

Dispute Resolution Board Foundation
Dispute Boards on the Nordics DRBF Conference & Workshop
Reflections on Addressing Global Disputes

Keynote Address

by

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Thank you very much for inviting me to address this conference that brings together an international audience of people from the world of construction, including banks, lawyers and other consultants.

I have been asked to open the proceedings by sharing some of my experience in effectively addressing global disputes during my time as the Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations from 1994 to 2004 – three years with Boutros Boutros-Ghali and seven years with Kofi Annan. I will make an attempt to do so, also focusing briefly on one situation before and two situations after that period.

It is obvious that with the time at my disposal I can only briefly touch upon some of the many dispute situations that I have experienced. For obvious reasons my presentation will be somewhat anecdotal. What I will focus on are the main characteristics of the situations and, in particular, on the lessons that could be learned from them.

Maritime Delimitation in the Baltic Sea

Let me start by a very important dispute that the Swedish government was facing when I took up my position as Legal Adviser and Head of the Legal Department in the Swedish Ministry for Foreign Affairs in 1984. The dispute concerned the delimitation of the maritime zones in the Baltic Sea between the then Soviet Union and Sweden. On the Swedish side we maintained that the delimitation of the Exclusive Economic Zone in the Baltic should be the equidistance line between the Swedish island of Gotland and the East Coast of the Baltic Sea. The Soviets insisted that the island of Gotland should not be used to determine the delimitation line, but the east coast of the Swedish mainland. The disputed area was commonly referred to as the White Zone. This dispute had existed for several years. However, in the 1980s negotiations at the political level suddenly produced a solution according to which the White Zone should be divided between the two parties with 25% to the Soviet Union and 75% to Sweden.

This meant that the actual formulation of the delimitation agreement could be handed over to me and my opposite number in the Soviet Ministry for Foreign Affairs Yuri Rybakov. After negotiations we delivered a draft agreement translating the principles of the political agreement into coordinates. The draft was accepted and the agreement could be signed by

Foreign Minister Eduard Sjevardnadze and Foreign Minister Sten Andersson in Moscow on 18 April 1988.¹

The lesson to be drawn from this process is that it is important to identify the nucleus in a dispute and ascertain that this is dealt with at the highest level between the parties. It may be that this nucleus is not so complex from a legal point of view but rather from a political point of view. Once there is an agreement at this level, the actual formulation of the agreement becomes more technical and can be entrusted to lawyers and technical advisers, who can then produce a result that is easy to understand and to agree upon between the principals.

The United Nations Convention on the Law of the Sea

When I arrived in the United Nations in March 1994 to become the UN Legal Counsel, a major issue on the agenda was Part XI of the United Nations Convention on the Law of the Sea (UNCLOS). This part regulates the so-called Area in the sea which is outside the jurisdiction of national states. It is often referred to as the common heritage of mankind. All rights in the resources of the Area are vested in mankind as a whole. The International Seabed Authority shall act on behalf of mankind in this area.

However, some of the states that had participated in the negotiations of this treaty were not satisfied with the manner in which Part XI regulated the subject matter, in particular the U.S. Intense consultations on this matter had been taking place conducted by my predecessor. It therefore fell upon me to chair the continued consultations on Part XI. This process resulted in an agreement that was adopted by the UN General Assembly on 28 July 1994.

The reason that these consultations became successful was a combination of different elements. One important factor was that UNCLOS was to enter into force on 16 November 1994, which meant that the three organs under the Convention: the International Seabed Authority in Kingston, Jamaica, the International Tribunal for the Law of the Sea in Hamburg, Germany, and the Commission on the Limits of the Continental Shelf that works in New York would be established and become operational. Because of this there was a common interest among the participating states that a proper order should be in place.

An important factor was that there were many representatives from UN Member States who were highly knowledgeable about the subject matter and that some of these persons could be relied upon to conduct informal consultations with different groups of Member States.

An important factor in a process of this kind is therefore to identify the different components in the process and see how they can be used to create an atmosphere that will be conducive to a positive outcome. UNCLOS is one of the most important treaties adopted by the United Nations. It now has 168 parties.²

¹ See

<https://www.regeringen.se/496dd8/contentassets/158a566ae23440c1aade24fe80cfa5a2/overenskomme-lse-med-sovjetunionen-om-avgransning-av-kontinentalsockeln-samt-av-den-svenska-fiskezonen-och-den-sovjetiska-ekonomiska-zonen-i-ostersjon-moskva-den-18-april-1988.pdf>

² With respect to the present state of the three UNCLOS institutions reference is made to an address that I delivered at the World Maritime University on 16 May 2019 available at <http://www.havc.se/res/SelectedMaterial/20190516corelluncloskeynote.pdf>.

