

# Chapter 5

## Reflections on the Security Council and Its Mandate to Maintain International Peace and Security

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### 1. Introduction

During my tenure as Under-Secretary-General of the Legal Affairs and the Legal Counsel the United Nations from March 1994 to March 2004, the question of Iraq was a constant companion. There were, however, three instances where I was more deeply involved than 'normal': the negotiations of the Memorandum of Understanding between the United Nations and Iraq in 1996 to implement Security Council Resolution 986 (1995) – the Oil-for-Food Programme (OFFP); the Secretary-General's negotiations with President Saddam Hussein in February 1998 for the purpose of getting access for the UN weapons inspectors to the President's palaces; and the aftermath of the attack on Iraq by the United States and the United Kingdom in March 2003.

The aim of this paper is, first, to share some of my personal experiences relating mainly to one of these events, the 1996 negotiations. The foremost objective is to reflect, based on those and other UN experiences, on the way in which the Security Council fulfils its mandate to maintain international peace and security.

### 2. The Memorandum of Understanding for the Implementation of the Oil-for-Food Programme

Already at an early stage, the Security Council realised that the effects of the sanctions regime that it had introduced might negatively affect the population of Iraq. In Resolutions 706 (1991) and 712 (1991), the Council had therefore decided to establish a programme which would allow Iraq to sell oil under UN supervision for the purpose of among other things purchasing humanitarian goods for the Iraqi population.

The decisions by the Security Council needed 'arrangements and agreements' for its implementation. The Secretary-General had requested Kofi Annan, who was then

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the UN Controller, and later my predecessor Carl August Fleischhauer to negotiate with the government of Iraq for this purpose. However, these rounds of negotiations, the latest held during the summer of 1993, were unsuccessful.

The Council then decided to change the concept somewhat and eventually, on 14 April 1995, adopted Resolution 986 (1995). But it was not until January 1996 that the Iraqis were prepared to enter into negotiations on how to implement this Resolution.

I was then contacted by Secretary-General Boutros Boutros-Ghali, who explained that he had had several contacts with the Iraqis and that they were now prepared to engage in negotiations. I was to lead the UN delegation. The government of Iraq had appointed their former UN Ambassador Abdul Amir Al-Anbari, now their Ambassador to UNESCO, to lead their delegation.

Then started an intense period that was to end by the signing of a Memorandum of Understanding (MOU) on 20 May 1996. The negotiations were held in four distinct phases in February, March, April and May 1996. In all, the delegations met for some 50 sessions.

I was assisted by a delegation of UN colleagues and by an interdepartmental working group. On my delegation were also experts in oil trading and banking. These experts were necessary because of the complex oil trading and banking arrangements that were necessary to implement the Programme and which to a large extent deviated from ordinary practice. The UN monitoring meant that the parties to the contracts for oil sales and purchase of goods would not be allowed the normal freedom of contract.

On his part, Ambassador Al-Anbari was assisted by a similar delegation.

The negotiations immediately attracted tremendous interest from the media. Both sides were concerned not to create speculations about the progress of the talks that could have an impact on the oil market. Furthermore, because of the considerable material we had to go through it was also obvious that the results of a day's negotiations in many instances would be fairly technical and maybe not so significant for the final outcome of the negotiations. We therefore decided to issue very formal press statements after every day's negotiations.

The press nevertheless waited in the foyer, and Al-Anbari complained that he always had to fight his way through the gathering of journalists because they were able to anticipate when he was to depart from the building, whilst I could choose to leave later and avoid meaningless encounters with the press; there was really not much to tell.

Resolution 986 was obviously the point of departure in the negotiations. We soon found that some of the work that had been done in the negotiations on the basis of earlier resolutions could be used. But our main concern soon focused on something else. In reading Resolution 986, my collaborators and I wondered whether the Security Council had realised the complexity of the operation that they had entrusted to the Secretariat.

