RECURRING PATHOLOGIES OF THE UN SECURITY COUNCIL: THE INSTRUCTIVE CASE OF IRAQ*

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Abstract

The UN Security Council is empowered to adopt resolutions binding on all UN member states. Under chapter VII of the UN Charter, it can adopt coercive measures (sanctions, the use of force) which all member states are bound to respect. These unique powers under international law were little used during the cold war, but since 1990 have come to be invoked almost routinely by the council. In the expansion of the council's ambition, the case of Iraq is particularly instructive, ranging from successful ventures (ending the Iran-Iraq war, expelling Iraq from the territory of Kuwait which it had sought to annex in 1990), the council was quite successful. During other episodes of the Iraq saga the council over-reached with sometimes startling heedlessness. The account of the council's engagement with Iraq highlights a number of its features pregnant with relevance for students of public international law, and particularly in its conclusions, aims to distil some lessons therefrom.

I Introduction

THE UN Security Council (UNSC) occupies a unique position in public international law. Under article 25 of the UN Charter, its decisions are binding on all UN member states. Under the provisions of chapter VII of the charter, the council is the sole international body authorized to mandate coercive measures such as the imposition of sanctions to be enforced by all of its member states, the imposition of blockades and the use of armed force. As will be seen, its decisions today target not only states but also national and international groups as well as individuals (specifically those suspected of involvement in terrorism and the unauthorized spread of weapons of mass destruction). Under the provisions of charter, article 2, paragraph 7, the council, when acting under chapter VII of the charter, is released from the charter's terms withholding authorization for the UN to intervene in matters "essentially within the domestic jurisdiction of any state". Taken together, these legal powers are both broad and unrivalled by those of any other multilateral body.

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* This article draws on David M. Malone, *International Struggle for Iraq* (Oxford UK and New York, NY: Oxford University Press, 2006) and on the scholarship and ideas of James Cockayne, who has written extensively on the UNSC's involvement in Iraq.

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Iraq has occupied a place on the UNSC's agenda for over three decades. In fact, the different phases of the UNSC's engagement with Iraq provides a remarkable lens to study the evolution of the council since the end of the cold war. It began with tentative decision-making during the Iran-Iraq war in 1980, but shifted to a more proactive stance as the cold war started to thaw in 1987, when the council adopted a settlement plan which Iraq and Iran accepted in 1988, bringing active hostilities to an end. These developments foreshadowed growing cooperation among the permanent five (P-5) members of the council in the post-cold war era.

When Iraq invaded Kuwait in 1990, the council responded by imposing mandatory sanctions against Iraq and later that year authorizing a US-led military intervention (which was carried out in early 1991), the deployment of weapons inspectors, the creation of a complex sanctions regime to encourage compliance with the disarmament obligations the council had imposed, and somewhat later an even more complex humanitarian program to mitigate the deleterious effects of those sanctions. In the next round of events in 2002-2003 it played the role of an ultimately unsuccessful political broker and finally that of a marginal peace-builder after 2003.

The paper retraces the council's engagement with Iraq from 1980 onwards and then explores in greater detail UNSC decision-making on Iraq from 2002 to 2013. The council's engagement with Iraq since 1980 has not only reflected wider patterns of international relations but also defined them. Further, some of the lessons from its involvement with Iraq have changed the council's approach to promoting international security in many ways, several of them pregnant with legal implications and risks, which are explored here.

The paper does not focus on Indian policy with respect to Iraq, or its approach to the UNSC, about both of which a great deal has been written by others.[1] Rather it explores systemic issues that have bedevilled the council on and off since the end of the cold war, drawing on Iraq as an iconic case study.

II Tracing history

Iran-Iraq

The Iranian revolution in 1979, during which the western backed Shah of Iran was ousted and Ayatollah Ruhollah Khomeini established a new theocratic regime, proved to be the impetus for a decade-long Iran-Iraq war that claimed hundreds of thousands of lives. Seeking to capitalize on the upheavals in Iran, Iraq attacked

1 A recent scholarly article assessed India's most recent term (2011-2012) on the UN Security Council at some length: Rohan Mukherjee and David M. Malone, "India and the UN Security Council: An Ambiguous Tale" XLVIII *Economic and Political Weekly* 1 10-117 (20 July 2013).

Iran, unprovoked. Amongst the P-5, opinion overwhelmingly favoured Iraq. The US had been jolted by the loss of a key ally in the region, the Shah of Iran, and pained by a long-lasting hostage crisis in Tehran affecting staff of the US embassy there. The Soviet Union had faced criticism from Iran over its 1979 invasion of Afghanistan. Iraq had been a long time trading partner of both the Soviet Union and France. The United Kingdom and China remained neutral, the latter supplying arms to both sides in the course of the conflict.[2]

Constrained by the cold war stand-off in the P-5, the UNSC failed to take any strong action. It adopted Resolution 479 calling upon Iran and Iraq to cease hostilities and settle their dispute through negotiations, but conspicuously failed to condemn Iraqi aggression. The council thus alienated justly aggrieved Iran for many years, and caused it to boycott the UNSC.[3] It also emboldened Saddam Hussein, with fateful consequences for many years.

In the absence of convincing action by the council, UN Secretary-General Waldheim offered his good offices to facilitate discussions, but to no avail. In 1984, Secretary-General Javier Perez de Cuellar appointed a former Swedish Prime Minister, Olof Palme, to help nudge Iran and Iraq towards a compromise. Finally, in 1987, Perez de Cuellar's efforts coupled with a shifting dynamic within the P-5 due to Mikhail Gorbachev's rise to power in the Soviet Union, led to the adoption of Resolution 598 which imposed a cease-fire (accepted by the two parties only after a further year of hostilities) to be monitored by the UN Iran-Iraq Observer Group (UNIIMOG). UNIIMOG was a classic cold war peacekeeping operation, leveraging the political capital of neutrality to provide a buffer between warring parties.[4] The withdrawal of forces to internationally recognized borders was complete by 1990.

