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Iraq: law of occupation

This Paper discusses some legal issues surrounding the occupation of Iraq during and after Operation *Iraqi Freedom* in spring 2003. It gives an account of UN Security Council Resolution 1483, of 22 May 2003.

Other matters are discussed in Standard Note SN/IA/2138, *Iraq: selected legal issues*.

Research Paper 03/50, *The Conflict in Iraq*, 23 May 2003, gives an account of the military campaign. RP 03/22, *Iraq: developments since UN Security Council Resolution 1441*, 13 March 2003, covers the debate leading up to the campaign, weapons inspections, the involvement of the Security Council, and likely cost implications. It gives social and economic indicators and a list of parliamentary statements and debates. RP 02/64, *Iraq and UN Security Council Resolution 1441*, 21 November 2002, gives detail on Resolution 1441. RP 02/53, *Iraq: the debate on policy options*, 20 September 2002, gives an overview leading into the crisis.

Standard Note SN/EP/2132, *Iraq: the humanitarian situation*, discusses humanitarian appeals and responses.

Paul Bowers

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Summary of main points

- The USA and the UK have the status of occupying powers in Iraq.
- This started as soon as they took control of portions of Iraqi territory. The status of occupying power is a matter of *de facto* control. It does not matter whether their military campaign was lawful.
- The main laws on occupation are in the Hague Regulations of 1907 and the fourth Geneva Convention of 1949. Other laws are relevant as well.
- Occupying powers have a duty to maintain public order and safety. They have the right to protect themselves. They do not take over sovereignty.
- Occupying powers may make limited changes to institutions, laws and other arrangements, but these must serve the general purposes of maintaining order, safety and security.
- Occupying powers must provide for humanitarian needs, like food and medicine, and for children to be educated. They must respect local culture and property.
- The UN Security Council passed Resolution 1483 on 22 May 2003. This recognises the role of the USA and the UK and calls on them to administer Iraq effectively in order to benefit the Iraqi people. It allows the creation of an interim administration, to be run by Iraqis, until a new government is formed.
- Security Council Resolution 1483 sets up a post of UN Secretary-General's Special Representative for Iraq. Sergio Vieira de Mello, UN High Commissioner for Human Rights, has been appointed. He will coordinate UN activities and liaise with the occupying powers.
- Security Council Resolution 1483 lifts non-military UN sanctions against Iraq. It winds down the "Oil-for-Food" programme, and passes control of Iraqi oil to the occupying powers. The occupying powers are obliged to put the proceeds of oil sales into the Development Fund for Iraq. This must be used for humanitarian needs, reconstruction, disarmament, the costs of civilian administration and other purposes benefiting Iraqis.
- Security Council Resolution 1483 reaffirms that Iraq must be disarmed, but it does not go into detail on how.

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I Introduction

A. Removal of the Saddam Hussein regime

On 20 March 2003 the USA and the UK, acting with the support of coalition partners, commenced military operations against Iraq under Operation *Iraqi Freedom*. The stated basis for this was Iraq's failure to comply with its obligations under United Nations Security Council Resolutions. The action was presented as the "serious consequences" mentioned in Security Council Resolution 1441 that would result from of this failure.

The British Government gave as its "overall objective" for the military campaign the creation of "conditions in which Iraq disarms in accordance with its obligations under [UN Security Council Resolutions] and remains so disarmed in the long term."¹ It set out various tasks which came from that objective:

5. In aiming to achieve this objective as swiftly as possible, every effort will be made to minimise civilian casualties and damage to essential economic infrastructure, and to minimise and address adverse humanitarian consequences. The main tasks of the coalition are to:

- a. overcome the resistance of Iraqi security forces;
- b. deny the Iraqi regime the use of weapons of mass destruction now and in the future;
- c. remove the Iraqi regime, given its clear and unyielding refusal to comply with the UN Security Council's demands;
- d. identify and secure the sites where weapons of mass destruction and their means of delivery are located;
- e. secure essential economic infrastructure, including for utilities and transport, from sabotage and wilful destruction by Iraq; and
- f. deter wider conflict both inside Iraq and in the region.

Military action will be conducted in conformity with international law, including the UN Charter and international humanitarian law.

6. Our wider political objectives in support of the military campaign are to:

¹ *British Government Military Campaign Objectives*, March 2003. The full text is reproduced in RP 03/50, *The Conflict in Iraq*, which also gives detail on the campaign objectives of the USA.

- a. demonstrate to the Iraqi people that our quarrel is not with them and that their security and well-being is our concern;
- b. work with the United Nations to lift sanctions affecting the supply of humanitarian and reconstruction goods, and to enable Iraq's own resources, including oil, to be available to meet the needs of the Iraqi people;
- c. sustain the widest possible international and regional coalition in support of military action;
- d. preserve wider regional security, including by maintaining the territorial integrity of Iraq and mitigating the humanitarian and other consequences of conflict for Iraq's neighbours;
- e. help create conditions for a future, stable and law-abiding government of Iraq; and
- f. further our policy of eliminating terrorism as a force in international affairs.

7. In the wake of hostilities, the immediate military priorities for the coalition are to:

- a. provide for the security of friendly forces;
- b. contribute to the creation of a secure environment so that normal life can be restored;
- c. work in support of humanitarian organisations to mitigate the consequences of hostilities and, in the absence of such civilian humanitarian capacity, provide relief where it is needed;
- d. work with UNMOVIC/IAEA to rid Iraq of its weapons of mass destruction and their means of delivery;
- e. facilitate remedial action where environmental damage has occurred;
- f. enable the reconstruction and recommissioning of essential infrastructure for the political and economic development of Iraq, and the immediate benefit of the Iraqi people; and
- g. lay plans for the reform of Iraq's security forces.

Wherever possible, these tasks will be carried out in co-operation with the United Nations.

The USA also laid emphasis on disarmament, and it saw the removal of Saddam Hussein and his closest associates as a prerequisite for this. On 17 March 2003 President George Bush gave Saddam Hussein and his sons 48 hours to leave Iraq, and warned that military conflict would commence if this ultimatum were refused.

B. Aftermath

During the military campaign coalition forces occupied areas of Iraq. After the removal of the regime in mid-April 2003 they took control of the whole country. This raised the question of future arrangements for the administration of Iraq.

a. *initial arrangements*

The USA had established the Office of Reconstruction and Humanitarian Assistance (ORHA) in January 2003. This had responsibility for planning and implementing post-conflict reconstruction programmes. ORHA was led by Jay Garner, a retired US General. It was expected to take over *de facto* administration of Iraq, while the coalition military forces retained responsibility for security and disarmament. One of ORHA's tasks would be the establishment of an interim authority, a group of Iraqis which gradually would assume governmental functions. It remained unclear exactly how long this phase would last, but eventually the interim authority and ORHA would hand over to a new representative government of Iraq.

According to the Congressional Research Service,

although plans for the immediate post-war period may change with evolving circumstances, U.S. officials currently expect a “rolling transfer” of authority to an Iraqi Interim Authority that would run ministries that affect daily civilian life – education, health, etc. The “power” ministries – military, intelligence – would be taken over and reformed by the U.S. military. Current U.S. plans also may include the use of Iraqi regular army personnel to work on many reconstruction programs, such as construction, engineering, road work and demining. “Free” Iraqis would be assigned as “advisors” to each of the roughly 21 ministries, and the roughly two million Iraqi civil servants, including educators and health workers, would continue to carry out their functions, with salaries initially paid by the United States. Iraqis would also be asked to form their own constitutional commission to devise a new governmental structure.²

On 8 April 2003, as Baghdad fell, Mr Bush and Prime Minister Tony Blair issued a Joint Statement.³ This included the following:

as the Coalition proceeds with the reconstruction of Iraq, it will work with its allies, other bilateral donors, and with the United Nations and other international institutions. The United Nations has a vital role to play in the reconstruction of Iraq. We welcome the efforts of U.N. agencies and non-governmental organizations in providing immediate assistance to the people of Iraq. As we

² R Margesson and C Tarnoff, *Iraq: recent developments in humanitarian and reconstruction assistance*, CRS Report for Congress, 1 April 2003.

