

Human rights in Iraq's transition: the search for inclusiveness

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Abstract

The aftermath of the invasion of Iraq set unprecedented challenges to the United Nations in the political and in the human rights spheres. Since the first involvement of the United Nations under Security Council Resolution 1483 (2003), the United Nations, through its assistance mission (UNAMI), has provided support to the process of transition from a military occupation resulting from an unlawful invasion to a fully sovereign and independent state, an objective yet to be fully achieved. The article looks at this trajectory from the angle of the involvement of the Security Council, the legal context, the protection of human rights and the striving for reconciliation, sovereignty and inclusiveness.

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The United Nations in Iraq: a chronology

When US and UK forces invaded Iraq at the end of March 2003, they did so without a mandate from the UN Security Council.¹ On 8 May 2003, a few weeks after the invading forces took Baghdad (9 April 2003), the United States and the United Kingdom addressed a letter to the president of the Security Council, in which they announced the establishment of a Coalition Provisional Authority (CPA) and gave details of its powers and areas of responsibility.² The letter also referred to the efforts aimed at restoring a national government. In particular, groups of Iraqis had been assembled in Nassiriya (15 April 2003) and in Baghdad (28 April 2003) to discuss

the future political arrangements. The letter gave a role for the United Nations principally in the area of humanitarian relief and reconstruction and “looked forward” to the appointment of a special co-ordinator.³

The UN Assistance Mission for Iraq (UNAMI)

On 22 May 2003 the UN Security Council adopted Resolution 1483; it asked the Secretary-General to appoint a Special Representative, who was to have “independent responsibilities” which would involve inter-agency co-ordination and, “in coordination with the Authority, the process of reconstruction and restoration of democratic government”. Five days later, on 27 May 2003, the Secretary-General announced his appointment of Sergio Vieira de Mello, then High Commissioner for Human Rights, as his Special Representative for Iraq, for a four-month term.

On 14 August 2003 the Security Council set up the UN Assistance Mission for Iraq (UNAMI) to enable the United Nations to carry out the mandate assigned to it by Resolution 1483. It also welcomed the establishment “of the broadly representative Governing Council of Iraq” on 13 July 2003 “as an important step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq”. Five days after the establishment of UNAMI, the attack on the UN office in Baghdad took place, taking a heavy toll in life and limb, including the life of the Special Representative of the Secretary-General. The subsequent evacuation by the United Nations of its international staff – following a second attack on 22 September 2003 – brought UN operations to a virtual halt, notwithstanding the heroic efforts of the UN national staff, many of whom continued to carry out a vestige of UN operations in their respective areas in increasingly dangerous circumstances. By this time the security situation had deteriorated to a point that started an exodus which continued into early 2004. Most international organizations, except for a few which had close links with the United States and the United Kingdom, left Iraq. UN staff were evacuated to Cyprus and then later in the year to Jordan. During this time there was much internal reflection on the direction the United Nations should follow. In early December the Secretary-General presented a report to the Security Council in which he gave the UN assessment of developments and the next steps the United Nations would take.⁴

1 “The United Nations Secretary-General Kofi Annan has told the BBC the US-led invasion of Iraq was an illegal act that contravened the UN charter. He said the decision to take action in Iraq should have been made by the Security Council, not unilaterally.” *BBC News*, 16 September 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3661134.stm (last visited 10 September 2007).

2 Security Council document, UN Doc. S/2003/538.

3 *Ibid.* The letter stated, “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.”

4 Security Council document, UN Doc. S/2003/1149, circulated on 5 December 2003.

The Secretary-General also informed the Security Council of his decision to reconstitute UNAMI by setting up a core team under Ross Mountain, who was designated Special Representative *ad interim*. Under his leadership, the United Nations was to resume its presence and reorganize its activities in Iraq. The report gave a comprehensive account of developments prior and subsequent to the 19 August 2003 attack. Throughout the report the Secretary-General repeated his overriding concern for security, given that the level of violence in Iraq had continued to increase. The core team was to include a human rights component. Among other aspects, UNAMI was to relaunch efforts at reconstruction, given the outcome of the Madrid International Donor Conference on 23–4 October 2003.

