The UN Security Council and its Future Contribution in the Field of International Law

What may we expect?[1]

Tono Eitel

I. Introduction

When reading international law treatises, one sometimes can get the impression that the UN Security Council is a natural, unquestionable source of revelation-like decisions, which in turn, are open to interpretation but not to questioning. Yet that does not mean that implementation is guaranteed. Those who fail to implement Security Council

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1 This article is based on a report given on 2 September 1999 to the German Commission on "Common Security and the Future of the Bundeswehr", chaired by the former President of the Federal Republic of Germany Richard von Weizsäcker. The views expressed are mine.

J.A. Frowein and R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, 53–71.

Resolutions may be either "Rogue States" or states that rely on the distinction between self-executing and non-self-executing resolutions.

The foregoing is to say that the Council, when conceived, was meant to become a Holy Alliance of Oligarchs whose decisions would be taken in consequence of a multilateral parallelogram of forces; the veto given to the most powerful members of that alliance was to safeguard only the vital interests of the major powers and not, e.g. the interests of client states. However, history has not bypassed this oligarchy. What we now have is a sort of Pantheon with the U.S. as the mightiest, not yet almighty head god surrounded by the four other Veto Powers as equal immortals who then together allow 10 mortals to sit at their table for 2 years (Article 23).[2]

This Mount Olympus suffers from deficiencies and disappointments, from thwarted good intentions and unexpected frustrations, from intrigues and power play, sometimes building up to a small palace rebellion, but never to a really revolutionary upheaval. If the need for improvements of structure and procedure is evident, any reform, which would deserve that name, would have to amend the UN Charter and would for this reason need, among other things, the ratification by the five Veto Powers' parliaments (Article 108). This is an almost insurmountable threshold. For the foreseeable future we shall therefore have to live with what we have got.

In the following I will try to predict what we may or may not expect from the Council over the next years in those fields that have repercussions in international law. I shall begin by a couple of points regarding structure and procedures of the Council which may be of relevance in this context.

II. The Security Council

1. Structure

The outside view of the Council is well-known. We see the 10 non-permanent members that are elected by the General Assembly according to an agreed geographical distribution for a two years' term. Thus Germany, for the first time after reunification, was a member for the years 1995/1996. We then see the all too well-known five permanent

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2 Any article cited without further indications comes from the UN Charter.

members that owe their seat to Article 23, and, as is sometimes pointedly said, not to elections. It may be questioned whether all or any of the permanent members would be elected today, but one has to admit that Article 23 together with the rest of the Charter has been adopted, if under some pressure, unanimously.

Permanent democratic legitimacy of the Permanent Five was not intended and deficiencies in that respect were foreseen and therefore remedied by (Charter) legislation, giving them permanence of membership and the veto. Since we no longer very often hear of a veto actually being cast, one could, at any given moment, expect to find a body of 15 members of rather equal status whose decisions are taken according to a structure based on political, social and/or geographical affinities.

This is, however, not how the Council presents itself to an, even temporary, insider. To begin with the veto, the insider will find that it plays its principal role not when cast but throughout the deliberations when the Council is looking for and negotiating a decision. If a non-permanent member expresses opinions and concerns, these are weighed against the other members' interests and, rather often, neglected. If, however, the identical concerns are expressed by one of the Permanent Five, they are taken seriously and, in one way or the other, accommodated, if necessary by dropping the entire draft, as it was done with the planned authorisation of an intervention in former Yugoslavia for the sake of the Kosovars which never reached the Council. There are cases, yet, where the proponents are content to demonstrate to the world who is for and who is against a certain action or solution. A recent case in point was the draft resolution submitted by Belarus, India, and the Russian Federation demanding the cessation of the use of force (by NATO) against the Federal Republic of Yugoslavia for which only China, Namibia and Russia voted.[3] Usually, the Permanent Five, or "P 5" in shorthand, discuss among themselves any action foreseen by or happening in the Council and, to a certain extent, also outside it, e.g. elections in the UN System (with the aim to vote for each other) or reform proposals regarding the Council that are discussed in the General Assembly. By doing so they, at the outset, set the stage for the Council deliberations, in most cases narrowing the field of possible Council action down to the sector comprising their own intentions. It is rare, therefore, that the non-permanent members, commanding after all a two-thirds majority, are free in their choice of options. More often than not

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3 Doc. S/1999/328 of 26 March 1999, in: UN Press Release SC/6659 of 26 March 1999.

the first statements of permanent members indicate already the corridor within which the respective permanent member is prepared to operate. Complaints against a permanent member like the one of Sudan about the U.S. bombing of a pharmaceutical factory in Khartoum or questions about the Russian campaign in Chechnya have therefore little chance to get further than being touched upon in the informal consultations under "Other Matters."

