interested parties, as the UNSCOM experience amply demonstrates. The burden placed on Member States to scrutinise contracts in the 661 Committee provides another example: with the exception of the US, and to a lesser extent the UK and France, most Council members lacked the expert analytical personnel necessary to perform this task adequately. The result was a dysfunctional Committee dominated by a few Member States.

Intelligence will likely remain a key resourcing issue for the Council in years to come.<sup>82</sup> We now know that the conclusions on Iraqi WMD capacities drawn from US and UK intelligence, based largely on satellite imagery and self-interested exile informants, were wrong. On the other hand, the UN's information, and its cautious approach to drawing conclusions from contradictory indicators was right. We were not, as David Kay asserted, all wrong: in exercising prudence in judgement, Mohamed ElBaradei and Hans Blix turned out to be right.<sup>83</sup> As George A. Lopez and David Cortright have commented:

The crisis of intelligence that pundits and politicians should be considering is not why so many officials overestimated what was wrong in Iraq; it is why they ignored so much readily available evidence of what was right about existing policies. By disregarding the success of inspections and sanctions, Washington discarded an effective system of containment and deterrence and on the basis of faulty intelligence and wrong assumptions, launched a preventive war in its place.<sup>84</sup>

*Regulatory agencies must have control over their own expertise*

OFF and other such ambitious undertakings mandated by the Council require a body of independent, technically expert, international administrative staff that can implement and oversee complex administrative mechanisms, while ultimately being subject to political control by UN Member States. Country and region-specific expertise of the depth required to assist in charting a new course

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<sup>82</sup> On the use of intelligence in the UN system, see generally Simon Chesterman, *Shared Secrets: Intelligence and Collective Security* (Sydney: Lowy Institute, 2006).

<sup>83</sup> Fareed Zakaria, "We had good Intel – The UN's", *Newsweek*. (9 February 2004) 39; Jessica Mathews, "Inspectors had the real WMD clues", *Financial Times* (9 February 2004) 15.

<sup>84</sup> George A. Lopez and David Cortright, "Containing Iraq: Sanctions Worked", (2004) 83 *Foreign Aff.* At 103.



for conflict countries is rarely connected to national and international decision-making. The International Crisis Group and several other research organizations have bravely and often successfully sought to fill this breach, but the absence of historical, anthropological, sociological, and economic knowledge of societies the UN seeks to help—and to regulate—is striking. Increasingly, the Security Council delegates fact-finding roles to groups of experts or commissions of inquiry with appropriate technical and contextual knowledge—for example, in the Democratic Republic of Congo, Liberia, Lebanon following the assassination of Prime Minister Hariri, and in Darfur to assess evidence of genocide.<sup>85</sup> Yet the Council, particularly members of the P-5, is much inclined to second-guess these experts. Ultimately, that is exactly what the US and UK did with UNMOVIC in 2003, even though, or perhaps because, they had relinquished control over the selection of UNMOVIC staff, after learning the lesson of the importance of independent staffing from UNSCOM.

Yet resource constraints on the UN system are hard to overstate. Managers, including decision-makers in the Security Council, will likely face increasing pressures for delegation, secondment and outsourcing of analytical, administrative, monitoring and even enforcement tasks. At the same time, they will need to find ways to balance these imperatives with the need to ensure that such agents are not captured by external interests. That will not be a straightforward task.

#### IV CONCLUSION

These ten lessons drawn from the Council's legal-regulatory approach in Iraq offer insights not only into the Council's own role, but also into broader questions of coherence, accountability and responsibility within the UN system as a whole.

The role of the Council at the apex of the international peace and security architecture, its binding authority, its unique power to mandate military enforcement action, and its agenda-setting role all point to the need for a close examination of the Council's record in establishing, implementing and learning from legal-regulatory systems. Such an examination would yield lessons not only for the UN Secretariat, and the Organization's funds, programs and specialized agencies when acting as agents of the Council, but also for when they operate as principals in their own right. Much of the contemporary work to develop programs for UN system and management reform, including the work of the High-Level Panel on System-Wide Coherence in the Areas of Development, Humanitarian Assistance and Environment, may require mapping and rationalizing relationships between various actors within the

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<sup>85</sup> See Philip Alston, "The Darfur Commission as a Model for Future Responses to Crisis Situations" (2005) 3 J. Int'l. Criminal Justice 600.

UN system, to avoid the kinds of regulatory and management pitfalls identified by the Council's experiences in Iraq.<sup>86</sup>

The Council itself seems likely to continue to develop its legal-regulatory approach, influenced by increased emphasis on conflict prevention, civilian protection and strategic pre-emption. This suggests a need for a more detailed consideration, both within the Council and beyond, of the Council's access to the necessary elements of effective regulatory systems. Key questions include the access of the Council and its enforcement agents to analytical expertise, professional regulatory expertise (including scientific expertise and even mediation capacity) and intelligence; and the clarification of norms surrounding preventive military action, whether under the rubric of the Responsibility to Protect or of counter-terrorism and non-proliferation.

If it fails to develop adequate regulatory capacity, the Council may be better off abandoning such an ambitious agenda, rather than risk further failure with its attendant costs to Council legitimacy. The Council's second-guessing of UNMOVIC in 2003 may, in fact, point to the limits of the type of fact-finding which the Council is willing and able to delegate to a *regulatory* agency. Ultimately, Council members may consider that the determination of the threat posed by a particular regime or situation cannot be reduced to narrow technical questions susceptible to legal-regulatory determination, but is an essentially political question, properly handled through the political-military decision-making processes of the Council itself. How and where Council members draw this line in future years will be controlling in determining the extent to which the Council relies on the legal-regulatory approach. There is no single correct approach that the Council should adopt in discharging its duty to maintain international peace and security: in most cases, it will need to continue with experimentation in exercising its role at the apex of a system of law and as security watchdog in the heart of a treaty framework. But where it *does* choose to adopt a legal-regulatory approach, as it did, without sufficient reflection, in Iraq in the 1990s, it needs to address at the outset issues of discretion, accountability and adequate resourcing. Going forward, the Security Council's experience in Iraq will provide invaluable lessons in this regard.

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<sup>86</sup> See "Secretary-General Announces Formation of New High-Level Panel on UN System-Wide Coherence in Areas of Development, Humanitarian Assistance, Environment", UN Doc. SG/SM/10349, DEV/2567, IHA/1150, 16 February 2006.