Preparing the transition

In the effort to support the quest for a transition process that would be acceptable to Iraqis at large, the Secretary-General's Special Adviser Lakhdar Brahimi visited Iraq from 6 to 13 February 2004 on a "fact-finding mission". He was mandated by the Secretary-General to assess the feasibility of holding direct elections before 30 June 2004 and/or the time frame for such elections. A "technical report" annexed to Brahimi's own report gives an assessment of the election processes that would be necessary in the transition. A transitional assembly and a provisional government would ensure the transition; the assembly would be elected and it would draft a constitution; similarly, a provisional government would be formed for the duration of the transition. A suggestion of the Coalition Provincial Administration for a caucus-style process to choose the assembly was rejected in favour of elections. These would take place some time before the end of 2004 or soon thereafter – in fact they took place on 30 January 2005.

Brahimi undertook two further missions to Iraq – from 26 March to 16 April 2004 and from 1 May to 2 June 2004. During the second mission he suggested the convening of a national conference after the handover by the CPA to the Iraq Interim Government, and during his third visit he facilitated an agreement among the Iraqis on arrangements for the transition and the institutions required to enable an interim government to assume power by the end of June 2004. Furthermore, in response to a request of the Interim Prime Minister, Ayad Allawi, the Secretary-General had provided additional support to the Preparatory Committee for the National Conference to assist in making "the Conference as inclusive as possible to reflect Iraq's diversity and range of political opinions".⁵

5 Report of the Secretary-General to the Security Council, UN Doc. S/2004/625, Para 29: "To succeed, the Preparatory Committee must be given sufficient time to make the Conference as inclusive as possible to reflect Iraq's diversity and range of political opinions. It is equally important to ensure maximum transparency so as to allow the Iraqi people to keep themselves fully informed of the nature, scope and purpose of the Conference. Furthermore, the outcome of the Conference should be determined on the basis of a procedure agreed through genuine consultations. The United Nations will continue to assist the organizers of the Conference to achieve consensus among all stakeholders to these ends."

The end of the Coalition Provisional Authority

On 8 June 2004 the Security Council, anticipating the end of the CPA, adopted Resolution 1546 (2004), “Welcoming the beginning of a new phase in Iraq’s transition to a democratically elected government, and looking forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004”.

Shortly thereafter, on 14 July 2004, the Secretary-General announced the appointment of Asharf Jahangir Qazi as his Special Representative for Iraq, to head UNAMI.

Resolution 1546 provided the framework for UN involvement in Iraq between 2004 and 2007. The mandate consisted of two parts: in the first part, UNAMI was to provide assistance and to “play a leading role” in the realization of the “transitional calendar”. This consisted of convening a national conference to select a Consultative Council, supporting the Independent Electoral Commission, the Interim Government and the Transitional National Assembly “on the process for holding elections” and promoting “national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq”. In the second part, UNAMI was expected to “provide advice” to the government of Iraq on a number of issues, including “(iii) [to] promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq”.

During the period 2004 to 2007 the Secretary-General presented regular quarterly reports to the Security Council on developments in the situation in Iraq and on the activities of UNAMI.⁶ These reports reflected the completion of most of the tasks mentioned in Resolution 1546. The National Conference was convened in August 2004. Elections were held on 30 January 2005, leading to the formation of the Transitional Government under Prime Minister Ibrahim al-Jaafari. On 15 October 2005 the referendum on the draft constitution took place, and elections to a 275-member Council of Representatives of Iraq were held on 15 December 2005; a government under Prime Minister Nouri Al-Maliki was subsequently formed.

On 1 August 2006 the Secretary-General informed the Security Council that, with the certification of the election results on 10 February 2006, the transition timetable set out in Resolution 1546 had been completed. An International Compact with Iraq had been set up a few days earlier, at the end of July 2007, on the initiative of the government of Iraq, for the purpose of achieving a national vision for Iraq which aimed “to consolidate peace and pursue political, economic and social development over the next five years”.⁷ The Secretary-General’s Report expressed “serious concern” over the security and human rights situation, and referred to the announcement by Prime Minister

6 These reports are available at <http://www.iraqanalysis.org/info/346> (last visited 22 November 2007).

7 International Compact with Iraq, 27 July 2007, available at <http://www.iraqcompact.org/ICI%20Document.asp> (last visited 22 November 2007).