Also within the group of the P 5 there are still recognisable class distinctions: Most obvious is the one between the sole world power left, the U.S., on the one side and the other four permanent members on the other. No other power can be as efficient as the U.S. in underpinning its interests in the Council by bilateral representations in the capitals involved. Using stick and carrot from its impressive military and/or economic arsenals, the U.S. almost every time manages to bring around reticent or opposing delegations. The global presence and involvement of the U.S. gives it a simply unique leverage. No other permanent member can match this.

At the other end of the scale we find China. Not only does China not command a comparable arsenal of compelling arguments, the Chinese do not show the same national interest in every event and agenda item. There is clearly one domain, in which they are vitally interested and that is the one-China Policy and its sometimes far flung derivates. There are other areas where the Chinese interest is evident, e.g. questions concerning the developing countries as a group (of which China considers itself a leader) or the rebuttal of too westernised ideas on human rights and intercessions, if not interventions on their behalf. On many questions, however, the Chinese delegation pronounces itself in more general terms and stays aloof of details.

Different from China, Russia takes interest in every detail everywhere. This may be a habit kept from the days of the Soviet Union, when it was involved either geo-strategically or ideologically in any part of the globe. The Russian delegation still represents a giant, but this giant is temporarily and partially incapacitated. The Russians, therefore, avoid trouble if they can; they may criticise American neglect of rules, but leave it at that, satisfied to have made the point, as was done when CIA staffers who had no clearance for the Council room explained to the Council, presided over by the American delegate, the circumstances of the Cuban shooting down of two US civilian aircraft in 1996.

The UK delegation clearly maintains the well-known special relationship with the U.S., whose immediate neighbour they are in the

Council (as long as the United Republic of Tanzania is not a member of the Council separating the two due to the English alphabet). To the American power the British add their refined diplomacy. Since English has become the main working language in the Council, it is the British, who in close consultation with the Americans dominate the drafting process of most papers that leave the Council, adding polish and their own nuances when reworking drafts from other delegations whose English is less perfect. The British normally argue and vote with the U.S., the only recent example of a different vote that comes to mind being the vote on a second term for the Secretary-General Boutros-Ghali in December 1996 when the U.S. was the only one to vote against while the UK, together with the other 13 members voted for a second term for Boutros-Ghali. In the following – informal – indicative votes this was not repeated any more.

Together with the U.S. and the UK the French make up the group of the three western permanent members, or the "P 3". The French point of view coincides less often than the British views with those of the Americans. They have their "*départements et territoires d'outre-mer*" to look after, and the cohesion of the *Communauté Française*, i.e. what is left of the former colonial empire is to be maintained. Until recently, it was French troops that kept certain African governments in power, although, for a couple of years now, non-interventionism has been the *mot d'ordre*. What seems to come effortlessly to the two Anglo-Saxon states, the world wide interest in their language, has to be striven for by France; the "Francophonie" is seen as a mortar of the *Communauté* and as almost a sufficient reason to take sides. And, last but not least, there is, at least since Charles de Gaulle, a strain of political independence in Frenchmen – certainly in the "*grands commis d'Etat*" – so impressively impersonated by the inhabitants of a little Gallic village in Roman times. At present, the French position *vis à vis* Iraq, for example, is closer to the Russian than to the American position. Regarding the above mentioned re-election of the then Secretary-General Boutros-Ghali at the end of 1996, the French were adamantly opposed to the American (and subsequently British) ousting of the incumbent, but finally gave in.

In spite of these and other incidences of divergence, the P 5 are and will remain a group apart, conscious of their elevated rank, of the irritation and the bad will it is constantly creating, and of their interest to defend its status, if possible in harmony with each other.

And then, there is a sixth permanent member of the Council that is hardly noticed from the outside, at least not in this function: The Sec-

retary-General. He and/or his deputy from the Secretariat has, like the Permanent Five, been present since the beginning. He (normally a member of his staff) draws up the provisional agenda for each meeting of the Council (Rule 7 of its Provisional Rules of Procedure – PRP –), acts as Secretariat for the Council (Rule 21 PRP), writes and keeps the records of the meetings and may make statements to the Council concerning any question under consideration (Rule 22 PRP). He is a living memory of the Council — a role of great importance in an environment where precedents carry enormous weight.