One obvious conclusion was that normal practice with respect to conclusion of contracts on oil sales or purchase of humanitarian goods could not be applied. Complex systems for monitoring of the contracting, overseeing of the loading of the oil at Mina el-Bakr or Ceyan, and inspecting the delivery of, and distribution of, humanitarian goods would have to be necessary elements of the arrangements.

What concerned us most was that the UN had no means of investigating violations of the arrangements by actors at the national level. In particular, we were concerned that the pricing arrangements might allow for kickbacks that could not be

detected in any other way than through criminal investigations at the national level. The UN is not vested with such power.

Halfway through the negotiations a very unpleasant event occurred. One day I was informed by Secretary-General Boutros Boutros-Ghali that the Americans were in the possession of a copy of the draft of the MOU and that they had views on its wording. I was extremely concerned and wondered how this had happened. I did not believe that anyone in my delegation would have leaked the text. The only other person on the UN side that had access to the text apart from the members of my delegation was the Secretary-General himself. For obvious reasons, he had to be kept informed.

I did not believe that the Iraqis would have given the text of the Americans. But maybe they had communicated it to Baghdad and that the communication had been intercepted?

The Secretary-General instructed me to include in the draft MOU suggestions that the Americans would make. These proposals were eventually delivered by Ambassador Edward (Skip) Ghnem of the US Mission to the UN. Ghnem was a professional diplomat who I held in very high esteem. He was clearly embarrassed when he came to see me, not least because some of the suggested amendments were very detailed and basically editorial. He excused himself and said that the document had been given to 'some gnome' in Washington who was responsible for the detailed proposals.

Anyone who has negotiated an international agreement knows that the text of such a document can be quite awkward, partly because the language is not the mother tongue of all parties, partly because of the complexity and delicacy of the subject matter. But I had no choice. My instructions from the Secretary-General were clear: I had to present the amendments to the Iraqi delegation.

When this happened, Al-Anbari got extremely upset. "With whom am I negotiating?" was his reaction. In the past, when there had been matters in the negotiations that were particularly delicate, I had asked to see Al-Anbari privately in my office. This was such a situation, and I suggested that we meet just the two of us in my office to discuss what had happened. So we did.

I actually had a very good relation with Al-Anbari across the negotiating table. But when we came into my office on this occasion he was really upset and even threatened to leave the negotiations. I explained to him that I fully understood that he was upset. But I added that there was another person in the room who was even more upset, and that was me. I told him that I felt extremely embarrassed and added that in view of the circumstances our skills as diplomats and negotiators were really put to the test.

After a moment I suggested that he calm down and study the text. He did, and it did not take long before I discovered the trace of a smile on his face. He had come to the conclusion that many of the amendments suggested were simply not relevant to the substance of the text. They did not matter. We then decided to work together to identify the substance, if any, in each specific amendment. Eventually, we returned to the negotiating table and continued our work.

Later, through Boutros Boutros-Ghali's book *Unvanquished*, I learned that it was he who had given the text to the Americans and the British.<sup>1</sup> I had of course suspected

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<sup>1</sup> B. Boutros-Ghali, *Unvanquished: a U.S. – U.N. Saga*, (Random House, New York, 1999), pp. 259–260.

this, but in a sense I did not wish this to be true. He also claims that he had discussed this step with Al-Anbari. This I find strange, since I doubt that Al-Anbari would have reacted the way he did if he was already familiar with the move that the Secretary-General had made. This does of course not exclude that the Secretary-General discussed the matter with Al-Anbari after the event or that the latter approached the Secretary-General directly to complain over what had happened and that it is this conversation that Boutros Boutros-Ghali recalls when he writes about his conversation with the head of the Iraqi delegation.

Under all circumstances, I am sure that the members of my delegation will remember my extreme concern when I first discussed this matter with them, expressing the hope that none of them had done this. To me, it was important to act with independence and impartiality. But, of course, any specific instructions from the Secretary-General had to be observed.