³ <http://www.usembassy.org.uk/potus03/potus03c.html/>.

stated in the Azores, we plan to seek the adoption of new United Nations Security Council resolutions that would affirm Iraq's territorial integrity, ensure rapid delivery of humanitarian relief, and endorse an appropriate post-conflict administration for Iraq. We welcome the appointment by the United Nations Secretary General of a Special Adviser for Iraq to work with the people of Iraq and coalition representatives.

The day when Iraqis govern themselves must come quickly. As early as possible, we support the formation of an Iraqi Interim Authority, a transitional administration, run by Iraqis, until a permanent government is established by the people of Iraq. The Interim Authority will be broad-based and fully representative, with members from all of Iraq's ethnic groups, regions and diaspora. The Interim Authority will be established first and foremost by the Iraqi people, with the help of the members of the Coalition, and working with the Secretary General of the United Nations. As coalition forces advance, civilian Iraqi leaders will emerge who can be part of such an Interim Authority. The Interim Authority will progressively assume more of the functions of government. It will provide a means for Iraqis to participate in the economic and political reconstruction of their country from the outset.

b. later developments

On 8 May 2003 the USA and the UK informed the Security Council that they had created a Coalition Provisional Authority, which included ORHA, for the security and provisional administration of Iraq.⁴ They were joined in this by coalition partners, states which took on a variety of roles of varying weight. In the letter to the Security Council they also said that they were facilitating efforts by the Iraqi people to move towards the formation of a representative government, that they were facilitating “the establishment of representative institutions of government,” and that their goal was to “transfer responsibility for administration to representative Iraqi authorities as early as possible.”

The two states made the following comments on the involvement of the UN and its agencies, and of other states and bodies:

The United Nations has a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority. The United States, the United Kingdom and Coalition partners are ready to work closely with representatives of the United Nations and its specialized agencies and look forward to the appointment of a special coordinator by the Secretary-General. We also welcome the support and contributions of Member States, international and regional organizations, and other entities, under appropriate coordination arrangements with the Coalition Provisional Authority.

The full document is reproduced in Annex II.

⁴ S/2003/538, 8 May 2003.

So far two meetings have been held with Iraqi representatives, on 15 April 2003 in Nasiriyah, and on 28 April 2003 in Baghdad. These were intended as initial moves towards the establishment of a national conference, which could set up an interim authority and make progress towards constitutional change and the election of a new government.⁵ The Nasiriyah meeting adopted a 13 point statement on Iraq's future, which is reproduced in Annex III. The Baghdad meeting reached agreement that a national conference should be convened within a month in order to select an interim administration.

Changes were made to the senior US administration in Iraq in May 2003. Paul Bremer was appointed Presidential Envoy to Iraq, becoming the senior coalition official there. Mr Bremer was formerly a long-serving State Department official and Ambassador. His role includes overseeing the coalition's reconstruction efforts and the process by which Iraqis will set up new institutions and structures of governance.⁶ Mr Bremer will report to Secretary of Defense Donald Rumsfeld, and through him to Mr Bush. General Tommy Franks remains in command of military personnel in theatre. The UK's senior representative, the Special Representative in Iraq, is John Sawers, Ambassador to Egypt.

Mr Bremer's appointment appears to have been a response to a perception that ORHA was ineffectual, and press reports indicate that he is regarded as a decisive administrator. Mr Bremer made some early alterations to the plans previously made by Mr Garner for the transition to Iraqi control. The national conference planned for late May or early June has been put back to July or August 2003. The conference was to have appointed an interim administration holding some governmental powers. The intention is still that the conference will appoint an interim administration, but this is unlikely to have ministerial powers. Instead, the preference in the coalition is reportedly that the interim administration will focus on drawing up a new constitution as an initial task, while coalition administrators rebuild the institutions of the state.⁷

c. the turn to the Security Council

As they took control of Iraqi territory the coalition entered the legal condition of being occupying powers. As such they had rights and responsibilities. These allowed a measure of latitude to alter the existing institutions in Iraq so as to maintain order. They did not confer an unfettered right to reconstruct the state.

There was pressure on the occupying powers to seek authority for their activities in a Security Council resolution, and the USA and the UK had given an undertaking at their summit in the Azores on 16 March 2003 to return to the Security Council. However, there was debate over what exactly the Security Council should be asked to approve.

⁵ HC Deb 28 April 2003, c22.

⁶ *Washington File*, "Ambassador Paul Bremer named as Presidential Envoy to Iraq," 5 May 2003, <http://www.usembassy.org.uk/iraq44.html>.

⁷ *Daily Telegraph*, 24 May 2003, *Times*, 22 May 2003.

Critics of the coalition argued that the UN should take the lead role in reconstruction, although some voices within the UN Secretariat suggested that the organisation was unenthusiastic about taking on broad administrative powers.⁸ The UN has had a mixed record in the past, and its most ambitious exercises have not always been its most glorious, as Cambodia demonstrated. Nevertheless, supporters of the idea that the UN should take the leading role in Iraq pointed to the political advantages of removing the transition from the control of two main powers, and to what they regarded as more successful examples of UN administration, such as in Kosovo or Bosnia-Herzegovina. The USA was unwilling to contemplate such a role for the UN. However, with the UK, it sought UN involvement in some areas. In the Joint Statement by Mr Bush and Mr Blair on 8 April 2003, and in the letter to the Security Council on 8 May 2003, the two states declared that “the United Nations has a vital role to play.”

In addition to this debate over the role of the UN in Iraq, there was concern among those who opposed military action that a Security Council resolution should not give retrospective endorsement to the military campaign.

When Clare Short resigned as Secretary of State for International Development on 12 May 2003 she made the argument for a Security Council Resolution thus:

the coalition does not have sovereign authority and has no authority to bring into being an interim Iraqi Government with such authority or to create a constitutional process leading to the election of a sovereign Government. The only body that has the legal authority to do this is the United Nations Security Council.⁹

The *New Statesman* of 26 May 2003 contained what it described as a copy of advice given by the Attorney-General, Lord Goldsmith, to the Prime Minister on 26 March 2003. The document stated that “in short, my view is that a further Security Council resolution is needed to authorise imposing reform and restructuring of Iraq and its Government.” It went on to give an “indication of the limitations placed on the authority of an Occupying Power.”

⁸ *Financial Times*, 9 April 2003.

⁹ HC Deb 12 May 2003, c36.

II Security Council Resolution 1483

Security Council Resolution 1483 was adopted on 22 May 2003, under Chapter VII of the UN Charter. Chapter VII allows the Security Council to make decisions which are binding on all UN members. The Resolution was adopted by 14 votes in favour with none against, and one member, Syria, absent from voting. It covers a range of issues concerning Iraq's future until a new government is in place. Many of its provisions are detailed, and implementation of them will be reviewed in 12 months. It is silent on the legality of the military campaign. The text of the Resolution is reproduced in Annex I.

A. Triangular relationship

The most obvious source of interest is the division of responsibilities between the occupying powers and the UN. However, the Resolution also mentions the continuing sovereignty of Iraq and the role of the Iraqi people, suggesting a triangular relationship.

a. *Iraqi people*

In the preamble to the Resolution the Security Council reaffirms the sovereignty and territorial integrity of Iraq, and stresses “the right of the Iraqi people freely to determine their own political future and control their own natural resources.” It also welcomes the “first steps” by the Iraqi people towards the formation of a representative government, and takes note of the statements arising from the meetings in Nasiriyah and Baghdad. The Iraqi people are given a prominent role in forming the interim administration (see below).

b. *the occupying powers (“the Authority”)*

In the preamble the Security Council notes the letter of 8 May 2003¹⁰ from the USA and the UK and it recognises

the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the “Authority”).

It also welcomes the willingness of other states to contribute to stability and security by making contributions and working under the Authority.

¹⁰ For detail on this letter see Section I, B, above, and Annex II.