Al-Maliki on 25 June 2006 of a national reconciliation plan, as a sign of the political will needed to confront crucial human rights problems. “UNAMI looks forward to its continuing engagement with Iraqi ministries, judicial institutions and civil society organizations to support the establishment of a strong national human rights protection system.”⁸

The government formally requested the extension of the UNAMI mandate shortly thereafter: in a letter dated 3 August 2006, the Foreign Minister of Iraq said,

“While the political process envisioned by the Transitional Administrative Law and endorsed by the Council in resolution 1546 (2004) has formally come to an end, there remains much work for Iraqis to do to continue to build democratic legal and political institutions, to reintroduce the rule of law and civil society, to engage in a national dialogue to build peace and security and to rebuild Iraq’s shattered physical and economic infrastructure for the benefit of this and future generations of Iraqis”.⁹

On 10 August 2006 the Security Council adopted Resolution 1700 (2006) – largely pro forma – by which it extended the mandate of UNAMI for a further twelve months.

The current mandate of UNAMI

The current UN mandate in Iraq is enshrined in Security Council Resolution 1770 (2007), adopted on 10 August 2007. Shortly before the adoption of this resolution, the government of Iraq had formally requested the extension in a letter from the Foreign Minister to the President of the Security Council, stating,

“During the coming period, the interests of Iraq require that the role of UNAMI should be expanded and activated on both the humanitarian and political tracks, at home and in the region, and that the specialized United Nations agencies, funds and programmes should be brought back to work, each in its area of specialization, to reconstruct and stabilize the country, to contribute to the coordination and delivery of humanitarian assistance pursuant to the obligations contained in the Charter and to launch comprehensive campaigns to address the deterioration of the infrastructure”.¹⁰

The government specifically described a number of areas where support was needed:

- 8 Letter dated 1 August 2006 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2006/601: “The announcement of a national reconciliation plan by the Prime Minister on 25 June provided a sign of political will needed to confront crucial human rights problems.”
- 9 Security Council document, UN Doc. S/2006/609, 3 August 2006.
- 10 Security Council document, UN Doc. S/2007/481, Annex.

- “• Supporting the efforts of the Government of Iraq and the Council of Representatives to review the Constitution and implement its provisions;
- Advising the Government of Iraq and the Independent High Electoral Commission on the development of election and referendum processes;
- Supporting the efforts of the Government of Iraq with regard to national dialogue and comprehensive national reconciliation and ensuring respect for constitutional mechanisms in dealing with contentious cases;
- Supporting the efforts of the Government of Iraq with regard to the facilitation of regional dialogue;
- Protecting human rights and reforming the legal and judicial systems in order to strengthen the rule of law;
- Providing training sessions, workshops and conferences on topics relevant to Iraq, within Iraq;
- Organizing sessions for Iraqi diplomats at United Nations institutes and, in particular, the United Nations Institute for Training and Research (UNITAR);
- Conducting a general population census;
- Addressing the problem of Iraqi refugees and displaced persons, at home and abroad, and coordinating with States and the relevant specialized agencies in order to provide for their needs and create conditions conducive to their return to Iraq;
- Following up on implementation of the International Compact with Iraq and encouraging participating States to implement their commitments;
- Following up on implementation of the decisions of the International Ministerial Conference of the Neighbouring Countries of Iraq held in Sharm El-Sheikh and the three committees which arose from the Conference.”

The resulting resolution (SCR 1770 (2007)), which was adopted on 10 August 2007, spelled out the mandate of UNAMI on the lines of the content of the letter of the Iraqi Foreign Minister. It mandated the Special Representative of the Secretary-General and UNAMI, at the request of the Government of Iraq, to

- “(a) Advise, support, and assist” the government in the implementation of various activities related to the national processes of national reconciliation, national security, and related issues, including the planning of a “comprehensive census”.
- “(b) Promote, support, and facilitate” a number of measures aimed at the reconstruction of the country and its institutions, including the provision of social services and the co-ordination of development activities and related funds,

“(c) And also promote the protection of human rights and judicial and legal reform in order to strengthen the rule of law in Iraq”.¹¹

“ ... as the circumstances permit”

This chronology shows the developments in the situation of Iraq since the invasion. The reality during these years – as has been widely reported – has been fraught with problems. The term “as circumstances permit”, for example, which is found in the main resolutions, refers to the security situation in the country, which is a serious obstacle to the achievement of the objectives set out in these mandates. This was stated explicitly in the current mandate in Resolution 1770 (2007);¹² in August 2006 the Secretary-General, in recommending the extension of the UNAMI mandate, spelled this out in his report of August 2006, stating,

