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The UNSCOM Experience: Lessons from an Experiment

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Abstract

The emergence of issues of independence and impartiality in relation to the work of UNSCOM is directly linked to the fact that this body's tasks changed from short-term to long-term ones. This change considerably increased its need for support from Iraq, the UN Security Council and Member States. Instead, this support, for various reasons, declined. UNSCOM was the first institution of its kind and its experience may be viewed as an experiment which gives rise to several questions, especially relating to the ease with which a state can conceal information relating to disarmament monitoring and verification processes, and to the need for clear goals on the part of states or organs which initiate this type of process. However, these questions do not make UNSCOM's experience a failure.

As is well known, President George H. W. Bush spoke in 1990 of a 'New World Order' with 'a new partnership of nations'. In the same year the United Nations Special Commission (UNSCOM) began its work. Eight years later, the UN Secretary-General spoke of 'a sad day for the United Nations, and for the world', referring to the US and British air strikes on Iraq which took place in December 1998.¹ These events marked the definitive disruption of UNSCOM's work. Between these two dates, however, many events occurred which influenced and gave substance to the UNSCOM experience.² In many ways, the UNSCOM experience may be viewed as an experiment.³ But could this experiment become a precedent?

The UNSCOM story is marked by considerable confusion.⁴ In her contribution to this symposium, Chantal de Jonge has set down the facts and analysed them very

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¹ Thouvenin, 'Le jour le plus triste pour les Nations Unies — Les frappes anglo-américaines de décembre sur l'Iraq', XLIV *AFDI* (1998) 209.

² Chronique des faits internationaux, *RGDIP* (1993) 1013, (1996) 227, 1046, (1997) 762, (1998) 184, 1043, (2000) 222, 757; Torelli, 'Le nouveau défi irakien à la communauté internationale: la dialectique des volontés', *RGDIP* (1998–2) 435.

³ UNSCOM reports, especially the last one, S/1999/94, 29 January 1999 and Amorim Report, S/1999/356, 30 March 1999. For a chronology, see <<http://www.un.org/Depts/unscom/Chronology/chronology.htm>>.

⁴ Skordas, 'La Commission spéciale des Nations Unies (UNSCOM)', in H. Ruiz Fabri, L. A. Sicilianos and J.-M. Sorel, *L'effectivité des organisations internationales — Mécanismes de suivi et de contrôle* (2000) 60.

clearly and convincingly. This comment will be limited to a few remarks, particularly on issues of independence and impartiality. I will first note some paradoxical aspects of these issues, and then proceed to consider how and why, from this perspective, the UNSCOM experience appears to be at a deadlock, even though the results of its work stand far from being a failure.

A sort of paradox may be seen in the very fact that issues of independence and impartiality could arise from UNSCOM. Concepts of independence and impartiality are nowadays more often used in, though not limited to, the context of dispute settlement as an element of fair trial or due process of law. They pertain to a third party involved in a dispute settlement. But UNSCOM was not a third party. Its actions were governed by the Security Council and, as long as it followed the Council's directions, issues of independence and impartiality were meaningless. The fact that this was not the case could suggest that UNSCOM did not act as it should have. This leads us to the question: In relation to whom was UNSCOM supposed to be impartial and independent? However, the fact that this question arises indicates an aspect of Iraq's success in resisting the whole process of control, taking advantage of UNSCOM's actual situation of dependence.

In many aspects, UNSCOM was in a situation of dependence.⁵ This would probably not have been the case if its short-term tasks had not changed. This work was supposed to be carried out in a period of four or five months. Instead, it extended over seven years. This circumstance increased the sense of disproportion between the breadth of its task and the weakness of the organ. UNSCOM was created as a subsidiary organ by the Security Council.⁶ It was an *ad hoc* body, the first of its type — perhaps a model? It was certainly an original institution. Obviously, the Member States did not want to create a large organ; an attitude which can be understood as a wish to limit the growth of international institutions, despite the fact that the tasks of disarmament and ongoing monitoring and verification assigned to UNSCOM were unusually far-reaching. The method generally used in the field of disarmament or monitoring and verification involves focusing on one type of arms. UNSCOM had to deal with all Iraqi weapons of mass destruction. And it had to do so in the context of a defeated country, which presented significant problems. To the more objective difficulties, including the considerable disorganization and harsh climate, could be added several political factors, which Chantal de Jonge has detailed so clearly in her paper. These most likely increased the difficulties involved in carrying out UNSCOM's task, for which it was dependent on Iraq and on the Security Council as well as on the UN Member States.