Paragraphs 4 and 5 set out the role of the Authority in general terms. The Security Council:

4. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;

5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;

The Security Council also calls upon the Authority to carry out various specific tasks (see below), but it does not present this as an exhaustive mandate.

c. the UN

By adopting the Resolution, the Security Council has applied its legal authority in certain areas of policy, and effectively it has entrenched the arrangements set out in those areas subject to its own authority to vary them. However, many of these arrangements are general, and the details of implementation remain to be worked out. These details will have to be consistent with the Resolution and with other provisions of international law.

Aside from this assertion by the Security Council, parts of the UN bureaucracy are given roles.

In the preamble to the Resolution the Security Council resolves

that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance.

In paragraph 8 the Council requests the UN Secretary-General to appoint a Special Representative for Iraq, a position to which Sergio Vieira de Mello has been appointed for a four month period, on leave of absence from his current post as UN High Commissioner for Human Rights.¹¹

Paragraph 8 spells out his responsibilities. He will be responsible for coordinating the UN's involvement in Iraq, and the involvement of other international agencies in humanitarian assistance and reconstruction.

¹¹ The Secretary-General, Kofi Annan, had previously appointed a Special Adviser on Iraq, Rafeeuddin Ahmed, to assist with coordination of UN activities.

He also has the tasks of “facilitating” or “promoting” activities in various areas, and these are to be carried out in coordination with the Authority. The areas include safe return for refugees, reconstruction of infrastructure, economic reconstruction and sustainable development, and protection of human rights.

Three of his duties of encouragement are linked expressly to “international efforts,” that is, to efforts taking place outside the UN umbrella. He is to encourage international efforts to contribute to basic civilian administration functions, to rebuild the civilian police force, and to promote legal and judicial reform.

In addition, paragraph 8 (c) gives the Special Representative the task of

working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq.

B. Detailed provisions

The Resolution contains many detailed provisions, including on the formation of an interim administration, the outstanding issues from Resolution 687 (the ceasefire at the end of the Gulf War in 1991), the lifting of non-military sanctions, and the Development Fund for Iraq.

Paragraph 1 appeals to states and organisations to assist the people of Iraq to reform their institutions, rebuild their country, and pursue stability and security.

Paragraph 2 calls on states to respond to appeals for humanitarian assistance.

There is nothing in the Resolution on the mechanics of justice for those who committed crimes under the Saddam Hussein regime, but Paragraph 3 appeals to states to deny such persons safe haven, while the preamble affirms the need for accountability for these crimes.

Paragraph 9 supports the formation of an interim administration. This is to be done “by the people of Iraq with the help of the Authority and working with the Special Representative.” It is to be a

transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority.

Paragraphs 6 and 11 deal with outstanding issues from the Gulf War. Paragraph 6 calls upon the Authority, and relevant organisations and individuals, to locate and repatriate Kuwaitis and others missing since 1990, including the remains of those deceased.

Paragraph 11 deals with Iraq's disarmament obligations, as set out in other Security Council resolutions. It does not call on the Authority to undertake tasks in this area. Rather it encourages the USA and the UK to keep the Council informed of their activities towards disarmament, and it "underlines the intention of the Council to revisit the mandates" of the existing weapons inspectors of the UN Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA).

Paragraph 7 concerns looted artefacts. In it the Council decides that all member states shall take steps to facilitate the safe return of cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance which have been removed illegally.

Paragraph 10 lifts non-military sanctions imposed under previous Security Council resolutions.

Paragraphs 12, 13 and 14 deal with the Development Fund for Iraq. Paragraph 12 notes the establishment of the Fund, and Paragraph 13 notes that it "shall be disbursed at the direction of the Authority, in consultation with the Iraqi interim administration," for the purposes set out in Paragraph 14. These are as follows:

[the Fund] shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq.

Paragraph 15 calls on the international financial institutions and donors to assist Iraq in the reconstruction of its economy, including the search for a solution to its sovereign debt problems.

Paragraphs 16 to 21 deal with the winding down of the "Oil-for-Food" programme.¹² In Paragraph 16 the Secretary-General is requested to terminate the Programme within six months and to transfer responsibility for "any remaining activity under the Programme to the Authority." Paragraph 16 goes on to give detailed guidelines on this. Under Paragraph 17 money from the programme should be transferred to the Development Fund for Iraq. This will include US\$1bn, plus surplus funds in the escrow accounts after the UN's expenses have been deducted. To this will be added Iraqi assets abroad resulting from past sales of oil, which were passed to the Secretary-General under Resolution 778 of 1992.

¹² See SN/IA/1431, *Sanctions on Iraq*, for further details on the "Oil-for-Food" programme. For brevity, the current Paper uses "oil" to cover what the Resolution terms "petroleum, petroleum products, and natural gas."

Under Paragraph 20 future sales of Iraqi oil are to be made “consistent with prevailing international market best practices,” and they are to be audited by independent public accountants. 95% of the proceeds will be deposited in the Development Fund for Iraq until the creation of a new government. The remaining 5% will go to the UN Compensation Fund, which was established under Security Council Resolution 687.

Paragraphs 22 and 23 set out arrangements for a freeze on the assets of the previous regime, for their transfer to the Development Fund for Iraq, and for privileges and immunities to be extended to these assets and to oil sales.

Under Paragraph 25 the Council will review the implementation of the Resolution within 12 months.

C. Subsequent moves in Iraq

In the period after the adoption of Security Council Resolution 1483 the Coalition Provisional Authority made decisive moves in Iraq, which might be seen as an assertion of its status under the Resolution.

On 23 May 2003 Mr Bremer dissolved the army, the Republican Guard, the defence and information ministries, and the security services and military courts. The move in respect of the army was formal, since it had disintegrated during the military campaign, but it also cleared the way for the creation of a new, smaller armed forces under civilian control.¹³ The Ba’ath Party had been banned on 16 April 2003.

On 24 May 2003 Mr Bremer proclaimed a weapons amnesty. This would begin on 1 June 2003, and it would allow a period of fourteen days for the surrender of “unauthorised weapons.” These were defined as:

automatic firearms firing ammunition larger than 7.62mm; machine guns or crew-served weapons; anti-tank weapons; anti-aircraft weapons; indirect fire weapons; all armored vehicles or self-propelled weapons; and high explosives and explosive devices.¹⁴

On 26 May 2003 Mr Bremer set out an economic reform programme aimed at moving Iraq towards a market economy.¹⁵

¹³ *Guardian*, 24 May 2003, *Daily Telegraph*, 24 May 2003.

¹⁴ *Washington File*, 27 May 2003, reporting US Central Command news release 03-05-87 of 24 May 2003.

¹⁵ *Financial Times*, 27 May 2003.

III Law on occupation

As discussed above, Security Council Resolution 1483 recognises the role of the occupying powers and gives them certain responsibilities. However, this cannot be taken as an exhaustive account of their role, nor does it give them *carte blanche*. Among other things, this is evinced by Paragraph 5, in which the Council calls upon all concerned to comply fully with “their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”

The law on occupation during and after conflict is based on the principle that the occupying power is precluded from alienating sovereignty (effectively, annexing territory) by means of the use of force.¹⁶ It is responsible for administering occupied territory, but it may make changes to existing institutions only where necessary for the maintenance of order and security.

This means that extensive forcible changes are unlikely to be lawful. However, limited changes may be made, and states have argued in the past that changes by agreement, for instance with newly discovered indigenous representatives, are a different matter. The occupations of Germany and Japan after World War II saw the Allies undertake radical reconstruction of state structures, in a manner that went far beyond the laws on occupation at that time. Various arguments have been made over this. The unconditional surrenders of Germany and Japan were held by some to have freed the Allies from their existing legal obligations, since they represented effective consent. This has not occurred in Iraq. Some argued that Germany was in a condition of *debellatio*, effectively meaning that its institutions had disintegrated and no longer existed, so they could not be maintained. This concept has few supporters today, not least since it might encourage armed forces to destroy as much as possible of the enemy state. However, it draws attention to the question of whether all arrangements under the previous regime are to be maintained unaltered, or only those which still are in existence strictly at the time of occupation. Finally, the argument was made that some aspects of the Nazi state, especially its race laws, so contravened international norms that their maintenance could not possibly be a duty for the Allies, a position which gained some support in case law.¹⁷

The constraint against taking over sovereignty normally implies that the occupation will be temporary. However, it can be open-ended. Some elements of what would normally be regarded as sovereignty were taken over by the Allies in Germany after World War II,

¹⁶ The term “occupation” has a limited meaning in international law, referring to the acquisition, by means of peaceful occupation, of territory not claimed by other powers and lacking internal political organs. New cases are rare in the contemporary world. In contrast, the occupation relevant to Iraq is properly termed “belligerent occupation.” For ease of reading, this Note uses “occupation” to refer to the belligerent occupation of Iraq.

