STATEMENT OF REMARKS

made by Paul Conlon,
(former political affairs officer of the UN Security Council)
before the Subcommittee on National Security, Emerging
Threats, and International Relations, of the
Committee on Government Reform of the
United States House of Representatives

EMBARGO: April 12, 2005 11 a.m.

Historically, the United Nations grew out of a treaty organization largely centered around the multilateral treaty known as the United Nations Charter. That treaty is unique and "privileged" in that its signers were not allowed to make any reservations and because it contains a provision that obligations under that treaty would take precedence over all its members' other treaty obligations. In that way it formed the basis of a constitutionally structured international legal order. Its rationale was collective security and its various parliamentary bodies were given governance and enforcement functions, most especially the Security Council which was empowered under certain circumstances ("Chapter VII") to bind the members against their will to abide by its decisions.

Seen now as a global system the United Nations consists of a large number of treaty organizations or intergovernmental organizations of much less privileged status dealing with specialized questions (human rights, development, health, refugees, international trade). They too are international governance organs but they lack the same unambiguous enforcement powers of the central treaty organization and their position in a constitutionally structured international legal order is much less clear. Nonetheless they make up the vast bulk of all UN activities and employ over 95% of all its personnel.

In the 1990s when the Security Council attempted to exercise some of its collective security enforcement functions it came into conflict with the wider UN system, partially because the latter had many functions and missions that were considered incompatible with mandatory enforcement of sanctions

resolutions. Most of those sanctions measures were binding, not only on states, but on other international organizations and their personnel. Used to operating with certain legal immunities, some of those organs of the UN and their staffs resented being subjected to the authority of the Security Council or did not share the objectives of the relevant resolutions. This was also true of most of the central Secretariat's personnel, ultimately as well of the then secretary-general (Boutros Boutros-Ghali). Within the margins of maneuver available to them, they worked against enforcement of Security Council decreed sanctions.

This historical experience is not without its relevance for discussions of UN reform. Reform has in recent years (and in the most recent proposal by the present secretary-general) been discussed as an historic compromise (or trade-off) between a western constituency interested in collective security (and human rights) and a developing world constituency interested in development. Whatever the merits of this approach, experience has shown that mixing these two functions up in the same governance organs, organizational framework and personnel pool has worked against efforts at enforcement of collective security objectives.

Therefore, in any reform and, provided collective security is to be retained as an objective of the United Nations, it would seem better to provide the Security Council with its own structures and resources (including its own personnel), preferably in a separate secretariat uninfluenced by the organization's secretary-general. Such an option appears to be admissible under the wording of the Charter as it presently stands.

The rampant commercialism that later engulfed several sanctions committees of the Security Council and paved the way for corruption under the Oil-for-Food program can only be understood against the background of this other function of the United Nations (development, humanitarian relief, etc.) and the vision of the organization's "proper role" cultivated by inside and outside constituencies interested in or engaged in these activities. UN-sponsored humanitarian relief deliveries and planned reconstruction

activities in Iraq after the military intervention of 1991 provided the original justification for humanitarian waivers, only to be followed by more commercial waiver requests and, ultimately unfeasibly voluminous waiver request flows whose purpose was something other than the delivery of goods to the target state.

Target state regimes and commercial interests elsewhere (often in states neighboring on target states) later came to encourage this phenomenon whose exact function was never entirely clarified but it appears that obtaining export permits for unfreezing of assets, laundering of target state assets, smuggling of non-approved goods to the target state and (occasionally) fraudulent activities unrelated to the target state were prominent motives. These activities also provided valuable experience for small firms specializing in sanctions busting.

At the time it was felt that such practices had an important humanitarian function in supplying much needed goods to suffering civilian populations and therefore sections of the UN system began to advocate liberalization of waiver practices in order to increase the range of goods and number of permits granted by sanctions committees. Additionally, it was held that encouraging exporters outside of the target states to enter this commercial arena was fostering economic development, another important United Nations objective. In one instance, a UN development office was behind such pseudo-humanitarian exports.

Instrumental in facilitating these undesirable developments was the secrecy with which subsidiary organs of the Security Council like sanctions committees operated. By comparison with other legislative bodies in the UN system, the Council itself is not particularly open but under the Charter much of its work is ultimately subject to publication. But the sanctions committees operated almost completely in secret.

This secrecy was not based on any more basic procedural requirement of Charter law but had evolved over time because most such subsidiary organs adopted rules of procedure opting for closed

session meetings as a rule. However, secrecy went far beyond the mere practice of holding deliberations in private because even the decisions were not divulged to the general membership. Empowered by resolutions adopted under Chapter VII of the Charter, those committees were authorized to make decisions that were binding on member states against their will (and were thus exercising authority in the terms of governmental theory). But decisions were originally only divulged to the member state (or states) that had addressed a query or request to the committees even though many such decisions had generic relevance to the general membership. Third states that might have to collaborate in the implementation of such decisions were not as a general rule informed of them officially.