“Despite severe operational and security constraints, UNAMI has further grown in size and has expanded its activities beyond Baghdad. However, in the light of the prevailing security situation which remains a matter of great concern, “as circumstances permit” will remain the defining operating principle for all United Nations activities in Iraq for the foreseeable future. There are a total of 396 international civilian and military personnel in Iraq, including up to 300 in Baghdad, 74 in Erbil and 22 in Basra. Progress has been made on the development of an integrated long-term United Nations complex in Iraq and new premises in Erbil and Basra have now been completed”.¹³

A number of obstacles have been described in the reports presented by the Secretary-General to the Security Council since the beginning of the involvement of the United Nations. The first two such reports, prepared under the first of these mandates (SCR 1483 (2003)) in 2003, are significant in terms of understanding the trend developing at the time. The first, circulated on 17 July 2003,¹⁴ gave a complete assessment of the situation as it then stood, and was the first report on Sergio Vieira de Mello’s activities. The second report, circulated on 5 December 2003,¹⁵ completed the July report and set out a number of considerations with regard to future directions and priorities. It shed light on the manner in which the United Nations adapted its approach to the situation in Iraq as a result of the attack of 19 August 2003 and the subsequent evacuation from Iraq. The report concluded,

“Of paramount importance is the need to uphold the independent role of the United Nations, as set out in Security Council resolution 1483 (2003). The

11 UN Doc. S/Res/ 1770 (2007), Adopted by the Security Council at its 5729th meeting, on 10 August 2007, paragraph 2.

12 Ibid., paragraph 2.

13 Security Council document, UN Doc. S/2006/601, page 3.

14 Security Council document, UN Doc. S/2003/715, 17 July 2003.

15 Security Council document, UN Doc. S/2003/1149, 5 December 2003.

legitimacy and impartiality of the United Nations is a considerable asset in promoting the interests of the Iraqi people.”

These reports, as well as others issued over time by the United Nations, including the human rights reports, although prepared using careful language, reflected a complex situation in the political, security, humanitarian and human rights sectors. A number of factors influenced and contributed to this complexity. The following parts of this article examine the legal context, the challenges to the implementation of the UN mandate, the development of the work of the Human Rights Office in this environment and the problem of “inclusiveness”, otherwise known as national reconciliation.

The legal context

The CPA governed Iraq through a variety of regulations, orders and so on. It created new ministries (among them the Ministry for Human Rights, the Ministry for the Environment and the Ministry for Displacement and Migration) reintroduced the Supreme Council of the Judiciary – to separate the judiciary from the Ministry of Justice – and a number of other institutions, such as the Iraqi Property Claims Commission.¹⁶

New ministries

The creation of the new ministries was significant. They constituted a response to the particular needs of Iraq arising from the situation before and after the invasion. The Ministry for Human Rights provided a much needed outreach to victims of human rights violations and a bridge to the governmental structures. It worked well with Human Rights Office of UNAMI, and a number of modest improvements could be reported. A significant measure was the creation of a prison-monitoring department with the power to visit regularly prisons all over the country. The Environment Ministry had the huge task of cleaning up the country, including the military debris resulting from all the fighting that had taken place on Iraqi soil over the previous thirty years and which was continuing. It also included the repairing the damage to land and waters resulting from, among other

16 A complete list of regulations, orders, etc. issued by the Coalition Provisional Authority is available at <http://www.iraqcoalition.org/regulations/index.html> (last visited 22 November 2007).

The site defines the various issuances as follows:

Regulations – are instruments that define the institutions and authorities of the Coalition Provisional Authority (CPA).

Orders – are binding instructions or directives to the Iraqi people that create penal consequences or have a direct bearing on the way Iraqis are regulated, including changes to Iraqi law.

Memoranda – expand on Orders or Regulations by creating or adjusting procedures applicable to an Order or Regulation.

Public Notices – communicate the intentions of the Administrator to the public and may require adherence to security measures that have no penal consequence or reinforces aspects of existing law that the CPA intends to enforce.

causes, the use of depleted uranium. Another major challenge for the Environment Ministry was the regeneration of the marshlands in the south of the country. The Ministry of Displacement and Migration had a formidable mandate ranging from the expected return of refugees to Iraq – notably from Iran – to managing the plight of the hundreds of thousands of persons internally displaced during the previous regime. Its meagre resources were to be further stretched as a result of the internal displacement of hundreds of thousands as a result of the ongoing violence.