¹⁷ These arguments are discussed in E Benvenisti, *The International Law of Occupation*, 1993, pp91-6. See also H McCoubrey and N White, *International Law and Armed Conflict*, 1992, pp286-7.

in addition to their thoroughgoing assumption of administrative powers, and some of this sovereignty was held in suspension until 1990.¹⁸ The exact status of Germany and its sovereignty during this period is open to interpretation. However, the Allies declared that it was not their intention to annex Germany, and if an alienation of elements of sovereignty did take place it was regarded as temporary and it was achieved on the basis of the arguments mentioned above for the occupation as a whole.

The USA and the UK do not have sovereignty over Iraq, regardless of whether in practice Iraq is able meaningfully to exercise its sovereignty, and whether the occupying powers may act on its behalf in doing so.¹⁹

A. Hague Regulations and Geneva Convention

The main sources of written law on occupation are the Regulations annexed to Hague Convention IV 1907 and Geneva Convention IV 1949.²⁰ These take as given that military forces will occupy territory for periods of time, and they set out various conditions they should observe. Under Article 6 of Geneva Convention IV all of that Convention's conditions apply until one year after the "general close of military operations," and, to the extent that the occupying power exercises the functions of government, many of the conditions apply for as long as the occupation lasts.

1. General

a. *fact of occupation*

Article 42 of the Hague Regulations provides that "territory is considered occupied when it is actually placed under the authority of the hostile army." It is usually argued that occupation is therefore a matter of fact, rather than hinging on a declaration by the occupier: if territory is actually placed under authority then it is occupied. It also follows from this that occupation need not be a matter of controlling the whole of another state's territory, but arises when authority is established over any portion of its territory.

¹⁸ These included rights to declare a state of emergency, full rights in relation to Berlin and rights in relation to Germany as a whole, including reunification and a peace treaty. See R Jennings and A Watts, *Oppenheim's International Law*, 9th edition, 1992, p137 fn 29.

¹⁹ F Kirgis, "Security Council Resolution 1483 on the rebuilding of Iraq," *ASIL Insights*, May 2003.

²⁰ The full titles are the *Geneva Convention relative to the protection of civilian persons in time of war*, 1949, and the Annex to the *Convention respecting the laws and customs of war on land*, 1907, being "Regulations respecting the laws and customs of war on land." The Geneva Conventions may be found at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc, and the Hague Regulations are at <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument>.

b. responsibilities of occupying power

Article 43 of the Hague Regulations gives an overview of the occupying power's responsibilities:

the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.²¹

Article 64 of Geneva Convention IV gives a more discursive statement of the same principle:

the Occupying Power may ... subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

These two articles give the general framework for military occupations.

c. changes to existing arrangements

According to one author "Article 43 [of the Hague Regulations] is a sort of miniconstitution for the occupation administration," which sets out obligations for the occupying power and rights necessary for it to fulfil those obligations. This, he points out, implies "recognition of the right of the occupant *not* to respect some of the local laws."²²

Article 47 of Geneva Convention IV gives another statement of general principle:

protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions of government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Again, this implies an acceptance that changes will be made, but provides that such changes may not remove the protections of the Convention.

²¹ The French version has "l'ordre et la vie publics" instead of "public order and safety."

²² E Benvenisti, *The International Law of Occupation*, 1993, p9.

Various other provisions of the Convention back up the argument that the occupying power may make changes to the arrangements in the territory. For instance, Article 54, which gives certain protections to judges and public officials, concludes with a statement that it “does not affect the right of the Occupying Power to remove public officials from their posts.”

The Regulations and the Convention thus recognise that occupation may occur, and they recognise the right of occupying powers to make changes to existing institutions in the occupied territory. However, this right to make changes is not unconditional. In the main, it is available in order to allow the occupying power to uphold its duties under the Regulations and the Convention, in respect of the maintenance of public order and safety, and of orderly government, and to maintain its own security.

2. Detail

The detailed provisions on occupation are set out in Section III of the Hague Regulations, Articles 42 to 56, and in Section III of Geneva Convention IV, Articles 47 to 78. The following account does not repeat the general Articles discussed above, and provisions relating to justice are dealt with in Section IV, A, below.

a. life

Article 46 of the Hague Regulations mentions laconically that “the lives of persons ... must be respected,” and this feature is given no further detail, apart from provisions on humanitarian and medical assistance in Geneva Convention IV (see below).

b. identity and culture

There are restrictions on the behaviour of the occupying power towards the inhabitants of occupied territory which are designed to prevent any attempt to change their identity and allegiances, or to break up their way of life. For instance, the occupying power is forbidden from forcing the inhabitants to swear allegiance to it,²³ and from forcing them to furnish information about the enemy’s army and means of defence.²⁴ It is also forbidden from forcing inhabitants to serve in its own armed forces or auxiliaries, or from using pressure or propaganda to encourage voluntary recruitment.²⁵

²³ Hague Regulations, Article 45.

²⁴ Hague Regulations, Article 44.

²⁵ Geneva Convention IV, Article 51.

Forcible population transfers are forbidden, whether of individuals or on a mass scale. In particular, persons protected under Geneva Convention IV (civilians) may not be deported from occupied territory to the territory of the occupying power, nor to any other country. Such deportations are prohibited “regardless of their motive.”²⁶ This does not preclude evacuations for reasons of security or military imperative.

All necessary steps should be taken to establish the identity of children, where this is in doubt, and to register their parentage, and the personal status of these children may not be altered.²⁷

Cultural life is protected in some Articles. For instance, family honour and rights must be respected, as must religious convictions and practice,²⁸ with the specific provisions that ministers of religion must be allowed to give spiritual assistance to their communities and that religious texts must be accepted and their distribution facilitated by the occupying power.²⁹

c. property

The real or personal property of individuals, the state, or public authorities, and of social and cooperative organisations may not be destroyed by the occupying power, except in cases of military necessity.³⁰ The property of municipalities, and of institutions dedicated to religion, charity, education, the arts and science is to be treated as private property. Any seizure, damage or destruction of such institutions, or of historic monuments and works of art and science is forbidden, and it must be made subject to legal proceedings.³¹

d. economy

There is little provision on economic matters, although there are provisions on taxation and property. For instance, private property may not be confiscated,³² pillage is forbidden,³³ taxes should be consistent as far as possible with those previously in force,³⁴ and other levies may be imposed only for the needs of the army or the administration of the territory.³⁵ Also, requisition in kind and of services may take place only in limited

²⁶ Geneva Convention IV, Article 49. Protected persons under this Convention are civilians in the hands of a power of which they are not a national. The detailed definition is in Article 4, and see also Article 5.

²⁷ Geneva Convention IV, Article 50.

²⁸ Hague Regulations, Article 46.

²⁹ Geneva Convention IV, Article 58.

³⁰ Geneva Convention IV, Article 53.

³¹ Hague Regulations, Article 56.

³² Hague Regulations, Article 46.

³³ Hague Regulations, Article 47.

³⁴ Hague Regulations, Article 48.

³⁵ Hague Regulations, Article 49.

circumstances.³⁶ Occupying powers are allowed to take possession of cash, funds and realisable securities belonging to the state, and of movable property belonging to the state which could be used for military operations. Appliances for the transport of persons or the transmission of news, as well as munitions of war, may be seized regardless of whether they are state or private property, but they must be restored or compensated when peace is made.³⁷

There is no mention of mineral resources. However, there is provision in respect of public buildings, real estate, forests and agricultural estates. Under Article 55 of the Hague Regulations the occupying power “shall be regarded only as administrator and usufructuary” of these properties. This means that its rights to make use of them and to enjoy their products are without prejudice to the principle that it may not take title to them.