But, the Secretary-General's influence in the Council derives even more from the habit of the Council to ask for a report from the Secretary-General for any major agenda item. These reports describe the factual situation as could be ascertained by the UN's world-wide networks of permanent or *ad hoc* "Rapporteurs" and, even more influential, in a final chapter "Observations" make an assessment of the situation, followed by suggestions and proposals how best to cope with it. Thus, the Secretary-General not only sets the stage for the Council's discussion, but even foreshadows its decisions, for, exceptions aside, the Council likes to follow the — neutral — Secretary-General's recommendations even if he has no vote. I personally rate his influence as at least as great as that of a Permanent Member. This explains why the politically interested member states lobby so vigorously for their nationals being hired by the Secretary-General for positions in the Secretariat. And, since the Secretary-General's reports carry this weight, interested delegations, of course, try to have their views reflected in the reports and sometimes bring heavy pressure to bear on the drafters of the respective report and on the Secretary-General himself. I have witnessed this on various occasions, and the former Secretary-General Boutros-Ghali has described it in his memoirs.[4]

2. Working Methods

According to my experience a Council decision (Resolution or Presidential Statement) is, in most cases, prepared through the following steps, the sequence of which may change:

a. Kick off by the U.S. or in many other cases with the support of the U.S.;

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4 Boutros Boutros-Ghali, *Unvanquished*, New York 1999, at 256 and 262 et seq.

b. Preparation by the Secretary-General in a report (often in consultation with one or all of the P 5 and, of course, principally interested other members);

c. Harmonising among the P 5;

d. Lobbying with reluctant Council members by the proponents and the U.S. (or the U.S alone);

e. Taking of the decision in the Council.

A particular procedure is followed with problems that have a national or at least geographically defined dimension, e.g. the former Yugoslavia; for several of them some states with interest in the region have organised themselves in semi-official groups like the so-called "Contact-Group" for the former Yugoslavia (in New York called "Consultative and Drafting Group") or the "Friends of the Secretary-General for Haiti" (Canada, France, the U.S. and Venezuela) or the "Troika" (Portugal, Russia and the U.S.) for Angola. The Council normally leaves to these groups not only the initiative of raising a matter in the respective field of interest but also the drafting of a the decision itself. For this reason the NATO plan of intervening in Serbia and Montenegro on behalf of the Kosovars never reached the Council. Russia had it already rejected in the Contact Group. The above mentioned draft condemning NATO's intervention had by-passed the Contact Group and was nothing but a demonstration of helpless protest.

A grave change of procedure has been introduced in the eighties: whereas the Council was meant to meet in public "unless it decides otherwise" (Rule 48 PRP) it is now the other way around: the Council meets daily in so-called "Informal Consultations" behind closed doors in a room especially arranged for these meetings. After the meeting, the President briefly informs the press. Only decisions (resolutions or presidential statements) that have been agreed upon to the last comma are taken to the well-known "Security Council Chamber" and are there publicly adopted, and only there interested members of the UN that are not members of the Council have a chance to address the Council — of course too late to change anything. This procedure does not violate the letter of any Charter Article or Rule of Procedure; Council members must be free to meet informally. The complete loss, however, of transparency and of the right of the concerned parties, e.g. Iraq, to address the Council *in corpore* while it is still in the process of deliberation can not, in my view, be reconciled with what the Charter calls "the principle of the sovereign equality of all its (the organisations) Members" (Article 2 para. 1). After all, many Council decisions "condemn" or

"invite" etc. Member States and even institute harsh sanctions against them. Their right of a fair treatment and of what in Court procedures is called "due process" has been completely lost. The private meetings (Rule 48 PRP) that are now being held once in a while cannot make up for that. Here, as elsewhere, reform is urgently needed.

III. The Council's Future Contributions to International Law

After this brief recapitulation of some of the Council's salient features I shall now turn to the question of what we may and may not expect from this important UN organ in the field of, or having repercussions for international law.

1. The Council as a Political Organ

Given the Council's influence on the development of international law, e.g. the regime of sanctions or of the use of force, one could expect its members to indulge, in the appropriate situation, in juridical arguments. Yet, that would be a misconception. References to international law in the Council's informal consultations carry relatively little weight. "We are not at Court", or "where does this lead us to?" could be the reaction. For the sake of a solution behind which all Council members can rally, legal inadequacies are tolerated. It makes little sense therefore to look for legal logic in Council decisions: the Council is not a juridical, but a highly political organ.