I might interject here that what had occurred was an important lesson which I remembered when I advised Secretary-General Kofi Annan during his negotiations with President Saddam Hussein in Baghdad in February 1998 in order to gain access for the UN weapons inspectors to the presidential palaces. My advice was that the Secretary-General not allow a syllable of the draft agreement with the Iraqi President outside a very small core group within the UN delegation present in Baghdad.

I was informed that the Americans at a very high level attempted to get hold of the text of the agreement before the Secretary-General signed it with Deputy Prime Minister Tariq Aziz on 23 February 1998. But Kofi Annan refused. Also for this reason it was a tremendous achievement on his part when the Security Council eventually 'endorsed' the agreement.<sup>2</sup> To me one thing is clear: the Baghdad negotiations would not have survived an American interference of the kind that occurred in the negotiations of the MOU in the spring of 1996.

However, returning to 1996, in all fairness I believe that Boutros Boutros-Ghali's personal involvement behind the scenes before and during the negotiations of the MOU was a determining factor in bringing them to a successful end. I recall the euphoria in the UN, both among member states and within the Secretariat, when Al-Anbari and I had signed the MOU on 20 May 1996. At long last the Iraqi population would receive the humanitarian goods that they so badly needed.

But, in a sense, this was only the beginning. All of a sudden the Secretary-General and the Secretariat were faced with the task of making the arrangements necessary for the implementation of the OFFP. The difficulties in identifying the bank that was to hold the escrow account, the oil inspectors and overseers, the goods inspectors and so forth have been amply described in the reports of the so-called Volcker Committee.<sup>3</sup>

2 SC Res. 1154, para. 1, (2 March 1998): "Commends the initiative by the Secretary-General to secure commitments from the Government of Iraq on compliance with its obligations under the relevant resolutions, and in this regard *endorses* the memorandum of understanding signed by the Deputy Prime Minister of Iraq and the Secretary-General on 23 February 1998 (S/1998/166) and *looks forward* to its early and full implementation;" It is a different matter that Saddam Hussein broke this agreement a few months later.

3 The Independent Inquiry Committee Into the United Nations Oil-for-Food Programme.

This is not the place to go deeper into what was later called the Oil-for-Food Scandal. I refer to the reports and the findings of the Volcker Committee. Surely, the Secretariat could have done better in administering this enormous programme, which lasted for seven years with a turnover of 65 billion US dollars. As a UN official who was involved in making these arrangements I am deeply concerned and offended that a few persons within the Organisation were suspected of crimes related to the OFFP and that two of them have been convicted. Not only were their acts criminal in a general sense. Through this behaviour the perpetrators provided a platform for the notorious UN critics from which they could criticise the Organisation and, indeed, the Secretary-General personally.

In my view, this criticism is highly unfair. Furthermore, as it appears from the reports of the Volcker Committee, the real scandal was caused by Member States themselves, among them those who were most vocal in their criticism of the UN. As I have pointed out in another context,<sup>4</sup> one should ask why the Security Council did not wish to discuss the reports from the Secretariat about suspicions that the OFFP was circumvented and that Saddam Hussein was lining his pockets. And why is not more focus directed on the states and enterprises that are suspected of having provided Saddam Hussein with kickbacks?

Another extremely serious question that has not been investigated and answered properly is where the remaining funds in the Oil-for-Food Account went when the OFFP was terminated.<sup>5</sup> This sum amounted to some eight billion US dollars. In accordance with a decision by the Security Council, this amount was handed over to the US administration as occupying power in Iraq in 2003 to be used for the benefit of the Iraqi people.<sup>6</sup> There is yet no satisfactory answer to the question where these eight billion US dollars ended up.

### 3. The Security Council Must Live up to Its Mandate

#### 3.1 *Reflections Based on the Implementation of Security Council Resolution 986*

The purpose of sharing these few personal experiences mainly relating to the negotiation of the MOU for the implementation of Security Council Resolution 986 is to give a flavour of what goes on behind the scenes in much of the work in which the UN Secretariat is involved. They could also serve as an illustration to the way in which Member States and in particular Members of the Security Council sometimes behave. The question is what can be done to improve the functioning of the Organisation.