UNSCOM needed Iraq's cooperation. Of course, the Commission was given broad authority. It was allowed to use inspections, even no-notice ones (i.e. not only

⁵ *Ibid.*, at 66–67.

⁶ Sur, 'La résolution 687 (3 avril 1991) du Conseil de sécurité dans l'affaire du Golfe: problèmes de rétablissement et de garantie de la paix', XXXVII *AFDI* (1991) 25, esp. 74 *et seq.*; Marauhn, 'The Implementation of Disarmament and Arms Control Obligations Imposed upon Irak by the Security Council', 52 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht (ZaöRV)* (1992) 781.

inspections of sites but also of vehicles), to obtain all documents and reports required, to interrogate any Iraqi official or citizen as appropriate, to use its own means of communication, to install a permanent means of supervision, to use its own aircraft without limitations to fly over Iraqi territory. UNSCOM was able to develop very intrusive methods and it did so, especially after 1995 when the extent of Iraqi concealment was uncovered. But the use of these methods evidences a downhill slide in the system, at least with regard to disarmament. Iraq had to give information about its mass destruction weapons; it was bound by clear obligations under Security Council resolutions and, in particular, it had the burden of proof as to arms counts and disarmament assessments. Iraqi attempts to conceal information exacerbated the difficulty of UNSCOM's mission (and, at the same time, as will be discussed below, made the intelligence question specifically sensitive). Further, after some time, there was even a kind of reversal in the burden of proof when Iraq declared, in 1998, that it considered the disarmament process to be completed unless UNSCOM could prove otherwise.

UNSCOM was also dependent on the Security Council and UN Member States, especially for financial and material support. Of course, Security Council Resolution 699 (1991)⁷ provided that all expenses required for the disarmament and monitoring and verification processes would be covered by Iraq.⁸ An escrow account was established for this purpose, into which Member States were invited to deposit Iraqi funds from oil sales confiscated on their territory and where funds from oil sales authorized by the Security Council were paid (Resolution 706 (1991)). But Iraq never accepted these resolutions. In addition, however, UN Member States were encouraged to provide extensive financial and material support to the Commission on a voluntary basis. Thus, even though the UN Secretary-General was able to prove in 1996 that this system was satisfactory, UNSCOM never had a formal budget nor did it have any guarantee on the continuity or duration of its funds.⁹ A sense of precariousness does not encourage independence, especially in this case since UNSCOM's need was significant and financial support came from only a few states.¹⁰ In his last Report, the Executive Chairman mentioned that UNSCOM's average annual 'budget' amounted to \$US35 million, not including material support. This latter was estimated to amount to twice that figure.

It also needs to be said that, while the 21 members of the Commission were supported by experts, most of these latter were not permanent to the Commission. In addition, UNSCOM members themselves were allowed to continue their own activities (in his last Report, the Executive Chairman indicated that 200 persons had held long-term positions with the Commission, and 700 experts and other specialists were employed for short-term missions¹¹). Moreover, considering the broad nature of

⁷ Para. 4.

⁸ This corresponds to the idea of a primitive or feudal society in which criminals have to pay for their penalty; it should also, however, be related to specific characteristics of an interstate society.

⁹ See Skordas, *supra* note 4, at 68–71.

¹⁰ United States, Japan, Kuwait, Saudi Arabia, United Kingdom.

¹¹ S/1999/94, Annex, Doc. 2, paras 43–49.