2. "Council Law"

All the same the Council's decisions claim validity in a global purview (Article 25). This is more than any legislator or court can hope for; the decisions of the ICJ, for example, have no binding force except between the parties (Article 59 of its Statute). Recommendations of the Council, e.g. under Chapter VI of the Charter, therefore will have at least to be weighed carefully and in good faith by the addressees; requests, e.g. under Chapter VII, will have to be implemented. For these binding requests one has to look in the operative parts of Council resolutions, not

in their preambles which are there for explicative and interpretative comments, not in "Presidential Statements" which despite the unanimity on which they rest (the President does not speak for a majority) are there for opinions and expectations of the Council, and certainly not in the remarks of the President to the Press which are there to simply report on activities of the Council. The media normally attribute all these different statements of the Council or its President simply to "the Security Council" without heeding these decisive differences. Since the end of the cold war the Council produces resolutions in an ever-increasing frequency. I consider an annual number of about 50 resolutions a conservative estimate for the next years to come.

The part of these resolutions that can claim binding force I would like to call "Council Law" and to put it into the same class as "Treaty Law" and "Court Law", the latter being the decisions of international courts of justice or arbitration. Council Law in this sense ranks higher than any other secondary law due to the all-encompassing nature of the UN Charter and the Security Council's vast competences. Council Law is not "soft law" but, comparable to decisions of the ICJ (Article 59 of its Statute), it is to be executed by the addressees and with respect to the material object of the Council's decision.

Council Law is multifaceted. It comprises rules on interventions as in the cases of Somalia or Bosnia and Herzegovina, on economic and financial sanctions as in the case of Iraq, on the drawing of borderlines as in Palestine, or between Iraq and Kuwait, on the creation of subsidiary organs (Article 29) as in the case of Sanctions Committees or, an excursion into the field of the judiciary, the two regional penal tribunals (for the former Yugoslavia and for Rwanda), on police matters, as with the UN support mission in Haiti (1996) — in short on all aspects of international security and peace keeping, and this everywhere in the world from Cambodia to Guatemala. The most important contribution of the Security Council to the future development of international law will therefore be the addition of further case law to the already existing corpus of "Council Law".

3. Future "Council Law"

a. Inactivity

I shall now venture a few forecasts on the future "Council Law", beginning with what the Council may not do (and what may not be done to the Council).

aa) The Council will continue to live with its "provisional" rules of procedure, adopted at its first meeting and amended many times since, but never overhauled with a view to lifting them out of their provisionalism. Such overhaul would, without any doubt, do away with some features dear to the P 5 and would have to incorporate or to abandon the relatively recent practice of the "informal consultations". It will therefore remain untouched.

bb) An improvement of the unjust and unfair status of non-members of the Council, especially those who are concerned by decisions (or inertia) of the Council, would probably need an amendment of Arts 31 and 32, would, as such, fall under the ratification requirement of Article 108 and stand a chance only as part of a larger package. To tie up such a package has been tried in vain by the General Assembly over a long time. The chances for such a package remain dim.[5] Thus, a veto reform and an enlargement of the Council will have to wait, until pursued with more energy by those who are interested.

cc) Also the Military Staff Committee (Article 47) will continue to hold its regular lunches without ever "advis(ing) and assist(ing) the Security Council on all questions relating to the Security Council's military requirements..." It may, though, advise the P 5, since the members of this Committee are staff officers of the P 5 which, perhaps gives their regular meals some sense as effortless meetings in times of tension.

dd) There will continue not to be any "special agreements" as were foreseen in Article 43 between the UN and Member States because no Member State will "undertake to make available to the Security Council on its call and in accordance with (such) a special agreement or agreements, armed forces, assistance and facilities..." It is again primarily the P 5, and first of all the U.S., that are recalcitrant; they do not wish to grant the Council the freedom of manoeuvre which would make it less dependent on its (permanent) members. Troops will continue to be

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5 See the well documented Article by I. Winkelmann, "Bringing the Security Council into a New Era", *Max Planck UNYB* 1 (1997), 35 et seq.

contributed only *ad hoc* and after detailed consultations. The Secretariat, however, has been trying to do at least what is feasible and has been working on getting officers at least earmarked for a core headquarter for any peace-keeping operation to be decided.

ee) I do not see the Council looking into environmental catastrophes as was recently suggested in an interesting academic thesis.[6] Such situations, horrible as they may be, are a far cry from "the maintenance of international peace and security" (Article 24).

ff) Finally, the Charter will continue to contain obsolete articles like the superseded names of two permanent members (China, Russia) in Article 23, and like the enemy state clauses (Arts 53 para. 2 and 107) dealing with World War II and the years immediately afterwards, and like Arts 82 and 83 on the Security Council's functions with respect to "a strategic area" which, together with the rest of the Chapters on Trusteeship (Chapters XI, XII, XIII), have lost their field of application after the emancipation of the last "strategic area" (Palau). As I have already said above, any charter revision will be brought about only as part of a package in the tying up of which, at present, there does not seem to be the necessary interest.