4 H. Corell, 'Who Needs Reforming the Most – the UN or its Members?', 76 *Nordic Journal of International Law* (2007) No. 2–3, pp. 265–279.

5 See para. 17 of SC Res. 1483 (2003). The Development Fund for Iraq was in reality controlled by the US and the UK as occupying powers under unified command (the 'Authority'), see para. 13 of the Preamble of the Resolution.

6 See Development Fund for Iraq – Statement of Cash Receipts and Payments – For the period from 22 May 2003 to 31 December 2003 (with Independent Auditors' Report), <[www.globalpolicy.org/security/issues/iraq/dfi/2004/0715receipts.pdf](http://www.globalpolicy.org/security/issues/iraq/dfi/2004/0715receipts.pdf)>, visited on 5 February 2008.

As already mentioned there was much discussion within my delegation during the negotiations of the MOU to implement resolution 986. Were the members of the Council really aware of the complexity and the scope of the task that they had laid upon the UN Secretariat? To monitor the entire sale of oil by one of the world's leading oil exporting nations, to identify a bank in which an escrow account could be arranged where the proceeds of this oil sale could be safely kept, to monitor the purchase of humanitarian goods, the nature of which would have to be identified in the process, and the ensuing banking arrangements, to select inspectors to certify that the goods purchased was actually delivered and that it arrived safely at the intended destinations – all this was an enormous task.

In addition, as an international organisation the UN does not have the same means as national authorities to monitor activities of this nature, including by conducting criminal investigations in case there are suspicions of violations of applicable rules and arrangements.

Seen in a more general perspective, the question is whether the members of the Security Council pay sufficient attention to the practical aspects of arrangements that they consider. In this particular case, the intention was to alleviate negative effects of a sanctions regime that the Council had imposed upon a country of some 25 million inhabitants.

In addition, the Council had divided the responsibility for the implementation of Resolution 986 between itself and its Sanctions Committee, on the one hand, and the Secretariat on the other in a very unfortunate manner. It was also sad to note that members of the Security Council were not always fulfilling in a satisfactory manner their own obligations under resolutions that they had themselves adopted.

The negative effect of this behaviour was an aggravating factor in a situation where the responsibility for the implementation of the resolution was shared as described. Suffice it to quote the Volcker Committee when it delivered its definitive Report on the overall management and oversight of the Oil-for-Food Programme: "However, responsibility for what went wrong with the Programme cannot be laid exclusively at the door of the Secretariat. Members of the Security Council and its 661 Committee must shoulder their share of the blame in providing an uneven and wavering direction in the implementation of the programme."<sup>7</sup>

It is true that the Report directs serious criticism against the UN Secretariat for its management of the Programme, and obviously the Secretariat could have done better. But it goes without saying that the behaviour of the members of the Council, combined with the constant blaming of the Secretariat for not being up to standards, was disastrous both for the execution of the Programme and for the standing of the UN in the eyes of the world.

Obviously, the UN administration needs strengthening. However, if in the future the Council would consider establishing arrangements of a similar nature and magnitude, it is to be hoped that the Council seeks more expert advice before the arrangements are launched. And, needless to say, if the arrangements are to succeed it is a *sine*

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7 <[www.iic-offp.org/story07Sept05.htm](http://www.iic-offp.org/story07Sept05.htm)>, visited on 5 February 2008. Reference is made in particular to Volume II, Chapter 3 the Report 'The Security Council – Response to Surcharges and Kickbacks'.

*qua non* that the members of the Council scrupulously abide by the arrangements that they themselves have adopted.

### 3.2 *Reflections with Respect to Peacekeeping and Peace Enforcement Missions*

The lessons from Resolution 986 could also be viewed in a more general perspective. The question is whether the members of the Council are prepared to respect their own decisions and contribute to the efforts that are a precondition for a successful execution of those decisions.