Iraq-Kuwait

The Iran-Iraq war is estimated to have cost Iraq over $450 billion.[5] Taking advantage of this war and Iraq's financial ruin, Kuwait began to press for concessions in its border disputes with Iraq. It exceeded its OPEC (Organization of the Petroleum Exporting Countries) oil production quota, flooding the market and depressing prices for Iraq's oil, which plummeted from $20 to $14 between January and June

2 James Cockayne and David M. Malone, "Lines in the Sand: The United Nations in Iraq, 1980-2001" in Ramesh Thakur and Waheguru Pal Singh Sidhu (eds.), *The Iraq Crisis and World Order: Structural, Institutional and Normative Challenges* 16-33, 18-20 (Tokyo: United Nations University Press, 2006).

3 Javier Perez de Cuellar, *Pilgrimage for Peace: A Secretary-General's Memoir* 132 (New York, NY: St. Martin's Press, 1997).

4 Cockayne and Malone, *supra* note 2 at 20.

5 Kamran Mofid, *Economic Consequences of the Gulf War* 133 (London and New York: Routledge, 1990).

1990. At a time when Saddam Hussein needed to deliver rewards to his country, the demands of Kuwait risked further humiliating him in the eyes of Iraqi people as well as the Arab world.

Perhaps driven by these considerations, Iraq invaded Kuwait on August 2, 1990. Now, demonstrating dynamics starkly different from those of the cold war period, the UNSC, within a matter of hours of the invasion, condemned it, mobilized to declare a breach of the peace (under the terms of the UN Charter's chapter VII) and demanded a complete withdrawal.[6] Four days later, Resolution 661 imposed comprehensive sanctions on both Iraq and occupied Kuwait, and established the 661 Committee to implement the same. This swift action signalled a fundamental shift in the UN's capacity to act, promising a new decisiveness and effectiveness in the post-cold war era.[7] US Secretary of state, James Baker stated: [8]

> [T]hat August night, a half-century after it began in mutual suspicion and ideological fervour, the cold war breathed its last.

Resolution 661's sweeping sanctions regime, requiring careful monitoring and humanitarian management, represented a bold shift in the council's approach to international peace and security. With it, the council initiated a move beyond its hitherto preferred politico-military mode as mediator and peace-keeper between warring parties to a more legal-regulatory approach seeking to coerce compliance with its demands, an evolution in council disposition greatly amplified in SCR(Security Council Resolution) 687 some months later.[9] This new approach would play out in the council's engagement in Iraq over the next two decades.

When sanctions did not achieve the desired results, the UNSC moved to authorizing the use of force, driven by determined and highly effective US diplomacy managed by President George H. W. Bush, Secretary of State James Baker and their UN ambassador Thomas Pickering. In November 1990, Resolution 678 called on "Member States ...to use all necessary means to uphold and implement Resolution 660 … and restore international peace and security in that region" unless Iraq were to comply with earlier resolutions by January 15, 1991.[10] When Iraq failed to comply, a military offensive, 'Operation Desert Storm' was unleashed by a US-led coalition importantly including leading Arab states such as Egypt and Syria, which routed Iraqi forces within 100 hours with overwhelming fire-power and organization,

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6 Resolution 660 (1990), Aug. 2, 1990.

7 Cockayne and Malone, *supra* note 2 at 21.

8 James A. Baker, *The Politics of Diplomacy: Revolution, War and Peace 1989-1992* 16 (New York: G.P. Putnam's Sons, 1995).

9 David M. Malone and James Cockayne, "The UNSC: 10 Lessons from Iraq on Regulation and Accountability" 2 *Journal of International Law and International Relations* 1-24 (Fall 2006).

10 Resolution 678 (1990), Nov. 29, 1990.

liberating Kuwait and driving Iraqi forces well into their own country before stopping. Bush later wrote that the decision not to move on to Baghdad was taken on the grounds that the UNSC had not authorized an advance on Iraq's capital, and also because it might provoke a disintegration of Iraq were its government to fall apart.[11] As Simon Chesterman and Sebastian von Einsiedel have written:[12]

> Resolution 678 provided the template for most of the enforcement actions taken through the 1990s: it was dependent on the willingness of certain states to undertake (and fund) a military operation; it conferred a broad discretion on those states to determine when and how the enumerated goals might be achieved; it limited Council involvement to a vague request to 'keep the Security Council regularly informed'; and, most importantly, it failed to provide an endpoint for the mandate.

Humanitarian response

Soon after Operation Desert Storm ended, insurgencies and humanitarian crises erupted in Iraq. Shi'a militias rose up in rebellion in southern Iraq and Kurdish rebels mounted an offensive in the north.[13] Although US President Bush had called upon the Iraqi people to 'take matters into their own hands and force Saddam Hussein to step aside',[14] the US would not intervene in the south and did so only belatedly in the north. The UNSC passed Resolution 688 condemning Iraqi repression and casting the refugee flows as a threat to international peace and security. Meanwhile, close to 2 million Kurdish civilians fled for their lives. Under strong media pressure, the US led a coalition effort, 'Operation Provide Comfort', acting unilaterally without council authorization to address a humanitarian crisis. This effort relied on previous resolutions and on international humanitarian law for justification and was quietly accepted by Russia and China. Coalition forces, including the UK and France, imposed 'no-fly zones' both in the north and the south. The UN

11 George H. W. Bush and Brent Scowcroft, *A World Transformed* 303 (New York, NY: Alfred A. Knopf, 1998).

12 Simon Chesterman and Sebastian von Einsiedel, "Dual Containment: the United States, Iraq and the U. N. Security Council" in Paul Eden and Therese O'Donnell (eds.), *September 11, 2001: A Turning Point in International and Domestic Law* 725-756 (Ardsley: Transnational Publishers, 2005); see also Frank Berman, "The Authorization Model: Resolution 678 and Its Effects" in David Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* 153-161 (Lynne Reiner, 2004).