Because of this the humanitarian waiver practices of sanctions committees were never clearly understood in all their ramifications by the general membership. Indeed, this lack of transparency in thousands of what in other systems might be called case law decisions made the work of the committees even more difficult for themselves since there was no coherent record keeping of decisions that would allow the delegates, in dealing with a particular case, to determine easily how similar cases had been decided in the past. The committees were not bound by precedent, but there was a feeling that consistency was at least desirable. Poor record keeping, together with non-promulgation, weakened institutional memory, all the more significant because the membership of such committees was constantly changing (one-third of the members were replaced each year) and non-permanent members were disadvantaged in their access to prior case law.

Secret deliberations were defended on the grounds that they encouraged candor in discussions of sensitive issues, but empirical research has shown that it was in fact often easier to sweep unpleasant issues under the carpet in such non-transparent bodies. The doors that impeded the flow of information in one direction ultimate did so in the opposite direction as well and the committees did not even discuss instances of alleged sanctions violations that were being aired widely in the press. Members of the committees (states, one should remember) frequently declined to inform the committees of information

that some of them most certainly must have had. In view of such a "don't ask, don't tell" posture, the committees' secretariat quickly grasped that certain types of information were not welcomed by the delegates or the chairmen and did not tell them all they knew either. The quality of decisions made in such an environment could never be good.

All of these baneful practices grew up over time on the basis of habit and mentality. There are no principles of law, or provisions of international law or Charter law that ever mandated such practices. With the passage of time and under pressure from the general membership, the decision-making delegates began to allow for more transparency. The Secretariat itself was partial to such secrecy, despite the fact that it was itself disadvantaged by it in its work. A few other departments of the Secretariat had access to what went on in the committees but important actors (primarily in the humanitarian departments) did not. This only further alienated the latter from the sanctions objectives of the Security Council.

Nor could interested and informed outsiders (non-governmental organizations with relevant mandates, scholars, the press) assist sanctions committees by providing interpretation, analysis or supplemental information on the work of the committees. This even applied to scholars funded by the United Nations. The latter, increasingly mobilized to denigrate sanctions, were kept in the dark about the rampant commercialism going on in the sanctions committees.

Other parts of the Secretariat structure, particular employees in the translation and document-processing department, clandestinely revealed what they knew from committee documentation to outside constituencies, particularly the target states themselves. One target state, Iraq, occasionally forced the Secretariat to publish its (slanted) versions of what went on at committee meetings as official Security Council documents.

A curious aspect of this matter was that the members of the committees (states, and the individuals representing them) were not bound to secrecy but could divulge what they knew and frequently did. The staff of the Secretariat was legally bound to secrecy and could only divulge what it knew of committee decision-making practice with the discretionary permission of their supervisors (ultimately: the secretary-general). Such permission was given selectively out of political considerations. The then secretary-general (Boutros Boutros-Ghali) used this prerogative to prevent the sanction committees' staff from defending the committees against unfounded allegations about their practices.

This even included one of the more sensitive issues involved in their work: violations of sanctions. It can be asked if secretary-generals really have the authority, or if so have not been abusing such authority, to force or attempt to force employees and former employees to conceal what they know about violations of sanctions measures adopted by the Security Council under Chapter VII of the Charter.

With so much non-systematic and selective information floating around about what went on behind closed doors, it is no wonder that there was no lack of manipulative and self-serving rumors available about what supposedly had transpired. Since no official versions of meetings were available to the general membership, outsiders had no way of disproving or rebutting such claims. Members of the committees could in this way not only keep their outsider colleagues in the dark but additionally mislead them with selective leaks and slanted versions of events. One member of the Security Council (that consistently supported the dominant position on the inside) made a practice of spreading rumors about its purported strong opposition to that position - thus currying favor with one faction on the inside and with the other one on the outside. Secrecy does not encourage candor or prevent demagogy. These practices are unworthy of a body of such high standing in the international legal order.

This lack of transparency went hand in hand with a concomitant lack of accountability. Which of these eyesores was the cause and which the effect is a matter that could be debated; clearly they reinforced

each other. When the possibility of ultimate accountability for such deplorable practices was occasionally brought up in private within the Secretariat there was a confident feeling that no one would ever be held to account for them. Some of the matters kept secret constituted violations or possible violations of measures adopted by the Security Council under Chapter VII of the Charter. Since measures adopted on that high authority are also binding on international organizations and their civil servants, the least one can say is that civil servants of international organizations should not assist, or be required by their superiors to assist, delegates in concealing such matters.

Annex I:

MEMORANDUM

to: Mr. James C. Ngobi, Deputy Director
Subsidiary Organs Secretariat Services Branch
Department of Political Affairs

30 December 1993

from: Paul Conlon, Political Affairs Officer

subject: security of Committee documentation

1. As mentioned orally, at the close of the latest meeting of the Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait, Mr. Martinovic and I witnessed some disturbing phenomena.