A case in point is resolutions on peacekeeping and peace enforcement missions where substantial troop contributions are necessary for the implementation of the same. The problem has been discussed in more general terms in the context of the modalities for cooperation between the members of the Council and members of troop contributing countries that do not have a seat on the Council.

A realistic approach is necessary here. In many cases it is clear that for various reasons a troop contribution by any one of the permanent five members of the Council would not be appropriate. These members could then be tempted to negotiate among them and present to the other members of the Council arrangements that require troops that by definition would have to be provided by other states. Are these latter states prepared to make such contributions? That question should be examined at an early stage through open discussions and consultations between the Council and prospective troop contributing states.

I believe that it is fair to say that experiences demonstrate that the Council might be well advised to be more open when considering whether and how to intervene in a situation where international peace and security are threatened or where there would otherwise be a reason for the Council to intervene to fulfil the responsibility to protect. With respect to the latter responsibility reference should be made to the Summit Resolution, in which the Assembly stated:

“In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, 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.”<sup>8</sup>

In this context, the criteria presented by the High-level Panel on Threats, Challenges and Change might be of assistance. It is recalled that the Panel suggested that the Council, in considering whether to authorise or endorse the use of military force, should always address – whatever other considerations it may take into account – at least the following five basic criteria of legitimacy: (a) the seriousness of the threat, (b) the question of proper purpose, (c) the question whether the action is the last resort, (d) the question whether the means are proportional, and (e) the question whether there is a balance of consequences.<sup>9</sup>

<sup>8</sup> See UN Doc. A/RES/60/1, para. 139.

<sup>9</sup> UN Doc. A/59/565, para. 207.

Even if those criteria have not been expressly endorsed by the UN General Assembly, as was the intention of the Panel, they should nevertheless be of assistance to make clear both to the Council itself and to the general public what the possibilities are for the Council to intervene in a credible manner in a particular situation.

In this context the criterion last mentioned is of particular interest. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction? Needless to say this criterion would be a determining factor when the Council considers whether any UN member state would be prepared to contribute troops to the operation and when possible troop contributing states make their own assessment.

### 3.3 *Reflections with Respect to Observance of Human Rights Standards*

The question of observance of human rights standards by the Security Council has arisen specifically in relation to targeted sanctions, *i.e.* sanctions directed against physical or legal persons. Unlike sanctions of a more general nature, targeted sanctions are based on the activities or behaviour of these persons themselves.

This question has triggered a rather intense debate relating specifically to the designation or listing of individuals and entities suspected of having terrorist connections.<sup>10</sup> Such listings are done in accordance with procedures established under Security Council Resolution 1267 (1999).

In the Summit Resolution the General Assembly actually saw fit to “call upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions”.<sup>11</sup>

The present system is laid down in the Guidelines of the 1267 Committee for the Conduct of its Work, last amended on 12 February 2007.<sup>12</sup> By way of example, according to Section 8 of these Guidelines, the Committee considers de-listing requests that have been brought to its attention and reaches its decisions by the consensus of its 15 Members, in accordance with its usual decision-making process. There is no appeal. In my view, such a system cannot in the long run be considered to fulfil the human rights standards of which the UN should be the champion.

On 30 March 2006, the Watson Institute for International Studies issued a White Paper that had been elaborated after a process supported by the governments of Switzerland, Germany, and Sweden.<sup>13</sup> The paper contained several recommendations relating to listing, procedural issues, and options for a review mechanism. In the report, the Institute noted that the issues at hand are both legal and political. It further rec-

10 See *inter alia* B. Fassbender, ‘Targeted Sanctions’, <[www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf)>, visited on 5 February 2008, and I. Cameron, ‘Protecting Legal Rights: On the (in)security of Targeted Sanctions’ in P. Wallensteen and C. Staibano (eds.), *International Sanctions: Between Words and Wars in the Global System* (Frank Cass, New York, 2005) pp. 181–206.

11 See UN Doc. A/RES/60/1, para. 109.

12 <[www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf)>, visited on 8 February 2008.