13 Cockayne and Malone, *supra* note 2 at 9.

14 George H. Bush, "Remarks to the American Association for Advancement of Science" Feb. 15, 1991 in 4 *Public Papers of the Presidents of the United States: George Bush* (Washington D.C: US Government Printing Office, 1990-1993).

secretariat meanwhile devised an innovative stop-gap arrangement stationing UN guards in northern Iraq, which permitted the return of thousands of Kurdish refugees and the safe delivery of a large international assistance program carried out by several UN agencies.[15]

Resolution 688 signalled a significant shift in the UNSC, with human rights and broader humanitarian issues becoming prominent in the council's decision-making, with the resolution representing the first instance in which the council explicitly stated that internal repression can lead to a threat against international peace and security. However, addressing human rights issues which were hitherto seen as internal matters of states remained controversial and several countries including India and China voiced their reservations clearly.[16] Nevertheless, since then, the council has increasingly invoked human rights in its decisions and addressed them in its mandates, although its practice has remained inconsistent across the range of crises it has addressed since 1991.

Finally, the US Iraq-Kuwait Observer Mission (UNIKOM) was established by Resolution 689 in April 1991. Once again, signalling a new a post-cold war vigour, the council empowered UNIKOM with duties under a chapter VII mandate, implying coercive powers if necessary.

All of these developments to a degree provided grist for President Bush's vision of a "New World Order" outlined in a speech to a joint session of Congress on 11 September 1990 prompted by the Iraqi invasion of Kuwait.[17]

Sanctions and weapons inspection

While international attempts to address some of Iraq's humanitarian needs were being made, Iraq's military capacity remained worrying, particularly after coalition forces uncovered the previously unknown extent of Iraq weapons programs. Resolution 687, widely known as the 'mother of all resolutions', among other wide-ranging provisions required Iraq to provide reparations for the damages it had inflicted and the elimination of Iraqi weapons of mass destruction and missiles with a range of over 150 kilometres.Unprecedented and complex regulatory machinery flowed from Resolution 687, in order to implement the disarmament of Iraq through weapons inspection and destruction. The council aimed to compel

15 For an excellent account on conditions in Northern Iraq during the winter of 1991, see United Nations, "Report to the Secretary-General on Humanitarian Needs in Kuwait and Iraq" by a team led by Martti Ahtisaari, 20th Mar. 1991 *available at*: www.un.org/depts/oip/background/reports/s22366.pdf (last visited on Aug. 20, 2013).

16 Chinmaya Gharekhan, *The Horseshoe Table* 61-64 (New Delhi: Longman, 2006); Malone, *International Struggle for Iraq*, at 86-87; Joanna Weschler, "Human Rights" in Malone, *The UN Security Council* at 58.

17 The speech is *available at*: http://en.wikisource.org/wiki/Toward_a_New_World_Order (last visited on sep. 6, 2013).

Iraq's compliance and cooperation through the continued imposition of wide-ranging sanctions. Together with an ambitious later humanitarian program, the overall result, seriously underestimated at the time, was one of regulatory and administrative overload for the UN.

The United Nations Special Commission (UNSCOM) was established in SCR 687 to monitor the destruction or removal of Iraq's chemical and biological weapons. The International Atomic Energy Agency (IAEA) was charged with similar responsibility with respect to Iraq's nuclear capability. Iraq's compliance with UNSCOM was reluctant, at best. The climate of controversy and brinkmanship fostered by Saddam Hussein around the weapons inspectors over time undermined faith in the inspections approach, with Washington pressing for a confrontation between UNSCOM and Saddam Hussein in 1998. Following P-5 divisions over the usefulness of the inspections-plus-sanctions approach, the US and UK once again acted unilaterally to bomb Baghdad ('Operation Desert Fox') for not allowing UNSCOM access to disputed sites. By January 1999, UNSCOM was disbanded, amidst much acrimony over evidence of a degree of UNSCOM collusion with the CIA.[18] As Seymour Hersh succinctly put it, "the result of the American hijacking of the UN's intelligence activities was that while Saddam Hussein survived, UNSCOM did not."[19]

Although the stated aim of UNSCOM was Iraq's disarmament, it soon became apparent that for the US, the goal was different. Secretary of State Madeleine Albright confirmed this in 1997, saying:[20]

> We do not agree with the nations that argue that sanctions should be lifted. Our view … is that Iraq must prove its peaceful intentions…Is it possible to conceive of such a government under Saddam Hussein? The evidence is overwhelmingly that Saddam Hussein's intentions will never be peaceful. Clearly, a change in Iraq's government could lead to a change in US policy.

Washington's stance did little to induce Saddam Hussein to cooperate with UNSCOM.[21]

Even prior to this, the sanctions proved critically ill-suited over time to induce compliance with the UN's wider demands articulated in Resolution 687, as the Saddam Hussein regime itself suffered little from the effect of sanctions, which,

18 David M. Malone, "Iraq: No Easy Response to 'The Greatest Threat'" 95 *The American Journal of International Law* 239 (Jan. 2001).

19 Seymour M. Hersh, "Saddam's Best Friend" *The New Yorker* 32 (April 5, 1999).

20 Madeleine Albright, "Preserving Principle and Safeguarding Stability: United States Policy Toward Iraq" Mar. 26, 1997, *available at*: http://secretary.state.gov/www/statements/970326.html (last visited on Aug. 27, 2013).

21 David M. Malone, "Goodbye UNSCOM: A Sorry Tale in US-UN Relations" 30(4) *Security Dialogue* at 400-401.

worse, created the potential for a lucrative black market largely controlled by and benefitting those in power in Baghdad. The Iraqi population suffered 'near-apocalyptic' humanitarian consequences.[22] After the program began, an estimated 50,000 Iraqi children under the age of five died as a result of the sanctions and child mortality rates more than doubled. Some even compared the sanctions regime itself to a weapon of mass destruction.

By 1995, the sanctions were becoming unpopular well beyond Iraq and led to a division within the P-5, with France and Russia, in particular, pressing to end them, for humanitarian and perhaps also commercial reasons. The devastating impact and overall ineffectiveness of the sanctions regime in Iraq, which mostly remained in place, due to lack of unanimity among the P-5 over ending it, until 2003 (although some measures lingered thereafter) created widespread negative perceptions globally of sanctions, one of the few coercive instruments at the council's disposal. While, as a result, the design and application of sanctions has been refined, the overall impact on the UN's reputation of their use in Iraq was and remains singularly negative.