There is a comment on this in the *Manual of Military Law*, which states that

the Occupant becomes the administrator and usufructuary of the property, but he must not exercise his rights in such a wasteful or negligent way as will decrease its value. He has no right of disposal or sale.³⁸

It goes on to say,

the Occupant may, however, let or utilize public land and buildings, sell the crops on public land, cut and sell timber and work the mines. But he must not make a contract or lease extending beyond the conclusion of the war, and the cutting or mining must not exceed what is necessary or usual. It must not constitute abusive exploitation.

e. humanitarian efforts

The occupying power must, “to the fullest extent of the means available to it,” ensure the food and medical supplies of the population, and this includes bringing in additional supplies if necessary.³⁹ Further, it must, to the fullest extent possible and in cooperation with existing authorities, maintain medical services and public health.⁴⁰ It must cooperate with humanitarian efforts (“relief schemes” in the terminology of the 1940s), and facilitate them by all means at its disposal.⁴¹ It must protect and allow free passage to consignments of food, medicine and clothing, and it must cooperate with and supervise the distribution of relief.

³⁶ Hague Regulations, Article 52.

³⁷ Hague Regulations, Article 53.

³⁸ “The Law of War on Land,” *Manual of Military Law*, Part III, War Office, 1958, as amended, p169, para 609.

³⁹ Geneva Convention IV, Article 55.

⁴⁰ Geneva Convention IV, Article 56.

⁴¹ Geneva Convention IV, Articles 59-63.

f. education

The occupying power must allow the care and education of children.⁴² To this end it must facilitate the work of existing institutions, with the cooperation of the indigenous authorities. In the case of children who have been orphaned or separated from their families, the occupying power must make arrangements for them to be looked after and educated, preferably by people of their own nationality, language and religion, should existing institutions be inadequate.

g. work

The occupying power may compel people over the age of 18 to work, but only on projects which do not entail taking part in military operations, and which are necessary for the needs of the army of occupation, or for public utilities, or for the “feeding, sheltering, clothing, transportation or health” of the inhabitants of the occupied territory.⁴³ Workers should normally be kept in their usual place of employment, and given work which is appropriate to their abilities. Workers must be paid “a fair wage” and they remain subject to the existing labour laws.

h. public officials

The occupying power may remove public officials from their posts, but it may not alter the status of such officials nor that of judges, nor may it pursue against them any sanctions, coercion nor discrimination, if they abstain from fulfilling their functions for reasons of conscience.⁴⁴

B. Other law

There have been developments since the Hague Regulations and the Geneva Conventions.

The first point to make is that they have often been honoured in the breach. Benvenisti, cited above, points out that when the Hague Regulations were agreed it was widely recognised that the occupying power had an *obligation* to establish a political administration (whether civil or military). He argues that states have neglected this responsibility, for a variety of reasons, and that this could be regarded as a development of customary law (without suggesting that it should be).

⁴² Geneva Convention IV, Article 50.

⁴³ Geneva Convention IV, Article 51.

⁴⁴ Geneva Convention IV, Article 54.

Equally, the context is enriched by the development since 1945 of international law on human rights and self-determination. Occupying powers must respect those human rights which are entrenched in international law insofar as is required by the relevant instruments. It could also be argued that they must pay attention to the sometimes mooted “emerging right” to democracy.⁴⁵ This was not present at the time of the Hague Regulations, and, although the imposition of democracy was one of the war aims of the western Allies in World War II, there is no mention of a duty to create democracy in Geneva Convention IV. Laws aimed at traditional belligerent occupiers may not always sit comfortably with the current rhetoric of “liberation,” and an emphasis has developed in international law since 1949 on the rights of peoples to determine their own status.

The creation of the UN is another important new factor. In particular, the Security Council, with its wide-ranging powers in relation to the maintenance of international peace and security, may lend legal authority to the actions of states in a manner barely available to them before 1945.

A feature of the debate before the adoption of Security Council Resolution 1483 was whether and to what extent the actions envisaged by the USA and the UK in Iraq went beyond those allowed under the Hague Regulations and Geneva Convention IV, and whether as a result they were permissible only if authorised by the Security Council.⁴⁶ A feature of the debate henceforth may be the extent to which their future behaviour is consistent with any additional capacity granted in Resolution 1483, and also with the Geneva and Hague provisions.

C. Conclusion

There is no specific written legal requirement that the Security Council must authorise occupations, nor the administrative arrangements used within them. In the case of Iraq, the main purpose of obtaining a mandate in the form of a Security Council resolution was to evade legal difficulties if the occupying powers sought to move beyond the limited rights conferred by the Hague Regulations and Geneva Convention IV to vary existing arrangements.

Security Council Resolution 1483 calls upon the Authority to “promote the welfare of the Iraqi people *through the effective administration* of the territory” (emphasis added). The Resolution confers various roles on the Authority, but it does not list the competences of the Authority in a way that could be taken as limiting. Likewise, it places few specific obligations on the interim administration in Iraq. In Paragraph 9 it merely states its

⁴⁵ F Kirgis, “Security Council Resolution 1483 on the rebuilding of Iraq,” *ASIL Insights*, May 2003.

⁴⁶ J Paust, “The US as occupying power over portions of Iraq and relevant responsibilities under the laws of war,” *ASIL Insights*, April 2003, M O’Connell, “The occupation of Iraq: what international law requires now,” *Jurist*, 17 April 2003.

support for the formation of such an administration, and it indicates that this will be run by Iraqis on a transitional basis until a new government is set up. As noted, the Resolution places the obligation to administer on the Authority, and it also speaks of the eventual new government of Iraq taking over the responsibilities of the Authority, not those of the interim administration.

The Authority and the interim administration obviously will have to comply with the various general points made in the Resolution, such as respecting the territorial integrity of Iraq. Also, there are places in the Resolution where roles are set out for them, or are implied (for instance, where they are to be consulted or to receive cooperation). Beyond this, the general law on occupation, as discussed above, will apply. The Resolution calls for compliance with the Hague Regulations and Geneva Convention IV (it actually mentions all the Geneva Conventions, because provisions not specific to occupation will still apply), and the states taking part in the occupation naturally will remain subject to their existing international legal obligations.

IV Justice

The Saddam Hussein regime was accused of many very serious crimes. These included systematic and widespread torture, arbitrary justice, extrajudicial killing and “disappearances.” Crimes against humanity, and possibly genocide, were committed during campaigns against the Kurds, in particular the Anfal campaign of the late 1980s, and against the Marsh Arabs, in particular in the early 1990s. War crimes were committed during the Iran-Iraq War, and during the invasion, occupation and resistance to the liberation of Kuwait. The brutality of the regime was regarded as a key factor in its survival, and reportedly this plays strongly still in the minds of Iraqis today. There are suggestions that the business of reconstruction may itself be hampered by fear among Iraqis, who have yet to see conclusive proof that the previous regime is wholly unable to return. Justice is likely to be an important issue in practical as well as moral and emotional terms.

Security Council Resolution 1483 does not make detailed provision for the administration of justice. However, as noted above in Section II, B, it addresses the issue in two places.

In the Preamble the Security Council affirms “the need for accountability for crimes and atrocities committed by the previous Iraqi regime.”

In Paragraph 3 it

appeals to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice.

It does not define the membership of “the previous Iraqi regime.”

A. Options

a. *Geneva provisions*

Geneva Convention IV covers the legal system in Articles 64 to 77. These provisions are not aimed primarily at the trial of serious international offences, but they would apply if members of the previous regime were tried in Iraq by the occupying powers.

The existing penal laws should remain in force, unless they constitute a threat to the security of the occupying power or an obstacle to the application of the Convention itself. In these two cases, the laws of the occupied territory may be repealed or suspended by the occupying power. The occupying power may also introduce new laws if these are essential to enable it to fulfil its obligations under the Convention, to maintain order, and to maintain its own security.