b. Possible Developments

I shall now turn to activities of the Council which I deem likely to happen in a not too distant future.

aa) When "maintain(ing) or restor(ing) international peace and security" by armed forces (Article 42) — the so-called "Peace Enforcement" under Chapter VII of the Charter — the bad experiences made with the "double-key-approach",[7] where certain competences in Bosnia were divided between the UN and NATO in such a way that they needed each other for action, will prevail. The reserve regarding a military UN-Command has grown and will prompt the Council to look for agents who, upon an authorisation by the Council, will act independently. If the Council will decide an armed intervention at all for which decision there may be little inclination, it will probably do so according to the Iraqi precedent, authorising a coalition of the willing. In Europe and the European glacis, that coalition could then consist of the members of

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6 B. Fassbender, *UN Security Council Reform and the Right of Veto*, 1998, 210.

7 Boutros-Ghali, see note 4, 146, 232–247.

NATO. Already in the early nineties when monitoring the Yugoslavia-Embargo,[8] the members of NATO had acted as immediate agents of the Council, using NATO as an instrument of co-ordination, rather than making NATO the Council's agent who in turn would put them to work. NATO has reservations about becoming a regional arrangement according to Chapter VIII of the Charter, not least because of the obligation to report to the Council (Article 54), as in general it does not like being a subordinate to any other international body.[9] Other regional organisations in Africa, America or Asia do not seem to have similar difficulties.

NATO's bombardment of Serbia and Montenegro for the sake of the Kosovars has taken place, to put it mildly, not under the auspices of the Security Council, and outside the UN Charter.[10] It is hard to see why this emancipation from the Council should not encourage other organisations or even individual states to follow suit. NATO's insistence, that its bombardment should not be considered a possible precedent, points to the problem but does not solve it. The obvious weakening of the Council will, at any rate, make it much more difficult for it to preserve its authority. Its monopoly of armed intervention (as distinguished from self-defence, Article 51) has been openly broken and it will be very hard, indeed, to restore it.

bb) The Council will, of course, continue to intervene selectively, at its discretion. The criteria will remain not the urgency of an intervention or action, e.g. the extent, the cruelty or the violence of a conflict, but the success in finding states that are ready to contribute what is needed for a complete operation, i.e. troops, equipment, logistics and

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8 As encouraged by S/RES/713 (1991) of 25 September 1991 and the following resolutions on the former Yugoslavia.

9 See e.g. the article by the US Under-Secretary of State Talbott, "Das neue Europa und die neue NATO", in: the German newspaper "Frankfurter Allgemeine Zeitung" of 5 February 1999, where this is explicitly stated.

10 For a discussion of the legality see K. Ipsen, V. Rittberger, Ch. Tomuschat with articles under the heading "Der Kosovo-Konflikt" and T. Eitel, "Bewährungsproben für den Sicherheitsrat der Vereinten Nationen", *Die Friedenswarte* 74 (1999), 19 et seq. and 126 et seq., (137/138); J. A. Frowein, in: "Neue Zürcher Zeitung" of 17/18 July 1999 and L. Henkin, R. Wedgwood, J.I. Charney, Chr.M. Chinkin, R.A. Falk, Th.M. Franck and W.M. Reismann, Editorial Comments: "NATO's Kosovo Intervention", *AJIL* 93 (1999), 824 et seq.; G. Nolte, "Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO Staaten", *ZaöRV* 59 (1999), 941 et seq.; see also in this Volume the articles by Francioni and Neuhold.

money. At least part of this normally comes from industrialised states, but they hesitate more and more to engage themselves, if the U.S. does not take the lead. This is why in the foreseeable future UN interventions, i.e. operations implying the use of force, will depend above all on the participation of the U.S. I assume that it will be more difficult to obtain such American lead in Africa than for example in the Middle East. Peace enforcement will be dispensed according to the political and financial rather than humanitarian or human rights interests. This is to be regretted, but with a highly political and politicised organ like the Security Council, this does not violate the Charter, and even less, general international law. There is no obligation under international law of an automatic mechanism or a right to equal treatment in this field. Article 42, as do the two preceding articles, leaves the Council free to act or not to act ("it may take such action...", "... may include...", etc).