The Oil-for-Food Program in Iraq

Another task that fell upon me very quickly was to negotiate an agreement between the United Nations and Iraq to give effect to the so-called Oil-for-Food Program. This became a very complicated process for the simple reason that the program created by the Security Council was extremely complex. One important factor was to identify the bank or banks to hold the so-called Oil-for-Food Account.

However, I and my colleagues in the Office of Legal Affairs had to negotiate an agreement that should regulate the practical processes in giving effect to the program. My counterpart, chairing the Iraqi delegation, was Ambassador Amir Al-Anbari.

Our delegations met on several occasions and finally we had a text of a draft agreement that we thought would be sufficiently clear to meet the requirements. However, the text of this draft ended up in the hands of the Americans, and I was instructed by Secretary-General Boutros Boutros-Ghali to accept a number of amendments that the Americans would bring to my attention.

I was very upset and wondered a great deal over how the Americans had got hold of the text. Under all circumstances I had to find a way of dealing with this situation without insulting my counterpart, who asked me with whom he was actually negotiating.

In the end, the two of us met on our own in my office – i.e. not in the presence of the members of our delegations – to sort out the situation. We came to the conclusion that editorial amendments were not a problem. However there were a few major issues that we needed to resolve. We managed to find solutions amongst ourselves, and came to the conclusion that it was important that all proposals did not come from one of the parties but that we would share the proposals among us when we presented them to the full delegations at the table.

This eventually resulted in a Memorandum of Understanding concluded on 20 May 1996 between the Secretariat of the United Nations and the Government of Iraq on the implementation of Security Council resolution 986 (1995) of 14 April 1995.³

When Boutros Boutros-Ghali's memoirs were published the answer to my question regarding the involvement by the Americans was there. And it did not come as a surprise to me. It was Boutros Boutros-Ghali who had given the draft agreement to them.

As you know, there has been much criticism of the Oil-for-Food Program. I refer to the reports about that. My concern is that I do not think that the Security Council realized the complexity of the program they had invented. However, at the closing of the program in 2003 it had actually fed a population of some 25 million people for seven years. Its turnover was 65 billion U.S. dollars. When the program was terminated in 2003, there were some 8 billion U.S. dollars remaining in the Oil-for-Food Account. In accordance with a decision by the Security Council, this amount was handed over to the U.S. administration as occupying power in Iraq in 2003. The question is: where did these 8 billion U.S. dollars go? Nobody has been able to give a satisfactory answer to that question.

³ See <https://digitallibrary.un.org/record/213544#record-files-collapse-header>.

One lesson that I learnt here is that it is important to try to create a good relation with one's counterpart in negotiations, and never ever try to score a point at his or her expense. I am sure that Amir Al-Anbari had a very difficult task to perform. And, no doubt, someone in his delegation was reporting to President Saddam Hussein about his performance.

The Inspection of Saddam Hussein's Palaces

In early 1998, Secretary-General Kofi Annan decided to engage himself in an attempt to solve a serious problem that had emerged with respect to the work of the weapons inspectors in Iraq. It concerned the inspections by the United Nations Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA) of the presidential palaces, which Saddam Hussein would not allow.

To make a long story short, Kofi Annan decided to travel to Baghdad to negotiate an agreement on this matter with Saddam Hussein. The Secretary-General had prepared himself carefully for this mission, including by consulting with some of the mayor actors among the UN Member States on how to proceed. He had also sent Staffan de Mistura to Iraq in advance with a GPS equipment to identify the eight palaces and to make a distinction between the palace buildings as such, and the gardens and other surroundings. In the latter the ordinary methods applied by the inspectors should continue. The special regime that Kofi Annan intended to negotiate would apply only in the palace buildings.

Kofi Annan had also been in touch with President Chirac of France, who offered to provide an aircraft that could take the Secretary-General and his team directly from Paris to Baghdad. Kofi Annan had asked former Foreign Minister Lakhdar Brahimi of Algeria and me to accompany him to Baghdad as advisers.

We travelled to Paris and had dinner with President Chirac in the Élysée Palace, during which further consultations took place. In the next morning we flew to Baghdad, where consultations started with Deputy Prime Minister Tariq Aziz, based on a draft Memorandum of Understanding that I had prepared with my team in the Legal Office in New York.