2. Firstly, a journalist that, I believe, works for a Gulf region news agency entered the room (conference room 7) and gathered up documents left on the table by the delegates.

3. In this context we became aware that the room was now completely empty, conference service personnel having already left, and that the document trolley was still standing in the room (left unlocked). We took the most sensitive types of documents from the trolley, but were obliged to leave it there.

4. Leaving the room we saw the Moroccan delegate, Mr. Bellouki, seated in the Viennese Cafe with Mr. Al-Nima of the Iraqi mission and another person, going through a bundle of papers.

5. One of these things cannot be prevented. The others might be amenable to some prevention. It is recommended that better arrangements be made with Conference Services about either locking the room until the trolley can be retrieved, or retrieving it immediately after the close of the meeting.

copy: Mr. Martinovic

Annex II:

16 May 1994

M E M O

to: Mr. James C. Ngobi
from: Paul Conlon

re: Desirability of publishing Committee decisions

1. The basic guidelines of subsidiary organs of the Security Council having once established the principle that closed meetings and restricted documentation were in the interest of expeditious and flexible decision-making - to which Committee Secretariat can well attest - far-reaching conclusions were then drawn as to the desirability of secrecy and the noxious nature of disclosure in general. The ultimate corollary has naturally been the idea that the members are not supposed to know what goes on either.

2. The Committee now takes thousands of decision every year in the form of export permit letters which are not published in an orderly or recognized manner. Supposedly these decisions are binding on all those connected in some way or another with the implementation of the decisions, although it is hard to see from a practical point of view how they are supposed to be implemented by those who are not allowed to know about them.

3. It can also be asked on the basis of what strange legal doctrines the Committee as a source of authority can simultaneously require the non-disclosure of its decisions and then assert pretensions to their universally binding nature? In most legal systems the validity of laws and decisions is directly dependent on their proper promulgation.

4. The basic idea of sanctions compliance has been that compliance can be ensured by the threat of prosecution of non-compliance in the court system of States. In most European jurisdictions, successful prosecution of sanctions evasions is made more difficult, if not outrightly impossible, due to the fact that there is no certainty as to which export transactions the Committee has permitted. The requesting State is the only jurisdiction where there is any certainty that the authorities can be legally bound to know of the Committee's decision in that case. This does not establish the degree of transparency in any other jurisdiction which would be necessary to make deviation from the terms of the permit prosecutable. In extreme cases this might even be the case within the jurisdiction of the requesting State.

5. The decisions of the Committee to allow exports is only communicated to the Government of the requesting State. It is unclear how third-State authorities (authorities of States other than Iraq and the requester) are supposed to be able to properly administer exports to Iraq without direct access to the permit decision. Jordan's constant requests for verification of authenticity of permit letters illustrates this point. Jordan is a "third State" in the vast majority of cases.

6. Even in other cases the point is not academic. The idea that the requesting State is the implementing State in the terms of older international law doctrine is nonsense in the case of our Committee. Frequently the requesting State stands in no relation to the export transaction other than that it is the domicile of someone who requests it. Nowadays even that requirement is being dropped. Just as there are "flag-of-convenience" jurisdictions there are also "notification convenience" jurisdictions. This is in no way impermissible according to Committee practice.

7. The general lack of knowledge as to the legal requirements of sanctions practices is well known to Secretariat staff who are constantly receiving enquiries from missions. Other feedback from national implementing authorities has indicated that they do not understand the exact regulations, particularly in regard to the question of frozen assets. There have been other examples pointing in the same direction. The result of all the secrecy is that the implementing States do not know what sanctions law requires.

8. Most importantly, the secrecy has played into the hands of the crooks who now make up an important part our ultimate clientele. Abuses of the Committee's good faith as have recently occurred would be less likely in a system where there was some fear of discovery. Gazetting permits would not deter or disturb the legitimate exporter, but the sanctions evader would see his designs foiled from the start. It might also discourage less well-founded requests.

9. It is therefore my recommendation that the Committee's approvals in the form of the core-portion of the usual approval or acknowledgement letter be gazetted in some appropriate manner, as are thousands of similar decisions of permitting authorities in the organized Western countries.

10. This might also force the Committee to clean up its act in matters of format, terminology, standardization, quantification and description. Secrecy has helped to keep unprofessional and amateurish practices alive long after volume and diversification would normally have forced through a more professional approach.

11. One possibility would be to require the requesting State to gazette the approval permit in the manner usually used for its own permits. This would be less desirable, because there would be no central source of gazetted permits, and there would be a greater variety of formats and forms. The permits might then have to appear in the official language of the Government Gazette. Abuses of permits through the use of "convenience jurisdictions" would still be possible.

12. The best alternative would be for the United Nations as such to gazette the permits, either by inserting standardized English and French versions in appropriate legal or commercial media, or by utilizing the facilities of the Treaty Section.