13 *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, <[http://www.watson-institute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://www.watson-institute.org/pub/Strengthening_Targeted_Sanctions.pdf)>, visited on 8 February 2008.



ognised that, given the extraordinary nature of the Security Council's role in promoting international peace and security, some margin of appreciation of flexibility in interpretation as to what constitutes effective remedy is appropriate. Ensuring fair and clear procedures in the UN sanctions process would, according to the Institute, strengthen the effectiveness and credibility of the targeted sanctions instrument.

It is easy to agree with the Institute. And, basically, I have no problem with the recommendations.<sup>14</sup> However, I believe that it is appropriate to highlight in this context some of the points that I made when I was given the opportunity to participate in the process. I do so, bearing in mind one of the conclusions of the so-called *Brahimi report*, namely that the Security Council must be told what it needs to hear, and not what it wants to hear.<sup>15</sup>

Looking at the past activities of the Security Council, it is notable that it has as far as possible avoided to get involved with individuals. But the Council has to make up its mind. Either the Council deals with individuals, which it can very well do under the UN Charter, or it does not. If the Council chooses to deal with individuals, then it must observe the standards that apply under international law when individuals are affected by decisions by political or administrative organs, in particular human rights standards. This applies in particular to the remedy that individual physical or legal persons must have if their civil rights and obligations are at issue. The following could be mentioned as an example.

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) could be taken as a point of departure at the global level. At the regional level reference could be made to Article 6 of the European Convention on Human Rights (ECHR).

According to Article 14 of the ICCPR; "in the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Article 6 of ECHR prescribes that "in the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

In the preparations of the White Paper a survey had been made of European cases. It was noted that it may only be a question of time until a regional or national court in Europe arrives at the conclusion that listing people in the way the Council does could amount to a violation of international human rights norms, unless the individual has a remedy that meets the standards prescribed by the Articles just quoted.

In the process it was noted that the survey demonstrated a reluctance on the part of the European courts to assess UN practices in a substantial way. The conclusion was that the courts show that they are well aware of the existing hierarchy and the special position of the UN and especially that of the Security Council.<sup>16</sup> It was noted, how-

14 See White Paper, 4.

15 UN Doc. A/55/305 – S/2000/809.

16 See Court of First Instance of the European Communities: *Ahmed Ali Yusuf and Al Barakat International Foundation and Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgments in Case T-306/01 and Case T-315/01. See also for example European Court of Human Rights (sitting as Grand Chamber): Decision on 2 May 2007 as to the admissibility of Application no. 71412/01 by *Agim BEHRAMI and Bekir BEHRAMI* against *France* and Application no. 78166/01 by *Ruzhdi*

ever, that the courts had also made it quite clear that in case of clear and flagrant human rights violations they will act.

In my view, the Security Council should act with utmost prudence in this field. There is a clear possibility that the courts will react if the listings are seen as arbitrary or if there is a persistent impossibility of being de-listed. The effect of such listings is that the persons in question cannot access their bank accounts, pay their rent, etc. Even if 'humanitarian exceptions' can be made, such a remedy would not be sufficient in the long-term perspective. The Council should therefore take as a point of departure that persons simply cannot be kept on sanctions lists for long periods of time without access to an independent and impartial court.

The question must of course be put whether there is an unconditional right to access to such a court in the situations regulated by Article 14 of the ICCPR and Article 6 of the ECHR. At the national level, exceptions are permissible in the following situations:

Article 4, para. 1 of the ICCPR:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Article 15, para. 1 of the ECHR:

"In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. "

In strictly legal terms, these provisions are not directly binding on the Security Council. However, the point is often made that when the UN acts in this field, the Organisation and its organs should take care to observe meticulously the standards that are required from its members.<sup>17</sup>

Certainly, the courts in Europe realise that the Security Council must have some margin of appreciation. However, the question is how wide this margin is, in particular

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*SARAMATI* against *France, Germany and Norway*, <[www.cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Article%20%7C%20103&sessionid=5214441&skin=hudoc-en](http://www.cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Article%20%7C%20103&sessionid=5214441&skin=hudoc-en)>, visited on 5 February 2008.