It was decided that we should meet with the President on 22 February. I never forget the evening before, when I went through the details in the MoU with Kofi Annan and asked if there was anything else that I could do. He fell silent for a while and then said: "Hans, you know, it often helps to pray."⁴

The next day we were taken to the presidential palace in Baghdad, where we met with Saddam Hussein and his team. The discussion with the President was based on the draft MoU. All of a sudden, Saddam Hussein wanted to see Kofi Annan alone – on his own. When we were permitted to join them again, Kofi Annan said that the two of them had discussed formulations in the MoU. I got rather nervous about this, but it turned out that they had only discussed the use of certain words in the text, like "entries", "work" and "activities" rather than "inspections" and similar words that were considered offensive by Saddam Hussein.

We returned to the Ministry for Foreign Affairs to finalise the text which was sent to the President for approval. The approval came very late in the evening when Kofi Annan had

⁴ This would later inspire me to compose a hymn for the Great Highland Bagpipe entitled "Secretary-General Kofi Annan's Prayer for Peace". I presented it as a farewell gift to him when I left the UN in March 2004. It is available at <http://www.havc.se/BagpipesSackpipa.htm>.

returned to his hotel. Therefore the MoU was signed by Kofi Annan and Tariq Aziz on 23 February 1998.

We then returned to Paris, where we met with President Chirac again. And the next morning we continued to New York. Upon his return Kofi Annan was greeted by jubilant UN staff members. This was in stark contrast to the silence with which we were met in the Security Council immediately thereafter. Later, I was subjected to almost a cross-examination about the formulations in the MoU by two delegates from the U.S. and one from the United Kingdom.

I am sure that you can understand the relief when, on 2 March 1998, the Security Council adopted a resolution commending the initiative by the Secretary-General to secure commitments from the Government of Iraq on compliance with its obligations under the relevant resolutions and endorsing the Memorandum of Understanding that he had signed with Tariq Aziz.⁵

There are many lessons to learn from this effort, but I would like to mention in particular the Secretary-General's contacts before he left for Baghdad and his preparedness to change certain words in the text without altering the effects of the Memorandum of Understanding.

The 1998 Rome Conference

Another very special experience was the five-week Rome Conference in 1998 that adopted the Statute of the International Criminal Court. The conference was hosted by Italy and was held in the premises of the Food and Agriculture Organization. I served as the Secretary-General's representative at the conference and the Secretariat was provided by the Codification Division of the UN Office of Legal Affairs.

The preparations for the conference had been made with utmost care. A draft statute had been provided by the International Law Commission, and this draft had been further elaborated by an expert committee established by the Sixth (Legal) Committee of the UN General Assembly. However, it was still a daunting task to reach an agreement during five short weeks in Rome.

For us in the Secretariat it was of course necessary to provide all the assistance that states needed in order to produce such a complex document. As a matter of fact, this conference was the hitherto most document intensive UN conference ever held. And we would not have managed if we had not been able to send on a daily basis draft documents to our offices in Geneva and New York, where they could be translated into the six UN languages and delivered back to us already in the next morning so that they could be distributed to the delegations.

However, the most important factor was that there was a general wish among a large majority of the UN Member States to achieve a result. And in many delegations there were experts who had developed a thorough knowledge about the intricacies in the documents that were discussed. These experts engaged in informal consultations and assisted in elaborating elements that could be introduced in the texts by the Secretariat. There was also a very competent Drafting Committee, chaired by one of the most renowned personalities in the field of international criminal law, namely Professor Cherif Bassiouni from Chicago, who passed away in 2017.

⁵ S/RES/1154 (1998) available at [https://undocs.org/S/RES/1154\(1998\)](https://undocs.org/S/RES/1154(1998)).

The combination of these elements, including the Plenary, assisted by Mr. Roy S. Lee, and the Committee of the Whole, assisted by Ms. Mahnoush Arsanjani, both from the UN Office of Legal Affairs, made it possible to produce this ground-breaking treaty that was adopted on 17 July 1998.

And in record time the treaty was ratified by 60 states, the number necessary for the Statute to enter into force, which happened on 1 July 2002.