CPA legislation

The legislative activity of the CPA – and indeed of the Iraq Interim Government that succeeded it – found only residual application.¹⁷ This may be due to three main reasons: in the first place, it was – and remained – physically impossible to enforce the law because of the absence of the state structures normally entrusted with maintaining order and the administration of justice. Second, most Iraqis did not accept what they considered to be the law of the occupier. Third, the absence of social and civil security did not allow the development of normal life.

Perhaps the most significant legislative act of the CPA was the Law of Administration for the State of Iraq for the Transitional Period (TAL), enacted on 8 March 2004 for the purpose of organizing the transition to a sovereign and independent Iraqi government.¹⁸ This law may be characterized as an attempt to foreshadow the constitution. The fact that it was the product of the occupation authority considerably reduced its influence among Iraqi legislators. Drafts prepared by the major parties played a more important role in the drafting process in 2005. Nevertheless, the law of administration ensured that some fundamental issues were on the agenda; these included a bill of rights, as well as the institutions to ensure the application of such rights, the guarantees regarding the representation of women and the protection of the several minorities that help to make up Iraq.

A number of these regulations and orders continue to apply in Iraq, notably Order no. 17 (Revised) promulgated on 24 June 2006, four days prior to the end of the CPA. This gave immunity to personnel of the Multi-national Force (MNF), and to “Certain Missions and Personnel in Iraq” including contractors, defined as “non-Iraqi legal entities or individuals not normally resident in Iraq, including their non-Iraqi employees and Subcontractors not normally resident in Iraq, supplying goods or services in Iraq under a Contract”, and private security companies, defined as “non-Iraqi legal entities or individuals not normally resident in Iraq, including their non-Iraqi employees and Subcontractors not normally resident in Iraq, that provide security services to Foreign Liaison Missions and their Personnel, Diplomatic and Consular Missions and their

17 The CPA legislation would require a separate analysis in regard to its consistency with the relevant provisions of international humanitarian law governing occupation.

18 Law available at <http://www.cpa-iraq.org/government/TAL.html> (last visited 22 November 2007).

personnel, the MNF and its Personnel, International Consultants and other Contractors”.¹⁹ Section 5 of the Order gave the responsibility to the “sending State” to determine requests for waiver of immunity from the “Iraqi legal process”.

Among these orders a number have been invoked as contributing to the chaos affecting law and order in Iraq. Notably, Order 2 of 23 May 2003 dissolved a number of “entities”, among them the army, the air force, the navy, the air defence force and other regular military services.²⁰

Transition challenges

Independence

Given the situation on the ground and the failure to secure an inclusive national Iraqi political base, discussed further below, the implementation of the UN mandate in Iraq presented several challenges. The main challenge in carrying out the mandate in Resolution 1546 (2004) lay in bringing about, through a credible transition that was itself sovereign and independent, a sovereign and independent government. This was not easy to accomplish, as it would be the product of and ultimately (at least de facto) under the authority of those who had invaded and occupied Iraq. In practical terms, although the CPA had passed on its “authority” to the Iraq Interim Government, the latter was still dependent on the (foreign) political will of the United States. Regardless of the references in the resolution, the exercise of powers which constitute sovereignty and independence had merely passed from the CPA to the US embassy. The Iraqi public – and political leadership, barring minor exceptions – was under no illusion as to who was in charge.

The independence of the UN’s operation in Iraq was equally severely limited, as was its freedom of operation, due to the lack of security and the dependence on the security coverage of the US forces (and UK forces in the south). Security was made even more complicated with the continuing influx of violent elements, including al-Qaeda, and the actions of some private security groups, among them foreign contractors, who enjoyed immunity under CPA Order 17 (Revised). The qualification of “independent” in Resolution 1483 (2003) for the mandate of the Special Representative did not appear in the version of the same mandate given in Resolution 1546 (2004).

19 Order 17, available at <http://www.iraqcoalition.org/regulations/index.html#Regulations> (last visited 22 November 2007).

20 Order 2, available at <http://www.iraqcoalition.org/regulations/index.html#Regulations> (last visited 22 November 2007).

The caveat requested by the Iraqi government

Another challenge to UNAMI in the implementation of its mandate consisted of the caveat “as requested by the Government of Iraq”, given the fact that the “government of Iraq” itself was in serious need of the capacity building that would enable it to formulate the request for support in the areas covered by paragraph 7 of Resolution 1546 (2004).²¹ The support for the reform of the judicial and legal sectors mentioned in the mandate of the Human Rights Office, for instance, was a classic example of this type of situation.