17 This was certainly Secretary-General Kofi Annan's reason for asking the UN Office of Legal Affairs to vet the legislation to be promulgated in Kosovo and East Timor when these provinces were governed by the UN.

in view of the very limited possibilities for exception laid down in the two provisions just quoted – ‘threatens the life of the nation’.

Admittedly, it is not easy to draw a clear distinction here. And one cannot draw too far-reaching conclusions on the basis of existing case law. In this situation the most relevant question becomes what standards the Security Council should set for itself. Should the Council allow itself to come anywhere near a situation where the legality of its resolutions or effects thereof are called in question? Are ‘we the peoples’ instead not entitled to expect that the Council acts in such a manner that it does not risk being found in violation of international human rights standards?

It is imperative that regional or national courts do not start second-guessing Security Council Resolutions. The system of collective security laid down in the UN Charter and the obligations that flow from the Charter and the hierarchy established by its Article 103 should be observed scrupulously by all, including by national and regional courts and, regrettably one must add, also by the members of the Council. But in case of a conflict between a Security Council Resolution and its effects, on the one hand, and international standards of fundamental human rights on the other, one cannot exclude that a court would rule against the Council. Needless to say, this would have very serious consequences for the credibility of the Council and, indeed, for the United Nations as an organisation. The Council should therefore be very careful when it decides how to proceed in the present situation.

If the conclusion is that the situation that the Security Council attempts to address does not allow exceptions similar to what would be permitted under the two provisions previously quoted, the inevitable conclusion is that indefinite listing of persons in the manner that is now practiced requires that the persons listed have access to an independent and impartial court as a last resort. It goes without saying that preliminary assessments and decisions on de-listing must be taken by a committee or other organ under the Council or by the Council itself.

Among the recommendations in the White Paper there are options presented for a review mechanism, among them the establishment of an ombudsman institution. Certainly, different mechanisms should be developed. However, I do not believe that mechanisms falling short of an independent and impartial court would be sufficient since they do not meet the standards required, in particular if the final ruling is left to the Council.

Access to court can be given either at the national or the international level. There might also be regional options, but such would probably be too complex.

The option of access to a court at the national level would require that the listing is done at the request of a particular state and that this state takes responsibility for the fact that the person in question is listed. Under this option, the person listed would have access to the courts in the state in question, and in case such a court would rule in favour of the individual, there would be an obligation to de-list the person which must be observed by the Council. This might also entail an obligation for the state in question to pay damages to the individual in case the listing was found arbitrary.

This option is however problematic. It would entail an element of individual states influencing the Council in a manner that is not customary. Furthermore, it might lead to abuse at the national level, where listings could be used as a tool to persecute political opponents. The question whether the courts in such a state are independent and impartial could also be raised.

The other option is that the Security Council establishes the judicial institution itself. Here, one can seek guidance in the way in which the United Nations Administrative Tribunal (UNAT) was established.<sup>18</sup> Needless to say, judges on such a tribunal should be professional judges with demonstrated ability to perform on the bench at the national level.

From the very notion 'independent and impartial court' follows that the rulings of such a court must be binding also on the organ that has established the same, just as is the case at the national level in a state under the rule of law.

As a matter of fact, this matter is solved as far as the United Nations is concerned. After the establishment of UNAT the General Assembly asked the International Court of Justice to give an advisory opinion on the effects of awards of compensation made by this Tribunal. The question asked by the Assembly was the following (a second question asked is irrelevant in this context): "Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?"

In its Advisory Opinion of 13 July 1954 the Court replied that the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent.

Needless to say, the establishment of a court by the Security Council needs careful analysis. In particular, attention must be given to the specific problems that will arise with respect to those who appear before the tribunal, viz. the status of individuals appearing before it in the territory of its host state.