It is true that the International Criminal Court has experienced difficulties after its establishment. However, it cannot be stressed enough how important it is that we have a functioning international criminal justice system. It is therefore regrettable that the UN Security Council has not used the Court and supported it in a manner that they should. However, the process is on its way and it is necessary that we have a functioning international criminal justice system that serves the purpose not only to punish those who commit the heinous international crimes that are defined in the Statute, but also serves the purpose of crime prevention in the same manner as the criminal justice system does at the national level.

The Transfer of the Lockerbie Suspects

When, in August 1998, I had returned to New York from the Rome conference, I was charged with another very special task. You will recall that Pan Am Flight 103 was destroyed by a bomb on 21 December 1988 over Lockerbie in Scotland. All 243 passengers and 16 crew members were killed. Since the crash happened in the residential areas of Lockerbie, also 11 people on the ground were killed.

In August 1998 the Security Council was informed that two persons charged with the bombing of the flight should be tried before a Scottish court sitting in the Netherlands. In a resolution of 27 August 1998 the Security Council requested the Secretary-General, after consultation with the Government of the Netherlands, to assist the Libyan Government with the physical arrangements for the safe transfer of the two accused from Libya direct to the Netherlands.⁶

The Secretary-General entrusted me with the task of negotiating the arrangements for their transfer. Libya was represented by their former Minister for Foreign Affairs Kamel Hassan Maghur. It soon became clear that the United Nations and Libya would need assistance with the transfer, in particular since the Council had decided that the transfer should be direct to avoid legal complications in other countries. Therefore, the Secretary-General contacted the Italian authorities to see whether they could provide flight assistance. They agreed.

Based on these facts Kamel Hassan Maghur and I negotiated an agreement which would serve the purpose. I also had detailed discussions with the Italian Security Service and Air Force, since it was important that the transfer could be performed with the highest security. For example, I wanted an aircraft that could take so much fuel onboard that it could land with this fuel in Tripoli and then, without refueling, fly directly to the Netherlands. I also did not want the aircraft to approach any buildings at the airport but stay on the tarmac. Therefore the aircraft would have to have a ladder of its own. There was also a military team on board the plane to protect it while on the ground.

⁶ See [https://undocs.org/S/RES/1192\(1998\)](https://undocs.org/S/RES/1192(1998)).

Kamel Hassan Maghur and I were in full agreement about these arrangements and we also decided to perform the transfer together on board the plane to demonstrate that we had taken every precaution.

The transfer went according to plans, and when we approached Rotterdam airport the pilot and I knew that we would be redirected to a military airport for security reasons. At this airport I entrusted the two suspects in the hands of the Dutch authorities.

At the airport there was also a Dutch judge. Kofi Annan had waved my immunity so that I could appear before the judge to explain that the suspects had boarded the plane voluntarily and that they had been treated as passengers. This was in order to avoid that they would seek asylum upon arrival in the Netherlands.

The lessons from this exercise are again the importance of developing a trustful relation with your counterpart and creating a sense of common “ownership” of the arrangement. In addition, in a situation like this it was obvious that none of the parties could perform the transfer on its own. It was absolutely necessary to engage a third party in a neighbouring country that could assist in a manner that the transfer could be made in complete accordance with the Security Council’s resolution. The Italian assistance was a sterling performance.

Kenya in 2008

When Kofi Annan had left the United Nations at the end of 2007 he was immediately asked to assist Kenya after the disastrous presidential election in December that year. The African Union asked him to chair the so-called Panel of Eminent African Personalities, consisting of himself, former President Benjamin Mkapa of Tanzania and Nelson Mandela’s wife Graça Machel from South Africa.

In early February 2008, Kofi Annan called me and asked me to assist. In his view, the only way to solve the situation was to form a grand coalition government in Kenya where the two parties, the Government/PNU (President Kibaki) and ODM (Honourable Raila Odinga), could interact. To be able to do this the National Assembly had to adopt legislation. Could I please assist in the drafting process?

I travelled to Kenya in mid-February and listened to the deliberations between the parties under Kofi Annan’s chairmanship. After a couple of days, Kofi Annan appointed me chairman of a legal working group on governance with two members from PNU and two members from ODM.

The cooperation with the four Kenyan members was a very positive experience. Within a few days we were able to present a proposal for legislation. An agreement on the principles and partnership of a coalition government was then signed by the two principals on 28 February 2008. This was later confirmed in the 2008 Kenya National Accord and Reconciliation Act that was based on the proposal provided by our legal working group. This law entered into force on 20 March 2008 and it would govern the coalition government in the country for five years. During this period a new Kenyan constitution was adopted in August 2010.