It might appear that the maintenance of existing laws would create the absurdity of coalition forces in Iraq having to uphold the oppressive laws and penalties of the Saddam Hussein regime. However, the provision that they may be varied if they present an obstacle to the application of the Convention would seem to circumvent this difficulty. Beyond this, the occupying powers are bound by their other legal obligations, for instance, for the UK, those arising from the *Rome Statute of the International Criminal Court* 1998, and the strict application of existing law could conflict with these. Equally, as mentioned above, there is a precedent in the case of Nazi Germany for existing laws to be set aside on the grounds of their manifest inhumanity.

Under Article 66 the occupying power may establish “non-political military courts” to try offences against the laws it has promulgated. Under Article 68 it may impose the death penalty for these offences, but only in cases of espionage, serious sabotage against its military installations or intentional acts causing death, and only if these were capital offences in the territory concerned before the occupation.

Civilians may not be prosecuted for acts committed before the occupation, except in the case of breaches of the laws and customs of war.

Under Article 67, the courts shall apply only those provisions of law, applicable prior to an offence, “which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned to the offence.”

The fair trial provisions for those prosecuted by the occupying power are set out in Articles 71 to 74. They include the right to be charged in a language understood by the accused, and the rights to present evidence, to call witnesses and to choose legal representation. There is also a right of appeal.

b. International Criminal Court

The Prosecutor of the International Criminal Court (ICC) may investigate a situation either on his own initiative, or at the request of a state party to the Rome Statute of the ICC, or at the request of the Security Council in a resolution adopted under Chapter VII of the UN Charter. If he investigates on his own initiative or at the request of a state party, an indictee must either be a national of a state party or have committed the alleged offences in the territory of a state party. Iraq is not a party to the Rome Statute. If the Prosecutor investigates at the request of the Security Council, these restrictions on nationality and territory do not apply.

Iraqis accused of war crimes, crimes against humanity or genocide could be brought before the ICC at the request of the Security Council. Without a Security Council resolution they could be prosecuted only for crimes committed on the territory of a state party to the Rome Statute. They could not be prosecuted at the ICC for crimes committed before the entry into force of the Rome Statute on 1 July 2002.

c. *ad hoc tribunal*

The Security Council could establish an *ad hoc* tribunal to deal with crimes committed by members of the Iraqi regime, armed forces and others, in the same way that it did for the former Yugoslavia and Rwanda. This would be done by means of a resolution setting out the jurisdiction of the tribunal. The Council could define jurisdiction broadly as it saw fit, citing the relevance to international peace and security, for which it has responsibility. The tribunals for former Yugoslavia and Rwanda have retrospective jurisdiction.

Two other methods have been used in the past. The Nuremberg Tribunal was established by agreement of the Allies, embodied in a treaty, and the Tokyo Tribunal was established under US military powers. Today, the latter would be subject to the Geneva provisions mentioned above.

d. *national courts*

The Iraqi courts could bring to justice those accused of breaking Iraqi law, while third states could seek to prosecute crimes over which they have jurisdiction. Some states claim universal jurisdiction over serious international crimes, such as torture and war crimes.

An alternative model might be found in Sierra Leone. There a Special Court has been established to try those accused of the most serious crimes in the civil war. The Special Court was set up at Sierra Leone's request by means of an agreement between the UN and Sierra Leone. It has a hybrid nature, with jurisdiction over both international crimes and crimes existing under Sierra Leonean law. It is staffed by both local and international judges and prosecutors, appointed partly by the UN and partly by the Sierra Leone Government, after mutual consultation.

B. Comments

The Foreign Secretary, Jack Straw, made comments on trials for members of the Saddam Hussein regime in response to a question by Douglas Hogg:

I cannot give the right hon. and learned Gentleman a precise, definite answer because these matters are still subject to discussion with the United States Government, and they will not be resolved until a functioning interim authority has been established. We want the Iraqi people, in the main, to take responsibility for ensuring justice in respect of former members of the regime. They had no effective justice system during the 24 years of Saddam Hussein's rule, but historically Iraq had a reasonably well functioning and fair judicial system. I held a discussion last week with British Ministers about how our Government could aid and assist in the creation of a new judicial system in Iraq, and I am happy to write to the right hon. and learned Gentleman about that.

There is a question as to whether an international tribunal should be established to try the leaders of the regime. We have not ruled that out, but I am sceptical because of the vast costs of the international tribunals set up to deal with Yugoslavia and, even worse, Rwanda. The right hon. and learned Gentleman did not mention the International Criminal Court, but let me say that it does not have a direct role because its jurisdiction is only for events that took place after July last year.⁴⁷

Pierre-Richard Prosper, the US Ambassador for War Crimes, was interviewed by the *Daily Telegraph* in April 2003. The report gave the following account of his arguments:

those accused of war crimes against US troops in recent weeks or during the Gulf war should be tried by military tribunals or civilian courts in America, while offences against Kuwaitis and Iranians should be dealt with by their respective countries.

As for Saddam's crimes, he believes that the Iraqis themselves should take the lead, and that their former president and his henchmen should be tried in Iraq itself. "We really need to allow the Iraqis the opportunity to do this. They are the victims. It is their country that was oppressed and abused. We want them to have a leadership role, and we're there to be supportive."⁴⁸

The *Economist* argued that the model for trying in the USA those accused of crimes against US forces "should not be contentious," but it went on,

America's current plan for the top leaders of Saddam's regime is far more controversial, and almost certainly a mistake. This is to reject the idea of an international tribunal, and instead to hold trials before Iraqi-only courts. The administration's stated goals are laudable. It rightly argues that the worst crimes of Saddam's regime were against the Iraqi people, and so concludes that they themselves should be the ones to judge their tormentors. Iraqi-controlled trials will also help establish the rule of law in Iraq, claims the administration, providing the cornerstone of a new, sorely-needed legal system.

These are indeed desirable goals, but they are unlikely to be achieved through locally controlled trials of Saddam, if he is caught alive, or his minions. Iraq's judges and lawyers have all been compromised by their own involvement in decades of repression. Returning Iraqi exiles, themselves victims of the regime, would also lack credible impartiality, even in the eyes of most Iraqis. The usual pattern after the fall of dictatorships is the escape of top leaders, revenge killings and kangaroo courts. Such could yet be the turn of events in Iraq. Trials held under American auspices will also be too easy for sceptics, inside as well as outside Iraq, to dismiss as "victors' justice."⁴⁹

⁴⁷ HC Deb 28 April 2003, cc32-3.

⁴⁸ *Daily Telegraph*, 21 April 2003.

⁴⁹ *Economist*, 3 May 2003.

The *Economist* went on to advocate either an international tribunal, as in the cases of former Yugoslavia and Rwanda, or a mixed court, as in Sierra Leone.

V British forces and the International Criminal Court⁵⁰

The UK is a party to the Rome Statute of the ICC, and its forces therefore are subject to the jurisdiction of the ICC. However, the ICC may investigate a matter only if national courts are unable or unwilling to investigate. There are various steps in determining inability and unwillingness, but it falls to the ICC ultimately to decide.

British forces are liable for any criminal acts that might occur on their part under the *International Criminal Court Act* 2001. They could appear before the ICC only if it determined that the UK were unwilling or unable to undertake in good faith investigations and prosecutions under the Act.

The Security Council may request by resolution that the ICC *not* investigate a matter for a period of 12 months, and it may renew this request indefinitely.

⁵⁰ Detail on the ICC is available in Research Paper 01/39, *The International Criminal Court Bill*, 28 March 2001.