The vast humanitarian 'Oil-For-Food' (OFF) programme, was created in 1995 under Resolution 986 to respond to the perverse outcomes of these sanctions, but the effort to graft it successfully on to other UNSC-mandated UN objectives and activities in Iraq largely failed to produce positive results (although it did relieve a degree of distress locally within Iraq). Under OFF, Baghdad was allowed to sell oil, with the export revenues devoted to purchasing humanitarian supplies under the controlling eye of the UN. A few years later, Baghdad was allowed to take over the distribution of goods within the country and choose who would buy Iraqi oil, greatly expanding the opportunities for corruption.[23] OFF over its lifetime handled $64 billion worth of Iraqi revenue and served as the main source of sustenance for over 60% of Iraq's population. Meanwhile, Iraq continued to channel oil illegally to Jordan, Turkey and Syria (at which some of the P-5 winked energetically), while billions of dollars were stolen by Iraqi and other intermediaries in the form of kickbacks. Frustratingly for UN staff, everything about the OFF, not unlike the UNSC itself, was inherently political. The selection of oil sale overseers, the bank to hold the revenues in escrow, and the firms to provide the supplies were all negotiated among member states in the council, particularly the P-5.[24]

Thus, the strategy of containment based on "inspections-plus-sanctions", buttressed by the occasional unilateral use of force, ultimately sundered P-5 unity. Crumbling international support for this approach on the one hand, and its relentless

22 UN Document S/22366, of Mar. 20, 1991, *Report on Humanitarian needs in Iraq*, para 8.

23 James Traub, "The Security Council's Role: Off Target" *The New Republic* 14 (Feb. 21, 2005).

24 *Id.*, para 16.

pursuit by the US and UK on the other, ultimately undermined the credibility and legitimacy of the related (and for some, wider) council decisions for many other member states.[25] Its standing, elevated very high in 1990 and 1991, never fully recovered.

Learning from the Iraq experience, the imposition of time-limits has now become common practice in UNSC sanctions regimes. This has not only altered the power dynamics within the council, but has also forced the council, at regular intervals and even if sometimes only formally, to assess the effectiveness of its measures in relation to other UN objectives such as the protection of human rights. Further, there has been an impetus to craft 'smart sanctions' *i.e.*, those that target perpetrators and avoid adverse impact on civilian populations.

A legal-regulatory approach

The evolution of the UNSC's role on Iraq points to one significant shift—from a mainly politico-military approach to international peace and security to a greater reliance on a legal-regulatory approach. In its legal-regulatory approach, the council establishes detailed rules governing the behaviour of states or other entities and devolves power to implement and monitor those rules to administrative delegates.

UNSCOM, UNMOVIC, the sanctions regime and the OFF programme are examples of this legal-regulatory approach and each provides examples of the council's failures of oversight. But the council is not likely to abandon this approach. The nature of contemporary threats which are diffuse, global and often propagated through non-state actors require collaborative, proactive and complex solutions for which the politico-military approach is insufficient.

Just as agencies in the domestic national spheres are bound by administrative law principles in regulatory decision making, so should be institutions of global governance, like the UNSC, when they act in legal-regulatory capacities. In adopting this perspective, the council would not only be upholding the rule of law, but also enhancing its own legitimacy and credibility. The council's effectiveness ultimately rests on UN member states recognizing its authority - and a council seen to be accountable and responsible has a better chance at that.

There are important lessons from Iraq for the council's effectiveness in this legal-regulatory approach. *First*, regulatory agencies need clear mandates. Resolutions must be precise, specifying what rules the delegated agent is to implement, the powers available to it in implementing them and the process by which they should be enforced. The Iraq sanctions regime was the biggest, most complex and longest lasting ever implemented by the UN. Yet, whether its goal was disarmament, regime change or achieving broader regional stability in the Middle East was not clear and

25 *Supra* note 18 at 240.

the P-5 disagreed among themselves on this key point. The duration of the sanctions regime was also not specified and the 'reverse-veto' dynamic, requiring P-5 unanimity for change, turned it into an indefinite one, long after support for it had evaporated internationally.

Second, member states as well as regulatory agents must be accountable. UNSCOM is an excellent example of an ambitious regulatory attempt by the UNSC encumbered with muddled lines of accountability. The Chairmen of UNSCOM were appointed by the Secretary-General, but were to report to the council. The triangular relationship became highly problematic when UNSCOM head Richard Butler and Secretary-General Kofi Annan differed on issues of substance. When claims arose that the US was using UNSCOM for its own intelligence purposes, there was no clarity on who UNSCOM was answerable to. Similarly, the Volcker inquiry report found 'egregious lapses' in the management of OFF both by the UN secretariat and by member states, also noting that neither the UNSC nor the secretariat was in clear command, producing evasion of personal responsibility at all levels.[26]

Third, agents must be independent and adequately resourced so as to maintain their capacity to perform effectively. For example, the 661 Sanctions Committee, which consisted of council members, was required to oversee extremely lengthy and complex contracts under Resolution 611. However, with some exceptions, members did not have the expertise or the resources to perform this task. The secretariat also was apparently somewhat at sea. No wonder problems set in.

The UN and Iraq 2001-2003

By 2001, the UNSC was stuck in an impasse over Iraq recalling the cold war. Any adjustments to strategies earlier agreedwithout an end-point were prevented by the 'reverse veto'. The terrorist attacks of September 11, 2001 against the US only strengthened Washington's resolve. The risk of proliferation of weapons of mass destruction (WMD) to terrorists became a driving preoccupation for the US, as did determination to be rid of Saddam Hussein once and for all.

President Bush's 'National Security Strategy' in 2002 advocated pre-emptive use of force, and made clear that the US would not hesitate to act alone.[27] This largely new doctrine suggested that the nation was free to use force against any foe it perceived as a potential threat to its security, at any time of its choosing and with

26 The Volcker Report, formally the report of the Independent Inquiry Committee, *available at* :http://www.iic-offp.org (last visited on Sep. 10, 2013).