UNSCOM's mission, members had to specialize, which created problems of coordination and information exchange. Also to be underlined is the fact that most of the Commission members and experts were from Western countries, as only these countries had sufficient numbers of experts. But this also possibly contributed to the weak political support and involvement on the part of other countries. This situation made it easy for Iraq to question the composition and staffing of the Commission and it also provided an excuse for other countries to keep their distance from the UNSCOM experiment. Material and operational support thus came from only a few countries. Does this set of circumstances, in itself, cast a shadow on the Commission's independence? Not necessarily. It is not unusual in the United Nations. Indeed, many UN operations — particularly those in the field of peacekeeping — are financially and materially supported by Member States on a voluntary basis. But in the case of UNSCOM, the situation was quite different because of the nature of its tasks and its particular needs, especially as far as information is concerned. As Chantal de Jonge points out in her contribution to this symposium, the intelligence question rapidly became highly sensitive in two regards: the provision of intelligence and information from states (in a situation where there was no certainty that manipulation in one way or another was not taking place).

This leads us to a third point: the problem of trust which is directly linked to the question of time and thus to issues of independence and impartiality. This question concerns the UNSCOM of course: In relation to whom should it be independent? Who could it trust? It also concerns the Security Council: Did Member States trust each other?

The disarmament plan was complex, but its initial formulation was conceived so that it could be implemented in a very short time. From the beginning, it was doubtful whether deadlines could be respected. But this was not the only problem. The main issue at stake was that the mission extended from the initially intended four or five months to seven years, which of course created the problem of a long-term sustainable policy. Once again, one can speak of disproportions. This was not only due to the fact that the Iraqi armament programmes were far more extensive than had previously been thought. What had most clearly been underestimated was the difficulty of gathering information in the context of a unilaterally imposed process, despite Iraq's formal acceptance. At the same time, UNSCOM's work also constituted a good test in relation to all monitoring and verification processes and the ease of government concealment, although governments subject to such processes are supposed to spontaneously provide a more or less wide range of information. This remark brings a nuance to the assessment of Iraqi behaviour. For the Commission to work effectively, as mentioned above, Iraq's cooperation was necessary. Of course, Iraq did not show a great willingness to provide such assistance. And such a reaction was hardly surprising. Disarmament had been unilaterally imposed on this country, which had just been militarily defeated. Iraq could not be expected to cooperate fully and spontaneously.

Moreover, there is a further question: Did Iraq have any interest in providing full and spontaneous cooperation? Intuitively, one might answer in the affirmative,

considering the prospect of the sanctions being lifted in the event of full cooperation. But to answer this question, one should also consider what could happen in the event of non-cooperation. On the one hand, the sanctions and embargo imposed were so extreme that the only means left was the use of force. On the other hand, non-cooperation immediately requires a Security Council intervention. Despite several mistakes and bad judgements, Iraq had understood that the time element was a trump in their favour and thus initiated a strategy of harassment. This strategy proved to be efficient in many ways, never questioning the entire system but only certain aspects. Most of the time, Iraq's opposition was not strong enough to justify a reaction, but it succeeded in seriously undermining UNSCOM's work.

The efficiency of this behaviour came from the obligation to negotiate. The French author Georges Scelle noted that 'Police should not negotiate with a criminal'. But international police, such as the UN and UNSCOM could be considered to be, had to undertake such negotiations, since the offender was a sovereign state. Now, the greater the need to negotiate, the clearer one's goals and ideas on what to do in the event of a failure should be. But what political support did the Commission have? It was undoubtedly quite exhausting to have to negotiate on the implementation of clear obligations. In addition, the problem was not only one of a lack of cooperation. There was also the serious problem of a lack of trust: How not to become a little paranoid in this context? This became even more obvious in 1995, with the discovery of the extent of Iraqi concealment. Concerning UNSCOM reports, it has been noted that the Ekeus reports were highly technical, whereas Butler's reports were more political. It could also be noted that UNSCOM became much more intrusive under Ekeus. This should most likely be linked to the context mentioned above: as UNSCOM was an interface between Iraq and the Security Council, it acted as a catalyst in their political confrontation.¹²

This point should be considered in relation to the question of impartiality. UNSCOM was not a third party operating between two adversaries. Questioning its impartiality necessarily means that it acted for other interests than those of the Security Council. However, imperceptibly, UNSCOM tended to refer to a relationship between parties in conflict and not to a vertical relationship between a subsidiary organ of the Security Council and a UN Member State. It had been, by that time, accused of being backed by the United States.