Annex I: Security Council Resolution 1483

United Nations

S/RES/1483 (2003)


Security Council

Distr.: General

22 May 2003

Resolution 1483 (2003)
**Adopted by the Security Council at its 4761st meeting, on
22 May 2003**

The Security Council,

Recalling all its previous relevant resolutions,

Reaffirming the sovereignty and territorial integrity of Iraq,

Reaffirming also the importance of the disarmament of Iraqi weapons of mass destruction and of eventual confirmation of the disarmament of Iraq,

Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, *welcoming* the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and *expressing* resolve that the day when Iraqis govern themselves must come quickly,

Encouraging efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender, and, in this connection, *recalls* resolution 1325 (2000) of 31 October 2000,

Welcoming the first steps of the Iraqi people in this regard, and *noting* in this connection the 15 April 2003 Nasiriyah statement and the 28 April 2003 Baghdad statement,

Resolved that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance,

Noting the statement of 12 April 2003 by the Ministers of Finance and Central Bank Governors of the Group of Seven Industrialized Nations in which the members recognized the need for a multilateral effort to help rebuild and develop Iraq and for the need for assistance from the International Monetary Fund and the World Bank in these efforts,

Welcoming also the resumption of humanitarian assistance and the continuing efforts of the Secretary-General and the specialized agencies to provide food and medicine to the people of Iraq,

Welcoming the appointment by the Secretary-General of his Special Adviser on Iraq,

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Affirming the need for accountability for crimes and atrocities committed by the previous Iraqi regime,

Stressing the need for respect for the archaeological, historical, cultural, and religious heritage of Iraq, and for the continued protection of archaeological, historical, cultural, and religious sites, museums, libraries, and monuments,

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority"),

Noting further that other States that are not occupying powers are working now or in the future may work under the Authority,

Welcoming further the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority,

Concerned that many Kuwaitis and Third-State Nationals still are not accounted for since 2 August 1990,

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Appeals* to Member States and concerned organizations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution;

2. *Calls upon* all Member States in a position to do so to respond immediately to the humanitarian appeals of the United Nations and other international organizations for Iraq and to help meet the humanitarian and other needs of the Iraqi people by providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure;

3. *Appeals* to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice;

4. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;

5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;

6. *Calls upon* the Authority and relevant organizations and individuals to continue efforts to locate, identify, and repatriate all Kuwaiti and Third-State Nationals or the remains of those present in Iraq on or after 2 August 1990, as well as the Kuwaiti archives, that the previous Iraqi regime failed to undertake, and, in this regard, *directs* the High-Level Coordinator, in consultation with the

International Committee of the Red Cross and the Tripartite Commission and with the appropriate support of the people of Iraq and in coordination with the Authority, to take steps to fulfil his mandate with respect to the fate of Kuwaiti and Third-State National missing persons and property;

7. *Decides* that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and *calls upon* the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph;

8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through:

(a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organizations;

(b) promoting the safe, orderly, and voluntary return of refugees and displaced persons;

(c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;

(d) facilitating the reconstruction of key infrastructure, in cooperation with other international organizations;

(e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions;

(f) encouraging international efforts to contribute to basic civilian administration functions;

(g) promoting the protection of human rights;

(h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and

(i) encouraging international efforts to promote legal and judicial reform;

9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally

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recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority;

10. *Decides* that, with the exception of prohibitions related to the sale or supply to Iraq of arms and related materiel other than those arms and related materiel required by the Authority to serve the purposes of this and other related resolutions, all prohibitions related to trade with Iraq and the provision of financial or economic resources to Iraq established by resolution 661 (1990) and subsequent relevant resolutions, including resolution 778 (1992) of 2 October 1992, shall no longer apply;

11. *Reaffirms* that Iraq must meet its disarmament obligations, *encourages* the United Kingdom of Great Britain and Northern Ireland and the United States of America to keep the Council informed of their activities in this regard, and *underlines* the intention of the Council to revisit the mandates of the United Nations Monitoring, Verification, and Inspection Commission and the International Atomic Energy Agency as set forth in resolutions 687 (1991) of 3 April 1991, 1284 (1999) of 17 December 1999, and 1441 (2002) of 8 November 2002;

12. *Notes* the establishment of a Development Fund for Iraq to be held by the Central Bank of Iraq and to be audited by independent public accountants approved by the International Advisory and Monitoring Board of the Development Fund for Iraq and looks forward to the early meeting of that International Advisory and Monitoring Board, whose members shall include duly qualified representatives of the Secretary-General, of the Managing Director of the International Monetary Fund, of the Director-General of the Arab Fund for Social and Economic Development, and of the President of the World Bank;

13. *Notes further* that the funds in the Development Fund for Iraq shall be disbursed at the direction of the Authority, in consultation with the Iraqi interim administration, for the purposes set out in paragraph 14 below;

14. *Underlines* that the Development Fund for Iraq shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq;

15. *Calls upon* the international financial institutions to assist the people of Iraq in the reconstruction and development of their economy and to facilitate assistance by the broader donor community, and *welcomes* the readiness of creditors, including those of the Paris Club, to seek a solution to Iraq's sovereign debt problems;

16. *Requests* also that the Secretary-General, in coordination with the Authority, continue the exercise of his responsibilities under Security Council resolution 1472 (2003) of 28 March 2003 and 1476 (2003) of 24 April 2003, for a period of six months following the adoption of this resolution, and terminate within this time period, in the most cost effective manner, the ongoing operations of the "Oil-for-Food" Programme (the "Programme"), both at headquarters level and in the field, transferring responsibility for the administration of any remaining activity under the Programme to the Authority, including by taking the following necessary measures:

(a) to facilitate as soon as possible the shipment and authenticated delivery of priority civilian goods as identified by the Secretary-General and representatives

designated by him, in coordination with the Authority and the Iraqi interim administration, under approved and funded contracts previously concluded by the previous Government of Iraq, for the humanitarian relief of the people of Iraq, including, as necessary, negotiating adjustments in the terms or conditions of these contracts and respective letters of credit as set forth in paragraph 4 (d) of resolution 1472 (2003);

(b) to review, in light of changed circumstances, in coordination with the Authority and the Iraqi interim administration, the relative utility of each approved and funded contract with a view to determining whether such contracts contain items required to meet the needs of the people of Iraq both now and during reconstruction, and to postpone action on those contracts determined to be of questionable utility and the respective letters of credit until an internationally recognized, representative government of Iraq is in a position to make its own determination as to whether such contracts shall be fulfilled;

(c) to provide the Security Council within 21 days following the adoption of this resolution, for the Security Council's review and consideration, an estimated operating budget based on funds already set aside in the account established pursuant to paragraph 8 (d) of resolution 986 (1995) of 14 April 1995, identifying:

(i) all known and projected costs to the United Nations required to ensure the continued functioning of the activities associated with implementation of the present resolution, including operating and administrative expenses associated with the relevant United Nations agencies and programmes responsible for the implementation of the Programme both at Headquarters and in the field;

(ii) all known and projected costs associated with termination of the Programme;

(iii) all known and projected costs associated with restoring Government of Iraq funds that were provided by Member States to the Secretary-General as requested in paragraph 1 of resolution 778 (1992); and

(iv) all known and projected costs associated with the Special Representative and the qualified representative of the Secretary-General identified to serve on the International Advisory and Monitoring Board, for the six month time period defined above, following which these costs shall be borne by the United Nations;

(d) to consolidate into a single fund the accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995);

(e) to fulfil all remaining obligations related to the termination of the Programme, including negotiating, in the most cost effective manner, any necessary settlement payments, which shall be made from the escrow accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995), with those parties that previously have entered into contractual obligations with the Secretary-General under the Programme, and to determine, in coordination with the Authority and the Iraqi interim administration, the future status of contracts undertaken by the United Nations and related United Nations agencies under the accounts established pursuant to paragraphs 8 (b) and 8 (d) of resolution 986 (1995);

(f) to provide the Security Council, 30 days prior to the termination of the Programme, with a comprehensive strategy developed in close coordination with the Authority and the Iraqi interim administration that would lead to the delivery of all

relevant documentation and the transfer of all operational responsibility of the Programme to the Authority;

17. *Requests further* that the Secretary-General transfer as soon as possible to the Development Fund for Iraq 1 billion United States dollars from unencumbered funds in the accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995), restore Government of Iraq funds that were provided by Member States to the Secretary-General as requested in paragraph 1 of resolution 778 (1992), and *decides* that, after deducting all relevant United Nations expenses associated with the shipment of authorized contracts and costs to the Programme outlined in paragraph 16 (c) above, including residual obligations, all surplus funds in the escrow accounts established pursuant to paragraphs 8 (a), 8 (b), 8 (d), and 8 (f) of resolution 986 (1995) shall be transferred at the earliest possible time to the Development Fund for Iraq;