27 United States, President of the United States, The National Security Strategy of the United States of America (Washington DC, United States 2002), *The National Security Strategy* (2002).

any means at its disposal. In the words legal scholar of Thomas M. Franck, this "stood the UN Charter on its head".[28]

It is now clear that a decision to go to war against Iraq was taken within the Bush administration by the late spring of 2002.[29] Nonetheless, under pressure from some of its traditional allies (mainly the UK), the US adopted the 'UN route'. But President Bush delivered an ultimatum to the UN: either the Security Council backed the US's demand for forceful disarmament of Iraq and regime change, or it would be sidelined, and in the effect, deemed irrelevant.

Seeking a 'middle ground' between unarmed inspections and military intervention, the UNSC adopted Resolution 1441 in November 2002. It decided that Iraq had been in 'material breach' of its disarmament obligations and gave it one final opportunity to comply, failing which it would face serious consequences. It required Iraq to allow inspections of the United Nations Monitoring and Verification Commission (UNMOVIC) to operate freely, as well as provide a complete disclosure of its WMD activities. However, Resolution 1441 suffered from creative ambiguity— it was unclear what would constitute a failure by Iraq to comply, what would happen in the event of the failure, and most importantly, who was to decide. Mainly, it begged the question of whether 'failure' by Iraq would automatically permit states to enforce the resolution or whether a second resolution would be necessary for that purpose.

Following the resolution, UNMOVIC deployed to Iraq Hans Blix, an energetic leader. In January 2003, Blix told the council that Iraq had not accepted the disarmament demanded of it, but that UNMOVIC was doubtful of Iraq's possession of biological and chemical weapons. Mohammad El Baradei of the IAEA (International Atomic Energy Agency) told the council that Iraq was not in the process of reconstituting its nuclear program. Further, both UNMOVIC and IAEA pointed to western intelligence the failures in Iraq. Sharp divisions within the P-5 flared up, with France threatening to *veto* any attempt to go to war, supported by Germany, Russia and China. In a final attempt along the 'UN route', the US, Britain and Spain introduced a resolution stating that Iraq had failed to take the 'final opportunity' afforded by Resolution 1441. If passed, this resolution would have provided a rationale for the use force. However, the deadlock within the P-5 persisted, and on March 19, 2003 the invasion of Iraq by a US-led coalition began without the Security Council authorization. (The UK and US had withdrawn their draft resolution

28 Thomas M. Franck, "What Happens Now? The UN After Iraq" 97 (3) *American Journal of International Law* 619 (July 2003); Jonathan Steele, "Bush doctrine makes nonsense of the UN Charter" *The Guardian* (June 7, 2002).

29 Walter Pincus and Dana Priest, "Some Iraq Analysts Felt Pressure from Cheney Visits" *Washington Post* (June 5, 2003). See also Nicholas Lehmann, "How It Came to War: When Did the President Decide to Fight" *The New Yorker* 36 (Mar 21, 2003).

not because of a *veto* but because they had been unable to secure the nine positive votes among council members required for an affirmative vote.)

A number of the episodes of sharp diplomatic confrontation over a six-month period in 2002-2003, particularly in February 2003, involving foreign ministers and ambassadors, unfolded before the eyes of the world and broadcasted by television all over the globe. The UNSC chambers and its surroundings offering non-stop drama, becoming a crucible for world politics as it had been before during the Cuban missile crisis of 1962 and in the run-up to Operation Desert Storm in 1990-91. Counter-intuitively, the decision by Washington and London to attack Iraq without a UN mandate proved highly negative for the UN in world public opinion. Publics in many countries seem to have thought the UN should somehow have actively prevented the invasion of Iraq.

In this sidelining of the UN, the US signalled a new approach. It would look to the UN as one potential source of legitimacy and support— one coalition amongst many— but if the UN could not contribute to the achievement of US's foreign policy goals, the US would do without it. Debate over policy on Syria in 2013 suggests that has not changed under President Obama, although his administration has engaged with the UN positively overall.

Efforts to brand the 2003 invasion of Iraq as a humanitarian intervention never took off credibly, although they had been toyed with both in London and in Washington. Ultimately, in its justification for the action, the coalition relied on the purported threat of weapons of mass destruction in Iraq. Nevertheless, the military campaign and subsequent occupation of Iraq as of 2003 for a time complicated matters for those advocating the option of humanitarian intervention in extreme cases.[30]

The occupation of Iraq and beyond (2003-2013)

With the coalition-led invasion underway, both the coalition powers and other member states, shocked by the sudden complete irrelevancy of the UN in Iraq, were left to decide what its future role there could be. While a continuing UN presence in Iraq now risked retrospectively lending legitimacy to the coalition's purposes and methods, its absence would represent an abdication of its essential humanitarian and peace-building roles. Striking a balance, once the major coalition military campaign to occupy and subdue the country was over, the UNSC adopted on May 22, 2003 Resolution 1483, which recognized the US and UK as occupying powers, and appointed a special representative of the secretary-general (SRSG) to

30 See for example Kenneth Roth, "War in Iraq: Not a Humanitarian Intervention" Human Rights Watch Report (Jan. 26, 2004) *available at*: http://www.hrw.org/news/2004/01/25/war-iraq-not-humanitarian-intervention (last visited on Aug. 18, 2013).

Iraq, Sergio Vieira de Mello. Secretary-General Kofi Annan envisaged a broad multidisciplinary assistance operation, to be carried out by the new United Nations Assistance Mission to Iraq (UNAMI) including constitutional, legal and judicial reform, police training, demobilization and reintegration of former military forces, public administration and economic reconstruction. However, on the ground, the US resisted any significant role for the SRSG.