Thus intervention is one of several options given by the Charter to the Council, another option being simply to do nothing. To make the option of intervention a "monopoly" of the Council – in Germany this option is often and wrongly (cf. Article 51) described as "monopoly for the use of force" – seems to have been considered balanced, because the Council was expected to make use of its policing power of intervention on a more equitable basis. If the Council continues to shun intervention in the face of flagrant violations of peace, international security and human rights, as in the African Great Lakes District, if it continues to fight inertia by verbosity, then the temptation for interested parties to act as vigilante may become irresistible. Kosovo is a case in point. And it may be a positive consequence of NATO's Kosovo intervention to remind Council members of this extra-Charter alternative.

cc) As illustrated by the Kosovo case where no attempt was made to turn the matter over to the General Assembly under the 1950 "Uniting for Peace" Resolution (A/RES/377 (V) of 3 November 1950), that resolution will, in my view, remain unused unless we go back to a cold war situation. Under present circumstances the coherence among the permanent members is too developed to allow for such a relapse.

dd) Almost as unpopular as interventions by force has become another measure decided upon by the Council: the levying of more or less comprehensive sanctions, i.e. the prohibition of all or certain economic contact with a country and its nationals. Sanctions are no punishment but an effort to bend a state's behaviour into the desired direction (Article 41). Therefore the sanction has to be lifted upon compliance. The Council prefers sanctions to military interventions because most of it

can be implemented from the writing desk and the only troops needed are those who would have to monitor or enforce it, a much less demanding task than fighting.

The most comprehensive regime of sanctions ever implemented by the UN is the one decided against Iraq, beginning with Security Council Resolution 661 (1990) immediately after Iraq's invasion of Kuwait. The sanctions regime has been modified several times, but has basically remained in place for about ten years now. While the Iraqi government and administration appear totally unbent, even unimpressed, the population suffers to an extent hard to imagine for the want of food, medical supplies and other humanitarian goods. I personally doubt that the upholding of these sanctions is still justifiable under general international law: the means have proven their complete inefficiency and the collateral humanitarian damage is therefore grossly out of proportion.

This missing of the Baghdad mark has almost entirely "iraqicized" the discussion on the suitability of comprehensive sanctions. An awareness has been growing that not in all cases and not under all circumstances could a population be expected to topple a totalitarian regime and be held accountable (by harsh sanctions) for not doing so. Thus, Haiti was invaded in 1994 by an UN Force (S/RES/940 (1994) of 31 July 1994) that ousted the military junta, after economic sanctions had not worked. Also the North Koreans are being helped with food in their struggle with the famine that ravages their ill-led country without anybody blaming them for their regime, considered by some dangerous as a so-called "Rogue-Regime". One consequence of this growing awareness will be that the majority of Council members will not levy comprehensive or partial sanctions anymore without having made provisions for the quasi automatic termination, as was for the first time done in S/RES/1298 of 17 May 2000 with respect to the arms embargo established regarding Ethiopia and Eritrea. The majority of UN and of the Council members does not wish a repetition of the Iraqi situation where the U.S. rejection, armed by the veto, keeps the Council majority from partly or totally lifting the sanctions. Altogether, future decisions on sanctions will reflect much more than before humanitarian considerations. Another consequence of the Iraqi experience is the effort to focus sanctions more on the political and military elites that are leading the country at which the Council aims. In co-operation with the UN Secretariat, Switzerland has from 1997 to 1999 organised the so-called

"Interlaken Process on targeting UN Financial Sanctions";[11] Germany, again in co-operation with the UN Secretariat, is at present (2000 to 2001) following suit with a "Bonn-Berlin Process on Smart Sanctions the next step; Arms Embargos and Travel Sanctions."

ee) If interventions under Chapter VII of the Charter are enforcement measures without consent or even against the declared opposition of a certain state's sovereign, then there is below this threshold the wide field of "Peace-Keeping", in which the Security Council acts with the consent, even on request and invitation, of one or more states or parties of the conflict. When a need for peace-keeping was discovered,[12] it was organised as a holding, a preserving operation, aiming above all at keeping at bay, at separating, hostile armies, as UNFICYP in Cyprus or UNIFIL in Southern Lebanon. Upon the experience made in the field this helpful intercession has over the last years been considerably enlarged into what is called "Peace Building". Necessarily it is less the military, the "Blue Helmets", that are needed in this context, but civil administrators (as in Eastern Slavonia or now in the Kosovo and East Timor),[13] organisers and monitors of elections (as in Cambodia and in Bosnia), and an efficient and persuasive police force (as again in Bosnia and the Kosovo). It is easy to predict that this kind of rehabilitation or development assistance will remain an instrument in the Council's arsenal that will be highly in demand, also an instrument that the Council will prefer to combat troops. Under international law this "loan of (state) organs" does not create problems; in the individual case, though, the fitting of these interim artificial organs into the weakened state body and their later removal may create considerable difficulties.

ff) The levying of sanctions is followed by the establishment of at least one subsidiary organ (Article 29): the Sanctions Committee. It is a committee of the whole (Security Council) and customarily chaired by

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11 See the 2 Volumes edited by the Swiss Federal Office for Foreign Economic Affairs in Bern "Expert Seminar on Targeting UN Financial Sanctions, March 17–19, 1998, Interlaken" and "2nd Interlaken Seminar on Targeting United Nations Financial Sanctions, 29–31 March 1999".

12 See e.g. K. Rudolph, "Peace-Keeping Forces", in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, 957 et seq., (962).

13 S/RES/1037 (1996) of 15 January 1996 established the UNTAES-United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium; S/RES/1244 (1999) of 10 June 1999 established UNMIK-United Nations Interim Administration Mission in Kosovo; S/RES/1272 (1999) of 25 October 1999 established UNTAET-United Nations Transitional Administration in East Timor.

a non-permanent member. There are at present 9 sanctions committees, so that almost every non-permanent member has its committee. While the rotating presidency of the Council allows only one month of heightened profile at a time, the chairmanship of a sanctions committee lasts for the full two years' term (unless the sanctions are initiated later or terminated earlier). But, normally, sanctions, once decided, remain in place for several years. Whereas in earlier years the Sanctions Committees limited their activities to a sometimes rather passive monitoring of the sanctions' implementation and to a granting of some individual exceptions for mostly humanitarian reasons, more recently some Chairmen have not shunned a higher profile and have become considerably more active, travelling to the region and mustering support against sanctions-busting in all parts of the globe. At the same time, they have assessed the collateral damage inflicted on helpless, maybe even innocent, parts of the population and on states that find themselves "confronted with special economic problems arising from the carrying out of those sanctions," as envisaged in Article 50. We may expect an increase of this activity by Committee chairmen which may not always be to the liking of each permanent member but which has found the general support of the Council.[14] Thus, the sanctions committees will gradually emancipate themselves somewhat from their mother institution and forge a proper role for themselves, becoming less hesitant to interact with the outside world. They will certainly work towards more consideration being given to humanitarian problems, as is evidenced by the presidential note cited above.

This higher profile has, from the outset, been shown by a kind of subsidiary organ of the Council of which we shall probably see more-International Criminal Tribunals with a jurisdiction limited in time and space such as the Tribunal for the Former Yugoslavia, established by Security Council Resolutions 808 and 827 of 22 February 1993 and 25 May 1993 to prosecute serious violations of international humanitarian law committed there since 1991, and the one for Rwanda, established by Security Council Resolution 955 (1994) of 8 November 1994 for the prosecution of genocide and other crimes against humanity committed in the region during 1994. The well-known opposition of the U.S. to the Permanent International Criminal Court under its presently drafted statute may lead it to a compensating pressure for particular tribunals (with limited jurisdiction) where it sees a need for this, and, most im-

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[14] See the note by the President of the Security Council: Work of the Sanctions Committees, of 29 January 1999.

portantly, where American nationals are not likely to be prosecuted. Some time ago, such a tribunal was under discussion for Eastern Timor to deal with the horrible crimes committed there around the time of the referendum in 1999; at present it is discussed for Sierra Leone.

The competence of the Security Council for such excursions into the field of administration of justice should not be taken for granted; it has though not been really disputed and I personally have no difficulties with it, as long as there is no other UN organ whose competence is encroached upon (the ICJ has no criminal jurisdiction) and to the extent that these tribunals are seen as a means of general prevention, i.e. to show the world that there is no longer impunity for such crimes.

gg) A real step forward, away from the conventional circumscription of the Council's competences has been made in the last years by the Council in re-interpreting Article 2 para. 7: The reservation of "domestic jurisdiction" had allowed despots like "Papa Doc" in Haiti, Idi Amin in Uganda or Pol Pot in Cambodia to massacre their own people at will, as long as this did not lead to international conflicts. The crusade for the advancement of human rights, led untiringly by the U.S. and its allies as well as by some NGOs, has brought about an awareness that manifest and continuous gross violations of these rights cannot anymore be regarded as "matters which are essentially within the domestic jurisdiction of any state..." (Article 2 para. 7) and that they are a threat to or breach of "international peace and security" (Arts 24 et seq., Arts. 39 et seq.). As was said by the UN Secretary-General Kofi Annan in his Hague Address on 18 May 1999: "This is the core challenge of the Security Council and the United Nations as a whole in the next century: to unite behind the principle that massive and systematic violations of human rights conducted against an entire people cannot be allowed to stand...the last right of States cannot and must not be the right to enslave, persecute or torture their own citizens."[15]

The principle of non-intervention has therefore been cut back and the realm of "international peace and security" been extended so as to allow the Council to intervene in such cases. The despatch of a military force to Haiti by Security Council Resolution 975 (1995) of 30 January 1995 is a case in point, since its mission was completely inner-Haitian: i.e. the reinstatement of the legitimate president Aristide who had been ousted by a military coup. We shall see more of this and of a tendency to consider democracy an essential and possibly the only guarantor of human rights, so that any coup against a democratically elected gov-

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15 Press Release SG/SM/6997 of 18 May 1999.

ernment will be a potential candidate for correction by the Security Council. If we try to qualify this new attitude of the Council legally, then we have to assume an obligation to respect human rights (and eventually a democratic form of government) as an obligation under the UN Charter whose violation entitles the Council to re-establish the lawful situation. If we extrapolate this line further (this dangerous step to my knowledge has not been made as yet) then there may develop an *opinio iuris* which would qualify such obligations as owed *erga omnes*. The violation of such an obligation would then have to amount to an armed attack entitling states (or alliances) to "individual or collective self-defence" (Article 51). What we may safely assume, however, is the Council's firm conviction that Article 2 para. 7 is no longer any protection for despots and continuous violators of human rights.

hh) A further task that the Charter has assigned to the Council is the "regulation of armaments" (Arts 26, 47 para. 1) and "possible disarmament" (Article 47 para. 1). The Council has, however, not devoted much effort to this general aim, apart from establishing and dissolving a subsidiary body.[16] Thus, disarmament in a more generalised form has almost exclusively been left to the Geneva disarmament fora.[17] But the Council has taken an enormous interest in one individual case, the destruction of all A-, B- and C-weapons, including ballistic missiles for their delivery, owned or being acquired or built by Iraq. The Council had established the Special Commission (UNSCOM) as one of its subsidiary organs by S/RES/687 (1991) of 3 April 1991 (later on UNMOCIV was established by S/RES/1284 (1999) of 17 December 1999) to oversee the elimination of Iraq's weapons of mass destruction after the liberation of Kuwait and it has instituted the above-mentioned comprehensive sanctions in the Commission's support. It is easy to predict that the Council will continue to work on the control of this kind of Iraq weapons. It has, though, become more difficult with some two or three permanent members lending some support to Iraq's demands to terminate controls and sanctions. I assume that the U.S., and to a lesser degree the UK, will still need some time before agreeing (by not casting a veto) to such a termination.

Other countries that are known to have developed or acquired A-, B- or C-weapons have not yet been and in my view will not be brought under a similar regime of sanctions. Rather the U.S., with some support

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16 Commission on Conventional Armaments (CCA), 1947–1952.

17 In July 1996, under German presidency, it has, however, adopted a Presidential Statement on Anti-Personnel-Mines.

from other permanent members, will try to deal with them bilaterally in recognition of the fact that there will hardly again be unanimity among the P 5 for a repetition of the Iraq exercise.

The (selective) interest of the Council in individual disarmament cases, however, will almost certainly grow and with it its reflection in international law — Council law first, more general rules, hopefully, later.

IV. Dangers to the Council's Role

The contribution of the Security Council to the further development of international law outlined here will only be possible if the Council is allowed to survive at least in its present, damaged, form. This survival is endangered from two sides: First, there is the drainage, so to speak, from the inside, of its members and the UN members altogether. This occurs through the refusal of the means the Council needs for the exercise of its functions: soldiers, equipment, money, policemen, administrators and all the other helpers under and beside the blue helmet. This danger is a real one, if one considers the decreasing readiness of Member States to contribute personnel and/or money to the implementation of Council decisions.

Second, the Council's survival is endangered, so to speak, from the outside, through the arrogation of its exclusive right of intervention (by force and outside the realm of self-defence) by states or coalitions that consider themselves above the Charter and, at least, independent from the Council's prerogatives. For some time already the U.S. has ascribed to itself such a lofty station, but other nations vie with the U.S. in this field, e.g. the UK in Iraq (enforcement of no-fly-zones etc.), numerous African states in neighbouring countries, and Canada and the European members of NATO regarding Kosovo. UN Secretary-General Kofi Annan saw the writing on the wall: "For this much is clear: unless the Security Council is restored to its pre-eminent position as the sole source of legitimacy on the use of force, we are on a dangerous path to anarchy."[18]

The Security Council is in a deep crisis, the end of which is not in sight; this crisis will heavily influence the Council's role as creator and reconfirmer of international law.

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[18] See note 15.