UNSCOM probably became more and more politically significant as political support from the Security Council faded. To be sure, one could object here that the Security Council continued to vote on resolutions condemning Iraqi behaviour. But can it be ignored that there was no consensus on the type of solutions to be promoted? Such a development could be considered as a kind of transfer, a logical one. From some points of view, in the last period, Butler's period, UNSCOM took political initiative away from the Security Council and led the Council to act as UNSCOM wished. To sum up, UNSCOM wishes, as coincidence stands, were very close to those of the United

¹² Zedalis, 'Dealing with the Weapons Inspections Crises in Iraq', 59 *ZaōRV* (1999) 37.

States. Does this mean that UNSCOM paranoia met US paranoia? Such an assessment would be oversimplifying, and even simplistic.

However, several points need to be made here. As Chantal de Jonge writes, a 'short-term game' became a 'long-term game' and this changed its very nature. UNSCOM had to adapt and many unresolved questions, such as those mentioned above, arose.

First, there is the question of support. The longer the mission lasted, the more dependent UNSCOM became on state support. At the same time, the fact that UNSCOM was not actually an integrated organ and that relations and coordination among its members were not at the level of those between each member and its government has to be taken in account. This experience could also provide an opportunity to think about the assigning of such activities by the Security Council itself. The Security Council performs normative tasks, but could it also actually undertake operational activities?

The second point concerns our conception of full disarmament. This question has probably always been controversial, but became even more so from 1995, when the degree of Iraqi concealment was revealed. On the one hand there are those who thought there could be a kind of compromise, even if not explicit, so that a partial achievement of the goals could justify a lifting of sanctions. Thus, from this perspective, part of the work could be shifted to ongoing monitoring and verification. On the other hand stand those who considered that disarmament should be total, with a real degree of certainty, before sanctions could be lifted. This was UNSCOM's standpoint. It was probably a realistic point of view, given the technical aspects of the situation. And incomplete disarmament would have been harmful to the ongoing monitoring and verification process. But the technical point of view became a political one as the Security Council was unable to make up its mind, and thus it endorsed the UNSCOM view and made it its own rather than considering it as one element in its assessment of the overall situation.

Third, despite the lack of cooperation from Iraq, most of its weapons of mass destruction were destroyed and an efficient ongoing monitoring and verification process was built.¹³ UNSCOM was far more efficient in disarming Iraq than was the concerted US and British bombing. But the price to pay was a more and more expensive and intrusive process; this was possible, though, because, as noted, UNSCOM had far-reaching authority over all Iraqi territory and was able to use very intrusive methods.¹⁴ However, not even such an intrusive process could guarantee the achievement of its goals. An implicit question emerges here: If certainty is out of reach even with such an intrusive mechanism, would not a less intrusive process become doubtful? In this way, the UNSCOM experience could be seen as creating a question mark on the credibility of all those processes. In July 2001, the United States argued that UNSCOM had not been successful in verifying whether Iraq had destroyed

¹³ Jalilossoltan, 'Désarmement de l'Irak en vertu de la résolution 687 (1991) du Conseil de sécurité de l'ONU', 1 *AFRI* (2000) 719.

¹⁴ Kay, 'The Lessons of Intrusive Verification in Iraq', *Brassey's Defence Yearbook* (1993) 201.

all its biological weapons in order to justify their decision to discard the draft protocol on biological weapons prepared in Geneva.

Finally, however, although the UNMOVIC,¹⁵ which followed the UNSCOM, is supposed to be guided by principles of transparency and impartiality and was created with the intention of removing what were considered to be UNSCOM's vulnerable points, it has not been able to begin its job.

¹⁵ SC Res. 1284 (1999) of 17 December 1999.