Obviously, these matters are highly complex. But it should be evident that the Security Council simply cannot afford to take the risk that regional or national courts some time in the near future find that the present system of listing individual physical and legal persons is in violation of international human rights standards.

The following quotation could serve as a lodestar. It is from the Madrid Agenda, adopted on 11 March 2005 by the Club of Madrid (an organisation of former heads of state and government in democratic states) to remember and honour the victims of the terrorist attacks in that city the year before on the same day: "Democratic principles and values are essential tools in the fight against terrorism. Any successful strategy for dealing with terrorism requires terrorists to be isolated. Consequently, the preference must be to treat terrorism as criminal acts to be handled through existing systems of law enforcement and with full respect for human rights and the rule of law."<sup>19</sup>

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18 See GA Res. 351 (IV) (9 December 1949).

19 <[www.summit.clubmadrid.org/agenda/the-madrid-agenda.html](http://www.summit.clubmadrid.org/agenda/the-madrid-agenda.html)>, visited on 5 February 2008.

#### 4. Concluding Remarks

To someone who almost on a daily basis has reason to seek guidance in the UN Charter, the document becomes a constant reminder of the time when the Charter was negotiated. Based on the experiences of two world wars, the engineers behind the Charter managed to negotiate a document that has actually stood the test of time very well. It is therefore easy to agree with the conclusion of the High-level Panel on Threats, Challenges and Change when they draw the following conclusion with respect to the Charter:<sup>20</sup>

“We believe, however, that the Charter as a whole continues to provide a sound legal and policy basis for the organization of collective security, enabling the Security Council to respond to threats to international peace and security, both old and new in a timely and effective manner. The Charter was also farsighted in its recognition of the dependence of international peace and security on economic and social development.”

One can well understand those who argue that the Charter reflects the geopolitical situation after the Second World War and that it needs reforming. This applies in particular to the composition of the Security Council.

However, I do not believe that one should be too easily impressed by these assertions. The challenges facing the Security Council will nonetheless be the same, at least until more states have joined the family of democracies. Personally, I do not believe that an enlarged Council would be better placed to address the issues on the Council's agenda.

The problem rests at a different level which must always be borne in mind: the behaviour of the Member States on the Security Council has to change. The respect for the Council is sometimes seriously undermined because of the way its Members act, in particular when states from which one has reason to expect better flagrantly violate the Charter, as was the case when Iraq was attacked in March 2003.

Leaving the period of the Cold War aside and focusing on the time after the fall of the Berlin wall, one would have thought that the Council would have found a new atmosphere that could generate trust among states. However, many events after the early 1990s demonstrate that there is yet a long way to go. At the same time, the threats against international peace and security are many and of a magnitude and complexity that mankind has never experienced before. Therefore, the role of the Council, which according to Article 24 of the UN Charter has the primary responsibility for the maintenance of international peace and security, has become even more important.

It would be wrong, however, to look only to the negative aspects. There are also positive developments that should be kept in mind. In particular, the fact that the Council is now prepared to discuss respect for human rights and the rule of law should be noted.<sup>21</sup> But pledges to respect rules, resolutions and presidential statements ring hollow if the states do not live up to their commitments. Those who engage in work

20 UN Doc. A/59/565, para. 301.

21 *See in particular* UN Doc. S/PRST/2006/28. *See also* <[www.un.org/News/Press/docs/2006/sc8762.doc.htm](http://www.un.org/News/Press/docs/2006/sc8762.doc.htm)>, visited on 5 February 2008.

to enhance the rule of law around the world are all too familiar with the constant reference from the auditorium to 'double standards'. This has to come to an end.

Some believe that this is an idealistic view. Maybe so, but it is the only way forward. Otherwise there is a clear risk that the state community will relapse into the primitive behaviour of the past – a behaviour that so often led to conflict and human suffering. It is hard to imagine the scale of suffering that would be the result if there would be a major conflict in the future.

The Security Council simply has to overcome its internal differences and take the lead based on a strict adherence to international law and, in particular, to the UN Charter.