18. *Decides* to terminate effective on the adoption of this resolution the functions related to the observation and monitoring activities undertaken by the Secretary-General under the Programme, including the monitoring of the export of petroleum and petroleum products from Iraq;

19. *Decides* to terminate the Committee established pursuant to paragraph 6 of resolution 661 (1990) at the conclusion of the six month period called for in paragraph 16 above and *further decides* that the Committee shall identify individuals and entities referred to in paragraph 23 below;

20. *Decides* that all export sales of petroleum, petroleum products, and natural gas from Iraq following the date of the adoption of this resolution shall be made consistent with prevailing international market best practices, to be audited by independent public accountants reporting to the International Advisory and Monitoring Board referred to in paragraph 12 above in order to ensure transparency, and *decides further* that, except as provided in paragraph 21 below, all proceeds from such sales shall be deposited into the Development Fund for Iraq until such time as an internationally recognized, representative government of Iraq is properly constituted;

21. *Decides further* that 5 per cent of the proceeds referred to in paragraph 20 above shall be deposited into the Compensation Fund established in accordance with resolution 687 (1991) and subsequent relevant resolutions and that, unless an internationally recognized, representative government of Iraq and the Governing Council of the United Nations Compensation Commission, in the exercise of its authority over methods of ensuring that payments are made into the Compensation Fund, decide otherwise, this requirement shall be binding on a properly constituted, internationally recognized, representative government of Iraq and any successor thereto;

22. *Noting* the relevance of the establishment of an internationally recognized, representative government of Iraq and the desirability of prompt completion of the restructuring of Iraq's debt as referred to in paragraph 15 above, *further decides* that, until December 31, 2007, unless the Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from legal proceedings against them and not be subject to any form of attachment, garnishment, or execution, and that all States shall take any steps that may be necessary under their respective domestic legal systems to assure this protection, and that proceeds and obligations arising from sales thereof, as well as the Development Fund for Iraq, shall enjoy privileges and

immunities equivalent to those enjoyed by the United Nations except that the above-mentioned privileges and immunities will not apply with respect to any legal proceeding in which recourse to such proceeds or obligations is necessary to satisfy liability for damages assessed in connection with an ecological accident, including an oil spill, that occurs after the date of adoption of this resolution;

23. *Decides* that all Member States in which there are:

(a) funds or other financial assets or economic resources of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq as of the date of this resolution, or

(b) funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction,

shall freeze without delay those funds or other financial assets or economic resources and, unless these funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative, or arbitral lien or judgement, immediately shall cause their transfer to the Development Fund for Iraq, it being understood that, unless otherwise addressed, claims made by private individuals or non-government entities on those transferred funds or other financial assets may be presented to the internationally recognized, representative government of Iraq; and *decides further* that all such funds or other financial assets or economic resources shall enjoy the same privileges, immunities, and protections as provided under paragraph 22;

24. *Requests* the Secretary-General to report to the Council at regular intervals on the work of the Special Representative with respect to the implementation of this resolution and on the work of the International Advisory and Monitoring Board and *encourages* the United Kingdom of Great Britain and Northern Ireland and the United States of America to inform the Council at regular intervals of their efforts under this resolution;

25. *Decides* to review the implementation of this resolution within twelve months of adoption and to consider further steps that might be necessary;

26. *Calls upon* Member States and international and regional organizations to contribute to the implementation of this resolution;

27. *Decides* to remain seized of this matter.

Annex II: Letter to the Security Council from USA and UK

United Nations

S/2003/538

**Security Council**Distr.: General
8 May 2003

Original: English

Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council

The United States of America, the United Kingdom of Great Britain and Northern Ireland and Coalition partners continue to act together to ensure the complete disarmament of Iraq of weapons of mass destruction and means of delivery in accordance with United Nations Security Council resolutions. The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. We will act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people.

In order to meet these objectives and obligations in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.

The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall inter alia, provide for security in and for the provisional administration of Iraq, including by: deterring hostilities; maintaining the territorial integrity of Iraq and securing Iraq's borders; securing, and removing, disabling, rendering harmless, eliminating or destroying (a) all of Iraq's weapons of mass destruction, ballistic missiles, unmanned aerial vehicles and all other chemical, biological and nuclear delivery systems and (b) all elements of Iraq's programme to research, develop, design, manufacture, produce, support, assemble and employ such weapons and delivery systems and subsystems and components thereof, including but not limited to stocks of chemical and biological agents, nuclear-weapon-usable material, and other related materials, technology, equipment, facilities and intellectual property that have been used in or can materially contribute to these programmes; in consultation with relevant international organizations, facilitating the orderly and voluntary return of refugees and displaced persons; maintaining civil law and order, including through encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; eliminating all terrorist infrastructure and resources within Iraq and working to ensure that terrorists and terrorist groups are denied safe haven; supporting and

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coordinating demining and related activities; promoting accountability for crimes and atrocities committed by the previous Iraqi regime; and assuming immediate control of Iraqi institutions responsible for military and security matters and providing, as appropriate, for the demilitarization, demobilization, control, command, reformation, disestablishment, or reorganization of those institutions so that they no longer pose a threat to the Iraqi people or international peace and security but will be capable of defending Iraq's sovereignty and territorial integrity.

The United States, the United Kingdom and Coalition partners recognize the urgent need to create an environment in which the Iraqi people may freely determine their own political future. To this end, the United States, the United Kingdom and Coalition partners are facilitating the efforts of the Iraqi people to take the first steps towards forming a representative government, based on the rule of law, that affords fundamental freedoms and equal protection and justice under law to the people of Iraq without regard to ethnicity, religion or gender. The United States, the United Kingdom and Coalition partners are facilitating the establishment of representative institutions of government, and providing for the responsible administration of the Iraqi financial sector, for humanitarian relief, for economic reconstruction, for the transparent operation and repair of Iraq's infrastructure and natural resources, and for the progressive transfer of administrative responsibilities to such representative institutions of government, as appropriate. Our goal is to transfer responsibility for administration to representative Iraqi authorities as early as possible.

The United Nations has a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority. The United States, the United Kingdom and Coalition partners are ready to work closely with representatives of the United Nations and its specialized agencies and look forward to the appointment of a special coordinator by the Secretary-General. We also welcome the support and contributions of Member States, international and regional organizations, and other entities, under appropriate coordination arrangements with the Coalition Provisional Authority.

We would be grateful if you could arrange for the present letter to be circulated as a document of the Security Council.

(Signed) **Jeremy Greenstock**
Permanent Representative of the United Kingdom

(Signed) **John D. Negroponte**
Permanent Representative of the United States

Annex III: Nasiriyah statement

13 point statement released at the end of the meeting in Nasiriyah, 15 April 2003⁵¹

1. Iraq must be democratic.
2. The future government of Iraq should not be based on communal identity.
3. A future government should be organized as a democratic federal system, but on the basis of countrywide consultation.
4. The rule of law must be paramount.
5. That Iraq must be built on respect for diversity including respect for the role of women.
6. The meeting discusses the role of religion in state and society.
7. The meeting discussed the principle that Iraqis must choose their leaders, not have them imposed from outside.
8. That political violence must be rejected, and that Iraqis must immediately organize themselves for the task of reconstruction at both the local and national levels.
9. That Iraqis and the coalition must work together to tackle the immediate issues of restoring security and basic services.
10. That the Baath party must be dissolved and its effects on society must be eliminated.
11. That there should be an open dialogue with all national political groups to bring them into the process.
12. That the meeting condemns the looting that has taken place and the destruction of documents.
13. The Iraqi participation in the Nasiriyah meeting voted that there should be another meeting in 10 days in a location to be determined with additional Iraqi participants and to discuss procedures for developing an Iraqi interim authority.

⁵¹ Directly reproduced from press statement by US Central Command, 15 April 2003, <http://www.state.gov/p/nea/rls/19714.htm>.