An important lesson here is that when there is a conflict of this nature, the solution can sometimes be a regional initiative, rather than that the United Nations gets involved. The Panel of Eminent African Personalities in Kenya appointed by the African Union is a good example of this approach. Furthermore, it points to the fact that the parties need eminent personalities to assist. And when there is an agreement on principles there is a need for

assistance by a group of experts who can cooperate and quickly provide a draft of the legislation that is necessary to give effect to the political agreement.

The Joint Comprehensive Plan of Action (JCPOA)

Let me now mention a fundamental concept that we have inherited from the Roman law, namely *pacta sunt servanda*. This means that agreements shall be honoured. I am sure that you are aware of that international law is firmly based on this concept.

The question is what signal is sent to the world when permanent members of the Security Council flagrantly violate this rule.⁷ By way of example I refer to the fact that the U.S. left the comprehensive, long-term solution to the Iranian nuclear issue, culminating in the Joint Comprehensive Plan of Action (JCPOA) concluded on 14 July 2015.⁸

The JCPOA was negotiated with the participation of the five permanent members of the Security Council. A necessary requirement for the execution of the JCPOA was that it should be endorsed by the UN Security Council. This was done on 20 July 2015 in its resolution 2231.⁹

In my view, the U.S. withdrawal from the agreement is not in conformity with *pacta sunt servanda*. However, even if a state that is a party to the JCPOA could withdraw from the agreement as such, this state is still bound by the obligations on all states laid down in the Security Council resolution.

In this resolution the Security Council calls upon all Member States, regional organizations and international organizations to take such actions as may be appropriate to support the implementation of the JCPOA, including by taking actions commensurate with the implementation plan set out in the JCPOA and the Security Council resolution and by refraining from actions that undermine implementation of commitments under the JCPOA. All States, relevant United Nations bodies and other interested parties are urged to cooperate fully with the Security Council in its exercise of the tasks related to the resolution.

The understanding is also that the Security Council would make the practical arrangements to undertake directly specific tasks related to the implementation of the resolution. The question is therefore whether the U.S. withdrawal from the JCPOA is legal after the endorsement of the agreement by the Security Council. Under all circumstances, the U.S. is bound by the resolution in the same manner as all UN Member States are bound by it. The question is: is this behaviour by a permanent member of the Security Council and a state under the rule of law acceptable?

Rule of Law and Corporate Social Responsibility

This brings me to my final point. I would like to end by making references to the need for the rule of law at the national and international level, and to corporate social responsibility.

⁷ With respect to my concern over the behaviour of the permanent members of the Security Council reference is made to *Security Council Reform – The Council Must Lead by Example*. In: Brill/Nijhoff The Max Planck Yearbook of UN Law (UNYB) (vol. 22) Forthcoming.

⁸ See Security Council resolution 2231 (2015) and its Annexes A and B available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2231\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2231(2015)).

⁹ See note 8.

With respect to the rule of law, let me stress the importance of making politicians understand their responsibility for the rule of law. Let me therefore draw your attention to a guide for politicians on the rule of law. It was inspired by a comment by then 90-year-old former Chancellor of Germany Helmut Schmidt in a preparatory meeting before the 2008 annual meeting of the InterAction Council of Former Heads of State and Government. When the discussion focused on the rule of law, Helmut Schmidt quietly asked: “I wonder if politicians understand *their* responsibility for the rule of law?” This led to the elaboration of what became a short – some 40 pages only – guide for politicians on the rule of law that was published in 2012. The guide is now freely available on the web for downloading and printing in 25 languages with more to come.¹⁰ Please spread the message!

Since many of you present here represent the business community I am sure that you are aware of the Global Compact that Kofi Annan introduced in 1999¹¹ and the Corporate Social Responsibility principles protect, respect, and remedy, endorsed by the UN Council of Human Rights in 2011.¹² These efforts to engage business in the protection of one of the core elements in the rule of law, namely human rights, are extremely important. Let me end by hoping that you are supporting this endeavour.

Thank you for your attention!

¹⁰ *Rule of Law – A guide for politicians*. A Guide elaborated under the auspices of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University, Sweden, and the Hague Institute for the Internationalisation of Law (HiIL), the Netherlands, available at <https://rwi.lu.se/2017/03/rule-law-guide-politicians/>.

¹¹ See <https://www.unglobalcompact.org>.

¹² See Guiding Principles on Business and Human Rights, available at https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf.