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PAUL CONLON*

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I. INTRODUCTION

In 1990, Iraq invaded Kuwait, and the Gulf War began. The United Nations ("U.N.") responded to Iraq's invasion by initiating sanctions against Iraq, including the prohibition on the export of oil from Iraq. Later in 1990, Jordan applied to the U.N. Security Council Committee Established by Resolution 661 (1990) Concerning the Situation Between Iraq and Kuwait ("Committee") for an exemption

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from the provision which prohibited the purchase of oil from Iraq. The resulting legal maneuvers used by the Committee which allow Jordan to continue buying oil from Iraq should cause great concern for international lawyers. Some causes for concern include: (i) the secrecy of the "agreement" between the Committee and Jordan; (ii) problems with the "agreement" itself; and (iii) whether the Committee has the power to make such agreements.

This article discusses the various issues involved in the Committee's decision to "take note" of Jordan's request for an exemption to buy oil from Iraq. This article also addresses the Committee generally, the United States' position on this topic, and other related issues.

II. THE SANCTIONS COMMITTEE'S DECISION AND ITS AFTERMATH

A. Jordan's Oil Problems

Traditionally, Jordan has satisfied most of its oil needs by importing oil from Iraq, which represented eighty-four percent of Jordan's oil imports in 1989.[1] Iraq was already in debt to Jordan; thus trade was already on a cash-less basis. The arrangements also were sweetened by concessionary pricing agreements. Then the Gulf War crisis broke out, beginning with Iraq's invasion of Kuwait in August 1990. The U.N. responded by immediately imposing sanctions on Iraq, including sanctions on Iraq's oil exports. Jordan had no substitution options in the short term for its oil, and its nearest substitute supplier, Saudi Arabia, simultaneously cut off its remaining supplies for reasons unrelated to the Gulf War. Therefore, Jordan continued to import oil from Iraq after the imposition of sanctions on August 6, 1990, that rendered such imports illegal.[2]

B. Jordan's Request for Relief Before the Sanctions Committee

Faced with additional enormous economic and logistical difficulties, in September 1990, Jordan applied to the Committee for relief under Article 50 of the U.N. Charter.[3] Jordan asked to be formally

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1. Jordanian trade data in this article was taken from the U.N. database of world trade (COMTRADE), from which its annual statistical yearbooks are generated. All data therein on Jordanian trade is ultimately derived from official Jordanian government sources.

2. *See* S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg. at 19-20, U.N. Doc. S/INF.46 (1990).

3. Article 50 of the U.N. Charter provides:

> If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

allowed to continue importing oil under certain conditions (*inter alia*, cash-less debt amortization in lieu of payment) and submitted relevant data on its oil import and credit extension situation.[4] Members of the Committee were in general agreement[5] that Jordan faced unique difficulties and needed to be granted a greater degree of relief than other Article 50 applicants. An exemption for the oil imports was seriously considered. Jordan's application was separated from the others and processed more expeditiously and generously; however, ultimately the Committee's recommendations[6] ignored the issue.

Jordan continued to import oil from Iraq, and this fact was widely disseminated in press reports as well as in public and classified U.N. documents.[7] In the general chaos accompanying Iraq's military collapse in March 1991, deliveries were temporarily brought to a halt. These events indicate that only in a limited sense can Jordan be considered to have stopped importing oil.

One can only speculate whether the continuing imports were covered by a tacit agreement with the United States, United Kingdom, and France—the so-called "P-3," power-wielding permanent Western members of the Security Council. The Committee made no such agreement, and its initial response to Jordan's request for an oil import exemption was not as charitable as its later one.[8] Additionally, hints dropped during the discussion of India's similar request for an exemption[9] suggest that the P-3 still considered Jordanian

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4. *See Letter Dated 20 August 1990 from the Permanent Representative of Jordan Addressed to the President of the Security Council*, U.N. Doc. S/21620 (1990) [hereinafter *Letter, Aug. 20, 1990*]; *see also Letter Dated 27 August 1990 from the Permanent Representative of Jordan Addressed to the Chairman of the Security Council Comm. Established by Res. 661*, Annex, U.N. Doc. S/21786 (1990) [hereinafter *Letter, Aug. 27, 1990*]. Prior to its issuance as a public document, *Letter, Aug. 27, 1990*, was referenced as U.N. Doc. S/AC.25/1990/CRP.3 (1990) (restricted) in the summary records of the Committee's meetings. All restricted documents cited here are on file with the author. Documents cited as "internal secretariat documents" do not have document symbols and normally refer to informal memoranda or reports which are generated by the secretariat and not distributed to committee members.

5. *See Letter, Aug. 27, 1990, supra* note 4, pmbl., 2, 3.

6. *See id.*

7. *See, e.g., Report of Mission to Jordan Undertaken by Mr. Jean Ripert*, at 4, U.N. Doc. S/21938 [hereinafter *Ripert Report*]; *Report of Mission to Jordan by Mr. James C. Ngobi*, at 8, 13, U.N. Doc. S/AC.25/1990/COMM.167 (restricted).

8. *See* U.N. SCOR, Comm. Established by Res. 661, 4th mtg. at 5-8, Agenda Item *Consultations Under Article 50*, U.N. Doc. S/AC.25/SR.4 (remarks by Mr. Goshu of Ethiopia, Mr. Sery of Côte d'Ivoire, and Mr. Lukabu Khabouji N'Zaji of Zaire) (restricted); *see also* 2 KUWAIT CRISIS: SANCTIONS AND THE ECONOMIC CONSEQUENCES 787-90 (D. L. Bethlehem ed., 1991) [hereinafter KUWAIT CRISIS].

9. *See* U.N. SCOR, Comm. Established by Res. 661, 24th mtg. at 7, U.N. Doc. S/AC.25/SR.24 (1991) (remarks by Ambassador Sir David Hannay of the United Kingdom in response to statement of Ambassador Gharekhan of India) (restricted) [hereinafter *Hannay's Remarks*]; *see also* 2 KUWAIT CRISIS, *supra* note 8, at 974.

imports to be a sanctions violation. The threat by the Security Council to apply sanctions against states evading sanctions,[10] unique in its resolutions, was directed precisely at Jordan.

India joined the Security Council in January 1991 and requested a similar exemption, citing the reported existence of such an arrangement without specifically naming Jordan. India's request was rebuffed, and in a formal opinion of considerable precision and clarity obtained from the U.N. Legal Counsel,[11] the Committee concluded that an exemption would be illegal. The Committee rejected India's argument that the debts in question predated the imposition of sanctions. The Committee also cited the case of the rebuffed Iraqi oil donation to the U.N. Relief and Works Agency for Palestinian Refugees in the Near East.[12]

C. *The "Agreement" Between Jordan and the Sanctions Committee – "Taking Note"*

In May 1991, the P-3 and Jordan arrived at an agreement which was formalized by an exchange of communications between Jordan and the Committee. Because Jordan approached the Committee after the details of the agreement had been worked out, the ensuing correspondence did not contain all the of agreement's details and provisions. One can assume that the P-3 discussed this agreement with most of the other Committee members prior to reaching the agreement.

It is not necessary to go into detail about the political motives of the various active and passive participants in these negotiations because the only issues are the legal basis and consequences of this diplomacy. In general, all of the members of the Committee had some valid grounds for acting as they did. In addition, the general feeling at the time was that the long-term provisions of Resolution 687 would be formally in place and operating by 1992. The problem was perceived as needing only a temporary "stopgap" solution to last until the New Year of 1992. One should not discount the possibility that the background agreement went beyond the oil import issue, thus making more sense than what it appears to on its face.

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10. *See* S.C. Res. 670, U.N. SCOR, 45th Sess., 2943d mtg. at 25, U.N. Doc. S/INF.46 (1990).

11. *See* U.N. SCOR, Comm. Established by Res. 661, 25th mtg. at 2-4, Agenda Item *Review of the Implementation of Security Council Resolution 661 (1990)*, U.N. Doc. S/AC.25/SR.25 (1991) (statement by Undersecretary-General Fleischhauer) (restricted); *see also* 2 KUWAIT CRISIS, *supra* note 8, at 977-78.

12. *See* U.N. SCOR, Comm. Established by Res. 661, 22d mtg. at 7, 8, Agenda Item *Other Matters (S/AC.25/1990/COMM.165)*, U.N. Doc. S/AC.25/SR.22 (1991) (statement of the Chairwoman, Ambassador Rasi of Finland) (restricted); *see also* 2 KUWAIT CRISIS, *supra* note 8, at 968.

Nor should one underestimate the extent of amateurism and "ad-hockery" in such times and circumstances. The *form* of the deal's legal quality is disappointing, suggesting amateur handwork, not super-Machiavellian strategizing in the agreement.

Jordan sent a letter to the Committee on May 16, 1991, informing the Committee that Jordan had "resumed" importing oil from Iraq in limited quantities, but only for domestic needs. Jordan claimed that it was paying for the oil by writing down each debt. The letter further stated that Jordan would report the quantities of oil each month to the Committee. Jordan explained that it was motivated by "difficulties in securing adequate supplies from other sources."[13]

This letter was put on the agenda of the next meeting, which was only two working days away. Chairman of the Committee[14] introduced the matter with introductory background remarks sketching Jordan's previous Article 50 request and citing the relevant documents.[15] The chairman's further remarks drew heavily from a draft response which had been prepared in advance. "Given the unique position of Jordan with respect to Iraq," he "suggested" that the Committee "take note of Jordan's resumption" of oil imports, "pending any arrangements that could be made to obtain supplies from other sources," and "on the understanding that such Iraqi oil exports were subject to the provisions" of Resolution 692.[16]

Resolution 692,[17] which established the U.N. Compensation Fund and the Compensation Commission, had only been adopted the previous day. There was no discussion or objection to the decision. Even the internal secretariat summary of the meeting,[18] which was used to keep the Secretary-General's office informed of Committee's decisions, did not mention this agenda item. Ironically, the agenda item was titled *Review of the Implementation of Resolution 661 (1990).* Originally done for historical reasons, further "note taking" exercises of the Committee done in later years were systematically put under

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13. *Note Verbale Dated 16 May 1991 from Jordan Addressed to the Chairman of the Comm. Established by Res. 661,* U.N. SCOR, U.N. Doc. S/AC.25/1991/COMM.159 (1991) (restricted), *quoted in* 1991 COMMS LOG at 102, Synopsis (internal secretariat document).

14. The 1991-92 Ambassador Peter Hohenfellner of Austria. The chairman of a sanctions committee is elected *ad personam,* is not the representative of his government in this function and, strictly speaking, is not a member of the committee.

15. *See* U.N. SCOR, Comm. Established by Res. 661, 41st mtg. at 2, Agenda Item *Review of the Implementation of Resolution 661 (1990),* U.N. Doc. S/SR.25/SR.41 (1991) (restricted) [hereinafter *Review of the Implementation of Resolution 661*]. For the list of the documents cited at that meeting, see *supra* note 4.

16. *Review of the Implementation of Resolution 661, supra* note 15.

17. S.C. Res. 692, U.N. SCOR, 46th Sess., 2987th mtg. at 18, U.N. Doc. S/INF.47 (1991).

18. Comm. Established by Res. 661, 41st mtg., Summary (reissued for technical reasons) (internal secretariat document).

this heading. No reference was made either to Article 50[19] or to paragraph 23 of Resolution 687.[20] The U.N. has recently preferred to speak of the Committee's "taking note" of "Jordan's request for resumption of imports,"[21] but the word "request" was used neither at the meeting of the Committee nor in the chairman's response to Jordan, dated May 21, 1991.[22]

D. The Aftermath of the "Agreement"

Jordan's ritual of periodically reporting volumes of crude oil and refined product in tons (along with the corresponding dollar values) to the Committee was eventually institutionalized. At Committee meetings, the chairman normally referred to the incoming letter and "suggested" or "proposed" that the Committee "take note" thereof, normally remarking "as has been its custom" or "as it has done on previous occasions." There was never any discussion or debate. By 1995, the instructed delegates of thirty-five governments had at one time or another silently condoned this action as successive chairmen repeated the ritual phrase "taking note . . . as has been its custom." Anyone may guess how many of the delegates knew what was behind this bizarre ritual. Apparently, Jordan's "obligation" to report was not universally recognized. On one occasion, a delegate expressed his appreciation of reporting and stated that he hoped Jordan would continue to keep the Committee informed.[23]

Jordan's reporting was not complete. It submitted figures for only seventeen of the first twenty-four months during which this scheme operated.[24] Further, it submitted one monthly report which contained tonnage figures, but not dollar values. On one occasion,

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19. *See* Gian-Luca Burci, *The Indirect Effects of United Nations Sanctions on Third States: The Role of Article 50 of the UN Charter*, AFR. Y.B. INT'L L. 157, 162 (1995).

20. S.C. Res. 687, U.N. SCOR, 46th Sess., 2987th mtg. para 23, at 14, U.N. Doc. S/INF.47 (1991).

21. *Implementation of the Provisions of the Charter of the United Nations Related to Assistance to Third States Affected by the Application of Sanctions Under Chapter VII of the Charter: Report of the Secretary-General*, U.N. GAOR, 50th Sess., at 10, U.N. Doc. A/50/361 [hereinafter *Report on Implementation*].

22. *Letter Dated 21 May 1991 from Chairman of the Comm. Established by Res. 661 Addressed to the Permanent Representative of Jordan*, U.N. Doc. S/AC.25/1991/NOTE/55 (1991) (restricted) [hereinafter *Letter, May 21, 1991*].

23. *See* U.N. SCOR, Comm. Established by Res. 661, 81st mtg. at 3, Agenda *Item Review of the Implementation of Resolution 661 (1990)*, U.N. Doc. S/AC.25/SR.81 (remarks by Mr. Graham of the United States) (restricted).

24. *See Data on Iraqi Trade/Rev.3: Memorandum Dated 1 December 1993 from Paul Conlon Addressed to James C. Ngobi D*, at 3 (internal secretariat document) [hereinafter *Conlon Memorandum*].

the secretariat neglected to put the letter on the agenda.[25] As a consequence, the Committee never "took note" of the oil imports in August 1991. Jordan bore no responsibility for this.

In 1993, the secretariat began to suspect that Jordan's reportings were not truthful. This was confirmed in early 1994 when full comparison data for 1993 became available. The figures submitted by Jordan reflected an approximate monthly flow of 55,000 barrels/day ("b/d"), whereas official Jordanian reportings to the U.N. world trade database[26] showed approximately 75,000 b/d. Additionally, outside press reports discussed details of the scheme which were not discussed by the Committee and were not even in its correspondence archives.

Originally, the pseudo-agreement's existence was held to be a secret. It was never mentioned in any published U.N. document. Even so, international lawyers knew about it at a fairly early date.[27] The Committee steadfastly refused to grant any other concessions of the same kind despite pressure from interested candidates, such as India,[28] Romania,[29] Czechoslovakia,[30] and Turkey. Public discussion concerned the question whether Iraqi debts were fully repaid and whether Jordan should begin paying cash for its imports. The secretariat was greatly annoyed by constant press usage of words like "approval," "permission," and "agreement" in reference to the Committee's actions regarding Jordan's oil purchases. The secretariat felt the Committee's "taking note" was only recognition of the de facto conditions and was not positive authorization for the oil imports.

Research showed that some detailed provisions of the scheme were found in various background documents.[31] The critical centerpiece contained more than one way of calculating Iraqi debt to

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25. *See Note Verbale Dated 13 September 1991 from Jordan Addressed to the Chairman of the Comm. Established by Res. 661*, U.N. Doc. S/AC.25/1991/COMM.423 (1991) (restricted).

26. *See supra* note 1.

27. *See* Martti Koskenniemi, *Le Comité des sanctions créé par la résolution 661 (1990) du Conseil de sécurité*, 37 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 119, 126 n.33 (1991).

28. *See Hannay's Remarks, supra* note 9.

29. *See* U.N. SCOR, Comm. Established by Res. 661, 58th mtg. at 4-7, Agenda Item *Consultations Under Article 50 of the Charter*, U.N. Doc. S/AC.25/SR.58 (restricted). The State Secretary of the Romanian Foreign Ministry, Mr. Ionel V. Sandulescu gave a statement; the French text was issued by the Romanian Permanent Mission to the United Nations as a press release on the same date.

30. *See Note Verbale Dated 29 December 1992 from Czechoslovakia Addressed to the Comm. Established by Res. 661*, U.N. Doc. S/AC.25/1992/COMM.1822 (1992) (restricted), *discussed in* U.N. SCOR, Comm. Established by Res. 661, 85th mtg. at 2, 3, U.N. Doc. S/AC.25/SR.85 (restricted).

31. *See Letter, Aug. 20, 1990, supra* note 4; *Letter, Aug. 27, 1990, supra* note 4; *Ripert Report, supra* note 7.

Jordan in August 1990.[32] The exact terms of interest and amortization were not clear. In addition, surviving delegates and secretariat officials were undecided regarding the meaning of the Delphic reference to Resolution 692 in the May 21, 1991, letter. Furthermore, no agreement existed to determine whether the deliveries of oil between August 1990 and May 1991 were to be deducted from the original debt. Indeed, the decision to "take note" at the meeting in May 1991 did not clarify the status of those oil deliveries. An internal best efforts calculation suggested that the original debt was paid by April 1992, and further trade credit debts were cleared by 1993. Therefore, after 1993, Iraq entered into a trade surplus with Jordan.[33]

In early 1994, the secretariat suggested that Chairman of the Committee consider telling the members about the contents of an internal report[34] on these matters, which his delegation and at least five others already had in their possession. The internal report included information on the discrepant sets of oil import statistics, but the matter was never formally brought up in the Committee. Rather, it came to the Committee's attention when the permanent mission of Kuwait faxed the Committee copies of a dispatch[35] from the Kuwaiti News Agency's U.N. correspondent, which divulged some of this information. Two members of the Committee promptly complained orally to the secretariat about this information being leaked. They further complained that the secretariat exceeded its mandate in collecting information. The U.N. later claimed that Jordan also lodged a formal complaint.[36] In this light and in the course of further disputes with Jordan over other matters, a delegate requested that the secretariat prepare information on Jordan's oil imports for the members of the Committee.[37]

The resulting research revealed new information: Jordan increased its dependence on Iraqi oil supplies from eighty-one–eighty-two percent in 1990-91 to over ninety percent in 1992-93. Jordan did not seek substitute suppliers because Iraqi oil was

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32. *See Letter, Aug. 27, 1990, supra* note 4.

33. *See Conlon Memorandum, supra* note 24.

34. *See id.*

35. *See* Sanctions: Iraq-Jordan, KUNA (Kuwaiti News Agency) dispatch from United Nations (April 25, 1994); *see also* Walter Pfäffle, *Irak/Jordanien: UNO will illegalen Ölhandel überprüfen*, LUXEMBURGER WORT, July 2, 1994, at 16; *Die eigenen Statistiken belasten Jordanien: Vereinte Nationen sorgen sich wegen Verstössen gegen Irak-Embargo*, BASLER ZEITUNG, July 11, 1994, at 2.

36. *See Conlon Report: UN Stonewalls Against Allegations*, INT'L REP., June 30, 1995, at 2, 3 (citing statement of Mr. Ahmad Fawzi, the Secretary-General's Spokesman).

37. *See* U.N. SCOR, Comm. Established by Res. 661, 112th mtg. at 10, Agenda Item *Report on the Visit to Jordan of Mr. Jingzhang Wan*, U.N. Doc. S/AC.25/SR.112 (1994) (remarks by Mr. Rose of the United States) (restricted).

cheaper. In addition, considerable manipulation was involved. The 1993 figures exceeded the figures submitted to the Committee by forty-one percent in tons and eighty-one percent in dollars. A set of tables and graphs, and one press excerpt on Iraqi oil exports to Jordan were distributed to the delegates at the following meeting.[38] At the meeting, one delegate stated that her government would study the information and return to the matter.[39] However, as late as April 1995, the matter had not been discussed again.

III. THE LEGALITY OF THE DECISION

A. Legal Problems with the Sanctions Committee's Actions

The winding road traversed by this pseudo-agreement clearly demonstrates the precariousness of law generated in a political and diplomatic environment. The Security Council was instituted "in order to ensure prompt and effective action."[40] Therefore, it has traditionally been granted license to put politics before law. However, the Security Council does not create subsidiary organs like the sanctions committees to decide whether a threat to the peace exists or whether sanctions should be imposed. Sanctions committees exist to administer the *minutiae* of implementation. If we are going to let the Security Council use legally questionable decisions to impose sanctions and abandon minimal legal provisions in their implementation by the Committee, then the Security Council's political prerogatives will no longer appear acceptable. Habits of diplomatic custom, such as the legally nebulous function of "taking note," contribute to the problem. The customary bias in international law leads to mere passive toleration of legally constitutive effects. Consistently "taking note" of questionable acts or documents is inadvisable because it jeopardizes legal positions and undermines credibility. Regarding a related question, the secretariat would occasionally warn the Committee delegates of the potential ramifications of uncritically "taking note" of submissions.[41]

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38. *See Note for the Reference of the Chairman: Iraqi-Jordanian Oil Export Statistics* (revised July 5, 1994) (internal secretariat document), *partially reprinted in Iraq's 1993 Crude Oil and Product Exports to Jordan Average 77,000 b/d*, MIDDLE E. ECON. SURV., July 11, 1994, at A11, A12. [hereinafter *Note for the Reference of the Chairman*].

39. *See* U.N. SCOR, Comm., 113th mtg., Agenda Item *Reports of Jordan's Importation of Oil from Iraq*, U.N. Doc. S/AC.25/SR.113 (1994) (remarks by Ms. Wade of the United States) (restricted).

40. U.N. CHARTER art. 24, para 1.

41. *See Conlon Memorandum, supra* note 24, at 7 (stating that taking note of noncredible data has caused ongoing damage to Committee's status and dignity).

B. Legal Problems with the "Agreement"

The intention of the agreeing parties was to regulate their agreement in an exchange of correspondence. This contributed to a further dilution of the contents. The reference to "resumption" of oil imports appeared twice in a short letter. This lends itself to the interpretation that the Committee endorsed Jordan's misrepresentations about having ceased to import Iraqi oil. A more neutral phrasing would have been more appropriate. The response on May 21, 1991,[42] by the Chairman of the Committee leaves open more questions than it answers because it does not contain an explicit enunciation of the two parties' obligations, nor does it suggest further correspondence or action. The degree of conditionality in the sentence "pending . . . arrangements . . . to obtain" oil elsewhere does not suffice to show a distinct obligation. The Delphic reference to Resolution 692, which probably intended to stress that cash-less deliveries of oil were exempt from impost for the benefit of the Compensation Fund, states the exact opposite. If the matter became the object of scrutiny by a court, it would be difficult to explain how the Committee continually repeated statements about the applicability of Resolution 692 while failing to ascertain whether Resolution 692 was being applied.

C. Other Legal Questions

1. On What Powers Did the Committee Act?

It is easier to determine on what authority the Committee did not or could not act. Misunderstandings arose because outsiders were under the impression that the Committee acted under Article 50 or under paragraph 23 of Resolution 687. Neither was correct. Article 50 is a problematic provision of the U.N. Charter because while Article 50 grants member states the dubious right to "consult" with the Security Council, it does not establish any provisions for relief measures, or any authority for any U.N. body to take concrete action.[43] In redelegating this function to the Committee,[44] the Security Council made matters worse. Because the Committee works in secret, outsiders will never really know if the Committee has granted an exemption under Article 50, or what was said or agreed to in private. India believed that Jordan was allowed to import oil under Article 50. The same general objection applies to paragraph 23 of

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42. *Letter, May 21, 1991, supra* note 22.
43. *See* Burci, *supra* note 19, at 164.
44. *See* S.C. Res. 669, U.N. SCOR, 45th Sess., 2942d mtg. at 24, U.N. Doc. S/INF.46 (1990).

Resolution 687. From its adoption to the beginning of 1995, the Committee did not use the powers provided by this paragraph, although pressure to do so continued. This fact was not known, however, because Committee's decisions are secret.

The "taking note" of Jordanian oil imports was not based on paragraph 23 for several reasons. First, no reference was ever made to paragraph 23. Second, the meeting in question was largely devoted to a bitter dispute over Iraq's application to use paragraph 23.[45] Third, the relevant agenda item referred to Resolution 661, not Resolution 687. Finally, the construction of paragraph 23 proceeds from the target state's need to export oil (presumably to any state of destination) to generate income for humanitarian expenses. The pseudo-agreement with Jordan proceeded from Jordan's unique need to import Iraqi oil. The purpose implied in paragraph 23 was not reflected in Jordan's situation.

2. Has a General Authority for Sanctions Committees to Grant Such Exemptions Evolved in Practice?

No. There is only one other known instance of this—a banal decision by the Yugoslavia Sanctions Committee allowing the export of a religious statue determined not to be "a commodity."[46] No legal power to grant such an exemption was cited in either the chairman's remarks at the 41st Meeting of the Committee, nor was any legal power to grant such an exemption cited in his reply to Jordan on May 21, 1991. This is not unusual. The Committee rarely cited any authority for its decisions. Jordan cannot be held responsible for either the Committee's lack of authority to grant the exemption or for the Committee's failure to clarify the powers under which it acted.

Patrick Clawson argues that Jordan's claim that it was still collecting on old debts is based on a "polite fiction," whereby Jordan consistently extends new loans.[47] However, the correct explanation may be different: Jordan could be collecting on a much larger debt, a guarantee on an Iraqi loan of $2.6 billion.[48] The manipulation that

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45. *See* U.N. SCOR, Comm. Established by Res. 661, 41st mtg. at 3-4, Agenda Item *Request by Iraq Pursuant to Paragraph 23 of Resolution 687 (1991)*, U.N. Doc. S/AC.25/SR.41 (1991) (restricted) (discussing *Letter Dated 14 April 1991 from the Permanent Representative of Iraq Addressed to the Chairman of the Comm. Established by Res. 661*, U.N. Doc. S/AC.25/1991/COMM.124 (1991) and *Letter Dated 19 April 1991 from the Permanent Representative of Iraq Addressed to the Chairman of the Comm. Established by Res. 661*, U.N. Doc. S/AC.25/1991.163 (1991)).

46. Michael P. Scharf & Joshua L. Dorosin, *Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee*, 19 BROOK. J. INT'L L. 771, 797 (1993).

47. PATRICK CLAWSON, HOW HAS SADDAM HUSSEIN SURVIVED? [McNair Paper 22] 49 (1993).

48. *See Letter, Aug. 27, 1990, supra* note 4.

Clawson believes Jordan is engaging in is not legal. The Committee questioned the legality of forward barter deals, such as goods now for oil later. Extensions of new loans for immediate delivery of oil should also be included. It is difficult to understand how Jordan could be held to have received permission to import oil for debts in a general sense. The construction of the discussions between Jordan and the U.N. in 1990 and 1991 strongly suggests that the exemption granted was only meant to apply to debts existing before August 1990 (as identified and quantified by Jordan in its dealings with the Committee over Article 50 relief in the fall of 1990). It is not clear exactly how high those debts were or how the debts were to be amortized. Debts not discussed were probably not covered by the agreement.

3. Does Jordan Have Any Responsibility for Violating the Sanctions?

It is hard to see any responsibility for Jordan at this point. The Committee has repeatedly "taken note" of its oil imports, failing to object to them. The Committee has not taken any action to notify Jordan of an obligation to either stop or pay thirty percent of its value to the Compensation Fund. It seems the Committee's behavior would undermine the legal position of the Security Council, should the Security Council attempt to hold Jordan responsible for violating the provisions of Resolution 661 or Resolution 692. One very important exception exists. In May 1991, Jordan expressly agreed to report monthly imports to the Committee. The Committee did not object to this agreement. Jordan, then, constantly submitted reports. The Committee acknowledged these reports. Thus Jordan cannot claim legalization for any imports in excess of what it reported, nor is there any lack of clarity regarding the applicability of the thirty percent impost to such imports. As of December 1993, the discrepancy exceeded 4.4 million tons of oil, valued by Jordan at $475 million.[49] The portion owed to the Compensation Fund would be approximately $142 million. If these trends continue, approximately $60 million would be owed each year. This outcome is independent of the question whether the rest of the oil was subject to the same thirty percent impost. Such a conclusion is not certain, but it could still be argued.

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49. *See Note for the Reference of the Chairman, supra* note 38.

4. Was There Responsibility on the Part of the Committee?

This problem is less clear as far as it concerns the Committee's duty to prevent or prosecute sanctions violations. The Committee's mandate was implicit. The Committee acted with extreme negligence, first by establishing a practice of granting pseudo-authorization for oil imports by "taking note" of them and, second, in failing to react to what were obvious violations of the terms of the agreement on Jordan's part. Yet, it is more on the issue of the general agreement that the Committee is vulnerable. Lacking authority to authorize Jordan's oil imports from Iraq under any heading, the Committee engaged in practices which Jordan and third parties could only construe as an authorization, and thus violated the sanctions regime itself. The Committee's actions so thoroughly undermined the Security Council's legal position that it is difficult to see if the actual perpetrator, Jordan, could now be held responsible for imports which clearly were in violation of Resolution 661. International lawyers are unanimous about the imports' illegal character.[50]

The Committee's actions also call into question the legitimacy of its discharge of duties vis-à-vis the collective membership of the U.N.[51] Under the U.N. Charter, the members of the Security Council are assumed to act on behalf of the entire membership. It is not clear if this assumption should apply to the Committee because, under the Charter, the Committee's status is very unclear. Nonetheless, responsibility must exist somewhere. If the Committee is not responsible to the members, then the Security Council must be responsible to the members for what the Committee did.

5. How Was Something of This Nature Actually Accepted and Defended by Those Participating in It?

Inside the secretariat (or, more properly, the part that services the Security Council and the Committee, now called the Department of Political Affairs), two main justifications were generated. One was that the Committee did not authorize, permit, or grant an exemption, or any such thing, but merely limited itself to "taking note." That act was clearly in the Committee's mandate, so that the Committee needed no further authorization. The second argument suggests that the Committee had the power to grant such exemption under

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50. *See, e.g.*, Burci, *supra* note 19, at 162 (stating that these imports are "of dubious legality under Resolution 661"); Koskenniemi, *supra* note 27, at 126 (stating these the imports are "a conspicuous violation of Resolution 661"). Burci's remark could be interpreted to suggest that the measure might have been lawful under Resolution 687.

51. *See* U.N. CHARTER art. 24, para 1.

paragraph 23, and, although the Committee admittedly did not do so in that particular instance, the Committee could not be held to have exceeded its powers because the Committee did have such broad authority under paragraph 23. Arguments of this kind have not been articulated by the U.N. Office of Legal Affairs ("OLA"), which has sought subtly to distance itself from the arrangement.[52] In a recent report of a General Assembly committee[53] (prepared by the staff of OLA) on assistance under Article 50, recommendations appear regarding the tightening of control over such exemptions in the future. These recommendations reflect the bitter lessons learned, at least by the U.N. legal officials, from the Jordanian exemption agreement. This report is the first and only published U.N. document to admit the existence of the agreement.[54] Otherwise, the U.N. lawyers have sought refuge in the excuse that the explicit reference to Resolution 692 prudently ensured protection of the Compensation Fund's interests.

IV. THE UNITED STATES' POSITION

The position of the United States government would appear to be that all Iraqi oil exports to Jordan are subject to the thirty percent impost, and a claim has even been advanced that the United States was instrumental in crafting the exact wording of paragraph 6 of Resolution 692[55]. The paragraph "allowed the [Compensation] Fund to try to recapture the deduction for any amounts of oil that have left Iraq since [April 2, 1991] . . . to Jordan with the tacit acceptance of the Sanctions Committee."[56] This statement leaves open the possibility that the P-3 proceeded with their legalization of Jordan's oil imports because the tacit agreement and the adoption of Resolution 692 occurred almost simultaneously. The P-3 believed that they had already created the legal basis for collecting thirty percent on these

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52. *See* Burci, *supra* note 19.

53. *See Report on Implementation, supra* note 21, at 11.

54. *See id.* at 10.

55. Resolution 692 provides:

> [T]he requirement for Iraqi contributions will apply in the manner to be prescribed by the Governing Council with respect to all Iraqi petroleum and petroleum products exported from Iraqi after 3 April 1991 as well as such petroleum and petroleum products exported earlier but not delivered or not paid for as a specific result of the prohibitions contained in Security Council Resolution 661 (1990).

S.C. Res. 692, *supra* note 17, para 6. It is unclear from this wording if the illegal Iraqi exports to Jordan between August 6, 1990, and April 2, 1991, would then be subject to the "thirty-percent requirement."

56. Ronald J. Bettauer, *Establishment of the United Nations Compensation Commission: The U.S. Government Perspective, in* THE UNITED NATIONS COMPENSATION COMMISSION [Thirteenth Sokol Colloquium] 29, 33 (Richard B. Lillich ed., 1995).

transactions. If true, this fact would then raise additional questions as to why the P-3 never tried to press any claims in this direction in the forum of the Committee, where they showed an extreme reluctance to get involved in any discussions on these matters. The P-3 may have feared that further discussion would open an additional can of worms, the exact contents of which can only be a matter of speculation.

In addition, it is not known what the Compensation Fund may have done, if anything, to press such a claim. Officials of the Compensation Fund were aware of most of what has been described in this article. They also had access to the report on Iraqi trade activities,[57] which never officially reached the members of the Committee.

V. CONCLUSION

With the passage of time, the practitioners who participated in the Security Council's sanctions expansion of the early 1990s from the inside have started to publish their analyses and reflections in various scholarly publications.[58] A consensus is emerging from these sources. The legal quality of Security Council's work has been deficient, the actors involved have been both quantitatively and qualitatively overwhelmed, the coherence of international law in this area has been more shattered than consolidated by practice, and the traditional conceptual apparatus of international lawyers cannot do justice to what has now evolved. These practitioners also tend to agree that excessive secrecy has contributed to this state of affairs and prevented assistance from the outside in the form of scholarly analysis and the development of doctrine. Meanwhile, sanctions committees and the Security Council have come into ill repute. Modesto Seara-Vázquez recently suggested[59] that the archaic premises on which the Security Council was built condemn it alternately to either impotence or illegality. The subject of the present article certainly bears him out.

The gap between the high legal dignity of Chapter VII actions and the deficient legal culture in which they evolve and are administered has clearly gotten out of hand. Some scholars recommend that

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57. *See Conlon Memorandum, supra* note 24.

58. *See, e.g.*, Koskenniemi, *supra* note 27; Scharf & Dorosin, *supra* note 46; Michael Scharf, *United Nations Sanctions: The Role of the Security Council Sanctions Committee*, INT'L PRACTITIONER'S NOTEBOOK, Oct. 1995, at 1, 8-10; *see also* HELMUT FREUDENSCHUSS, BESCHLÜSSE DES SICHERHEITSRATES DER VN NACH KAPITEL VII: ANSPRUCH UND WIRKLICHKEIT (Schriftenreihe des Walther-Schücking-Kollegs 16, 1995).

59. Modesto Seara-Vázquez, *The UN Security Council at Fifty: Midlife Crisis or Terminal Illness?*, GLOBAL GOVERNANCE, Issue 3, 1995, at 285, 291.

sanctions committee decision-makers should be appointed from among legally qualified diplomats for a fixed term.[60] Elsewhere, the author of this article has stated that the use of instructed diplomats in this function has been a disaster because it prevents the development of a specialized and qualified core of professional civil servants to assist, guide, and advise them.[61] The author proposes to replace diplomats with individually appointed expert commissioners of suitable background, who can be held responsible for their own decisions. The author believes that such commissioners should not represent their governments because this representation precludes responsibility.

International law can only develop on the basis of the practice of states in their intercourse with each other, and this has made diplomats the embodied actors in generating international law. At the present stage, the need is greatest for procedural norms and practices for professionalized multilateral governance structures. To achieve this goal, another approach and other actors are required.

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60. *See, e.g.*, Scharf & Dorosin, *supra* note 46, at 826.

61. Paul Conlon, Sanctions Infrastructure and Activities of the United Nations: A Critical Assessment 23 (unpublished paper prepared for the 1995 Carnegie Commission to Prevent Deadly Conflict, on file with author).