On August 19, 2003 the UN suffered the largest loss of its civilian employees to date. A truck-bomb detonated outside UNAMI headquarters in Baghdad killing Vieira de Mello and 21 others. The terrorist attack shocked the UN community and cooled its ardour to play a leading role in Iraq, but also carried implications for its approach to peace-operations elsewhere thereafter. Any notion of the UN and its staff somehow rising above conflict and enjoying a degree of immunity from attack due to its humanitarian mission vanished.

Soon after securing Baghdad, the slow and rocky task of nation (re-)building began for the coalition. A coalition provisional authority (CPA), headed by US administrator Paul Bremer, was established and with the SRSG, it was tasked with appointing an interim Iraqi administration. The appointed Iraqi governing council (IGC) served as a provisional government for Iraq, and on November 15, 2003 the CPA and IGC entered into an agreement on the political process, involving several steps: a transitional national assembly would prepare a Constitution; an interim government would be formed by June 2004; and national elections for a post-transition government would be held by December 2005. However, finding support for this arrangement, particularly amongst the Shi'as and the Kurds, proved challenging.

Recognizing the difficulty of the task, the US called upon the UN to play a role in gaining acceptance for the plan. The UN's most respected mediator, and the architect of the Taif agreement that ended the Lebanese civil war, Lakhdar Brahimi, working with the CPA and the Iraqis as a UN special envoy, was able engineer an acceptable interim government until elections could be held, and importantly, injected much-needed legitimacy into the political process. Nevertheless, at his mission's end in May 2004, he expressed some frustration over the difficulty of working with the CPA, characterizing Bremer as "dictator of Iraq" in a parting shot.[31] British officials working within the CPA and in London expressed similar reservations, more privately.

On March 8, 2004 a 'Transitional Administrative Law' was signed to serve as a constitutional framework until elections allowed for drafting a new Constitution.[32]

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31 Tom Lasseter, "UN's Brahimi: Bremer the 'Dictator of Iraq' in Shaping Iraqi Government" *Knight Ridder News*, (June 3, 2004).

32 *Iraq's Transitional Law* (May 25, 2004), US Federal Government document GAO-04-746R (May 25, 2004) *available at*: http://www.gao.gov/assets/100/92639.html (last visited on Sep. 22, 2013).

At the same time, the IGC was replaced by a transitional government which would prepare for elections. On June 28, 2004, sovereignty was restored to the Iraqis, and a transitional government headed by Iyad Allawi, took over.

Throughout this period, the security situation remained tenuous. The CPA disbanded the Iraqi military and oversaw de-Baathification of the security forces began. In the resulting security vacuum, the coalition was unable to meet the most basic security needs of Iraq's citizens. Further, the effect of a disenfranchised Sunni community was underestimated. An energetic insurgency that de-stabilized an already fragile Iraq with an intense cycle of conflict ensued (also involving elements of the Al Qaeda terrorist movement).[33] Ten years later, domestic security is still seriously impaired by patterns of sectarian and insurgent violence, with murderous crescendos of bombings punctuating political life in ways often difficult to de-code from outside the country.

The humanitarian costs of the decade of war continue to burden Iraq. About 5 million Iraqis have been displaced from their homes since 2003. While hundreds of thousands fled to Jordan and Syria, nearly 3 million are displaced within Iraq.[34] While estimates vary, in all likelihood, 100,000 civilians lost their lives during these years.[35] Minority ethnic and religious groups, including the Baha'is, Christians, Shabaks and others, have been and continue to be particularly vulnerable in the face of insecurity.[36]

UNAMI

Since 2003, the UN's role in Iraq has been that of a peace-builder. The United Nations Assistance Mission for Iraq (UNAMI) was established by Resolution 1500 in 2003, and its role greatly expanded in 2007. Its mandate included supporting political dialogue and national reconciliation, assisting in electoral processes, facilitating regional dialogue between Iraq and its neighbours, and promoting the protection of human rights and judicial and legal reform.[37] Between 2003 and 2005 UNAMI remained seriously handicapped by the bombing of its headquarters and the lack of policy space to play a meaningful role. Ben Rowswell senior program

33 Freedom House, Country Report "Iraq" in *Freedom in the World 201, available at* :http://www.freedomhouse.org/report/freedom-world/2013/iraq (last visited on Aug. 21, 2013).

34 *Ibid.*

35 For one serious estimate slightly above this, see figures, *available at*: http://www.iraqbodycount.org/database (last visited on Sep. 9, 2013).

36 Human Rights Watch, "Iraq: At a Crossroads Eight Years After the US-Led Invasion" 65 (2011) *available at:* www.hrw.org/sites/default/files/reports/iraq0211W.pdf; Bill Bowring; "Minority Rights in post-war Iraq: An Impending Catastrophe" 5 (3) *International Journal of Contemporary Iraqi Studies* 332 (2011).

37 *Available at*: http://unami.unmissions.org/ (last visited on Aug. 10, 2013).

manager of the National Democratic Institute in Erbil and then Canada's diplomatic resident representative in Baghdad, 2003-2005 recalls: "After de Mello's death the UN played important technical roles such as with the surprisingly successful organization of three national polls in 2005, but exercised little significant political influence."[38] Jeremy Greenstock, the UK's senior representative in the CPA in 2003 notes: "The main stumbling blocks for greater UN involvement were a), of course, big power disagreement but also b) the Iraqi people's distaste for the UN after sanctions."[39]

However, UNAMI played an important role in the process of drafting and adopting a constitution in 2005 as well as with elections in 2009 and 2010. In 2006, the International Compact for Iraq was entered into— an agreement between the Iraqi government and the United Nations, with the support of the World Bank, aimed at normalizing the security environment, reconciling the political environment, and revitalizing the economy.[40]

Taking nothing away from individual, sometimes significant achievements of the UN in Iraq, it has not, overall, been able to much improve the quality of life, justice or politics in the country, and this at considerable public expense. Regular reports from the Secretary-General to the Security Council document UN activities but also the very dire conditions in which the country's public life stumbles from crisis to crisis, UN and other international efforts notwithstanding.[41]

Current signals from the ground are hardly encouraging, except perhaps for developments in the Kurdish provinces. There is widespread recognition that at times, on politically sensitive issues such as the status of Kirkuk, UNAMI has made real contributions. That said, like much else in Iraq, Kirkuk's status remains unresolved. UNAMI represents one of the UN's largest political deployments, along with its cousin, UNAMA, in Afghanistan (which equally wrestles with unpromising local circumstances). At last count (for 2012), UNAMI included 352 troops, 380 international civilian staff and 463 national civilian staff, spending a budget of $172.8 million. Depressingly, in spite of hard, at times bold and effective work by UN staff, no meaningful reconciliation has been achieved; the Kurdish territories

38 Correspondence with the authors, Sep. 7, 2013.

39 Correspondence with the authors, Aug. 29, 2013.

40 UN Press Release IK/552 (27 July 2006). *Available at*: http://www.un.org/News/Press/docs/2006/ik552.doc.htm (last visited on Sep. 4, 2013).

41 The most recent, at the time of writing, dated 11 July 2013, appears as UN Document S/2013/408. Much more user-friendly than the UN's web-site is the excellent Iraq archive of the research NGO Security Council Report *Available at*: http://www.securitycouncilreport.org/un-documents/iraq. Equally useful complementary assessments are now produced annually by NYU's Center on International Cooperation, documenting both UN peace missions. *Available at* http://cic.es.its.nyu.edu/content/annual-review-global-peace-operations (last visited on Sep. 19, 2013).

continue their transition towards complete autonomy; the economy is still hamstrung; and violence remains endemic.

Joost Hilterman, who has contributed so much to the excellent analytical work on Iraq of the International Crisis Group, concludes: [42]

> On balance, within Iraq, the UN has made the best of a bad hand, lying low when it was most vulnerable to US manipulation, then playing to its strength on issues that the US was willing to hand over, such as disputed territories. Now, with US troops gone and the situation deteriorating partly as a result of developments in neighbouring Syria, the UN could play a more prominent role but would probably achieve less due to local dynamics.

Unilateralism

The sidelining of the UN by the US prompted widespread criticism not only of the US but also the UN. Many argued that there had been a twin failure on the part of the UN: failure to contain Iraq and the failure to contain the US. Further, the UN's failure was seen as a sign of an international system that was insufficiently responsive to the needs of the day and didn't mirror the evolving realities of world power. James Traub describes the catch-22 situation that the UNSC found itself in: "Containing the Bush administration has meant finding a middle ground between rubber stamping American policy— and thus making the Council superfluous— and blocking American policy, and thus, provoking America to unilateral action, which of course would make the council irrelevant."[43]

However, the sidelining of the UN did not come without its costs for the US, both financial and reputational. When it acted unilaterally without explicit authorization from the UN, the US showed disregard for the principles (and benefits) of collective decision-making. Soon after its intervention, the US began to realize that it needed far more resources and troops than previously anticipated.[44] Embarrassingly, the claims of WMD that justified its decision to go to war have since been proven unfounded. International skepticism of US intelligence-based assertions was bound to be greater in the future and affected the US and international calculus on alleged use of chemical weapons in Syria in mid-2013.[45]

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42 Correspondence with the authors, 29 Aug. 2013.

43 James Traub, "Who Needs the UN Security Council?" *The New York Times* Nov. 17, 2002.

44 United States Department of Defense, Testimony of Delivered by Deputy Secretary of Defense Paul Wolfowitz (July 29, 2003). *Available at* L: http://www.defense.gov/speeches/speech.aspx?speechid=494 (last visited on Sep. 12, 2013).

45 Kenneth Pollack, "Spies, Lies, and Weapons: What went Wrong?" *The Atlantic Monthly* 92 (Jan./Feb. 2004).

Implications for international peace and security

The 2003 invasion also held important lessons for post-conflict reconstruction and state-building. In the case of 'Operation Iraqi Freedom', the insufficient number of boots on the ground to secure key locations coupled with a lack of post-war planning resulted in widespread looting, collapse of basic services like electricity, medical and local security services. In face of multiple failures by the invading coalition, Larry Diamond articulated important lessons for post-conflict reconstruction. These include preparing for a major commitment, committing enough troops with the proper rules of engagement to secure the postwar order, mobilizing international legitimacy and cooperation as well as generating legitimacy and trust within the post-conflict country. Perhaps most importantly, he advises humility and respect, since the act of seizing the sovereignty of a nation is a particularly bold and assertive one.[46] These recommendations apply to the UNSC in planning UN operations just as much as to Washington in planning US interventions. Similarly, cautioning against the under-estimation of the fallouts of interventions, Phebe Marr warns: "If you cannot garner adequate resources and public opinion at home and abroad to rebuild a nation, don't start".[47] The US public today seems profoundly convinced of this wisdom, but at great cost to their country meanwhile, and also at great cost to the standing of the United Nations, too frequently attempting to deal at the international level with the consequences of decisions at the national level formulated for domestic political reasons.

III Conclusion

A number of lessons emerge from the narrative above. One can suggest only a few of the obvious ones here. Among many others, one stands out: law and legal justification of actions, even by the greatest powers, matters. Hubris rapidly overtakes those who believe it is optional.

The Iraq experience demonstrates that the UNSC is tremendously vulnerable to the ebb and flow of international politics, especially the relationship among the P-5 at any given time. P-5 members alienate each other at considerable risk, as happened during the 1990s on and again in the first three years of the new century on Iraq. When the Iran-Iraq war broke out, cold war divisions prevented an effective council response. By contrast, freed from the cold war stasis, the council acted swiftly and effectively in addressing Iraq's aggression against Kuwait. Indeed, this success triggered in the council a short-lived era of euphoria, during which, between

46 Larry Diamond, "Building Democracy after Conflict: Lessons from Iraq" 16(1) *Journal of Democracy* (Jan. 2005).

47 Phebe Marr, "Occupational Hazards: Washington's Record in Iraq" 84(4) *Foreign Affairs* at 186.

1991 and 1993, it passed 185 resolutions and authorized 15 peace-keeping and observer missions. But that euphoria soon gave way to bitter experience in the Balkans, Somalia and Rwanda; while P-5 divisions over Iraq only grew more pronounced. The result was frequently curdled P-5 relationships. Although their capitals continued to be disposed to and capable of cooperation on most UNSC files, their disagreements over sensitive ones, most recently Syria, are much harsher in nature and tone than should be the case, exhibiting little taste and capacity for compromise.

The Iraq's case after 1990 points towards real limitations of the UNSC's ability to oversee the implementation of its decisions impartially and effectively. (For example, with active collusion of leading council members, the awarding of contracts under the OFF was highly politicized, with benefits 'carved up' between member states.) These have been addressed to some extent through the professional staffs of several of the council's committees, notably those of SCRs 1373 and 1540, but the instinct in P-5 capitals to advance national objectives, including commercial ones, through council decisions, no matter how unwise when viewed retrospectively, remains strong. Administrative probity lost out to diplomatic real politics in the council on Iraq. But most of the blame of the Volcker report fell on the secretary-general and others in the secretariat. This sorry saga is pregnant with implications that should have been anticipated by adopting an administrative law lens through which to plan such complex operations and such an ambitious, including financially staggering, game plan.[48]

Even for the most powerful nation, the quality and quantity of member states it keeps as company in its international ventures matters. In 1990, the US administration, working closely with P-5 capitals, Arab governments and many others, patiently built the consensus necessary for the formidable military and political coalition with significant regional participation to which Operation Desert Storm gave expression under an expansive but nevertheless well-defined council mandate. It stopped well short of taking toppling the government and taking over the country. The result was, overall, a very good one for coalition members and for the UN.

In 2003, the US and UK led a narrowly-gauged collation involving no active Arab participation (although several Gulf countries did provide quiet support). Washington and London overestimated their capacity to govern a country of which they knew all too little, and failed in all but the narrow objective of overthrowing Saddam Hussein at huge cost to Iraq, the region and themselves. The coalition they were able to assemble was not widely-gauged. Governments approached to participate

48 For insight on how administrative law perspectives could and should have informed security council decision-making on Iraq, see Benedict Kingsbury, NicoKrish and Richard Stewart, "The Emergence of Global Administrative Law", Institute for International Law and Justice Working Paper 2004/1. *Available at:* iilj.org/publications/documents/2004.1KingsburyKrischStewart.pdfy (last visited on Sep. 14, 2013).

in it very frequently linked participation explicitly to SC authorization. Without it, the consequent lack of broadly-based (particularly regional) company in this venture was as a warning flare that sailing would not be easy and that the venture was highly risky. A UNSC in and of itself, because of the legitimacy it confers, tends to produce company.

Deliberately vague resolutions seeking to bridge very deep differences can be dangerous. The lack of clarity about what amounted to 'material breach' of Resolution 687 and the 'serious consequences' threatened by Resolution 1441, as well as about who would enforce those provisions, and what powers were available to actors, made it tempting for the US (if not the UK) to undertake unilateral military action relying on implied authorization as justification. Short-term diplomatic cleverness in the form of sleight of hand in capitals and within the council carries great risk. The meaning of mandates needs to be clear and widely shared, at the very least among the P-5.

The UNSC engaged in a flight forward on Iraq as of 1991, imposing ever sterner restrictions and conditions on the country, hoping against the evidence that these would compel cooperation with its objectives. The humanitarian costs of the strategy caused France to defect from the critical P-3 consensus, which the UK and US, in their agitation, hardly seemed to notice. And they hardly seemed to notice international public opinion had abandoned them. This speaks to the isolation of chanceries which can convince themselves of almost anything. Reflecting on a failure to secure UNSC approval for invasion of Iraq in 2003 might productively have prompted second thoughts. It only increased US and UK truculence (as it had French excitement in the run-up to the climax, during which France alienated many of its European Union partners be seeking to speak for and to intimidate them). And although the US and UK largely lost the 2003 Iraq war (after briefly winning it), in public opinion the UNSC lost a great deal of legitimacy for failing to prevent it. There were thus no winners from this fiasco.

Challenged by European courts, the council has recently become more attentive to considerations of due process. These challenges (still under way in 2013) arose after a period of the council adopting sweeping decisions, notably on terrorism and weapons of mass destruction, with significant negative impact on targeted individuals around the world who could not appeal.[49] The belief that the council can act in any way it chooses is neither supportable in law, nor acceptable to international public

49 For the latest in a series of judgments finding the UNSC in breach of satisfactory legal due process towards individuals sanctioned by it on suspicion of association with terrorism, see Court of Justice of the European Union, press release No 93/13, Luxembourg, 18 July 2013, *available at:* http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-07/cp130093en.pdf (last visited on Aug. 10, 2013). For a brief and balanced discussion of the ebb and flow of argument on the case involved, see Kokott and Sobotta, "The Kadi Case" 23 *The European Journal of International Law* 1015-1024 (2012).

opinion. These episodes, just as those in which the council failed to tend carefully to oversight of its legal-regulatory strategies in Iraq, have significantly further entailed the council's credibility, a fragile asset that now more than ever needs careful nurturing.

And, perhaps the central lesson in this sorry saga: there is nothing inevitable about a new cold war among the P-5 members. But it could well come about without greater sensitivity to each other's concerns and an ability and willingness to craft compromises that are also operationally viable (rather than merely forms of hollow diplomatic mastery leading on to operational disaster).

Has much changed? On Iraq's legacy within the council, Mark Malloch Brown, formerly administrator of UNDP, and then UN Deputy Secretary-General, later a minister in the UK government of Gordon Brown, sums up aptly if gloomily:[50]

> The Security Council is inhabited by the Ghost of Iraq. Crisis after crisis seems to re-open the distrust sowed by that conflict. The West is branded as having manipulated intervention into a means of projecting its power and influence under a UN banner. The opposition, notably Russia and China, is portrayed as having turned its back on the Responsibility to Protect and human rights more generally. The result is a broken-backed unreformed Council no longer representative of the distribution of global power, let alone the Charter Principles, but only of the world's basest fears and suspicions.

50 Correspondence with the authors, 30 Aug. 2013.