The security situation

A third challenge was the security situation. The words “as circumstances permit” made any action by the United Nations contingent on the security situation. Although there was a gradual increase in the UN presence in Iraq, the international presence in Iraq remained – and remains – symbolic. International organizations still operated from Amman, Jordan, and a few conducted periodic visits to Iraq under very strict security conditions. Virtually all the international non-governmental organizations which had left during 2003–4 had not returned. Responsibility for the implementation of such activities as they might still run continued to be entrusted to national Iraqi partners. A notable exception which deserves recognition was Human Rights Watch. The Secretary-General, understandably, was extremely cautious in authorizing any presence in Iraq, even with the security guarantees extended by the Coalition Forces. Hence the mention in the letter of the Foreign Minister of Iraq to the Security Council, which led to Resolution 1770 (2007), that these organizations, “the specialized United Nations agencies, funds and programmes should be brought back to work, each in its area of specialization, to reconstruct and stabilize the country, to contribute to the

21 Security Council Resolution 1546 (2004), paragraph 7, spells out the mandate of UNAMI:

“7. Decides that in implementing, as circumstances permit, their mandate to assist the Iraqi people and government, the Special Representative of the Secretary-General and the United Nations Assistance Mission for Iraq (UNAMI), as requested by the Government of Iraq, shall:

- (a) play a leading role to:
 - (i) assist in the convening, during the month of July 2004, of a national conference to select a Consultative Council;
 - (ii) advise and support the Independent Electoral Commission of Iraq, as well as the Interim Government of Iraq and the Transitional National Assembly, on the process for holding elections;
 - (iii) promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq;
- (b) and also:
 - (i) advise the Government of Iraq in the development of effective civil and social services;
 - (ii) contribute to the coordination and delivery of reconstruction, development, and humanitarian assistance;
 - (iii) promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq; and
 - (iv) advise and assist the Government of Iraq on initial planning for the eventual conduct of a comprehensive census.”

co-ordination and delivery of humanitarian assistance pursuant to the obligations contained in the Charter and to launch comprehensive campaigns to address the deterioration of the infrastructure”.²²

The Human Rights Office

In these circumstances, with the return of UNAMI in 2004, the re-established Human Rights Office had to identify its *modus operandi*. The United Nations had given priority to human rights issues from the first days of its involvement in Iraq. The two reports presented to the Security Council by the Secretary-General in 2003 contain detailed assessments of the human rights situation in the country. A human rights officer was deployed as part of the core UN team that was to resume the presence in Baghdad with the Special Representative of the Secretary-General in August 2004.

Mandate

The mandate of the Human Rights Office was described in Resolution 1546 (2004) paragraph 7(b)(iii) as to “promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq”. Under Resolution 1770 (2007) the mandate is to “promote the protection of human rights and judicial and legal reform in order to strengthen the rule of law in Iraq”. Working with and through national Iraqi organizations, mainly in Baghdad and Amman, the Human Rights Office re-established links with a number of Iraqi non-governmental groups. This was also accomplished by visits by the Office to the southern governorates and to the north, where these contacts were consolidated and new ones were made. Eventually the Human Rights Office established a presence in Basra and Erbil, in addition to its offices in Baghdad and Amman. The Basra office discontinued operations in 2006, when the security situation worsened in that area.

The Office advised the Special Representative of the Secretary-General on human rights aspects of his mandate – it became clear that, in the case of Iraq, human rights considerations were an integral part of the political dialogue. The problems inherited from the pre-invasion period required urgent and serious attention, as did those that arose after the invasion. The Office therefore needed to focus on supporting the transition of Iraq whilst a large part of it was under military attack; it also had to address the post-invasion human rights realities. For this reason the situation in Iraq, from a human rights operational standpoint, presented unique challenges. The Office was able to keep up to date on the day-to-day human rights situation around the country and to interact with networks of Iraqi groups and organizations in the area of human rights. These contacts were

²² Security Council document, UN Doc. S/2007/481, Annex.

further supplemented by regular encounters with representatives of key ministries and other authorities (including US military authorities).

Reconstruction and the Human Rights Programme

This also enabled the Human Rights Office to develop activities in support of the general effort of reconstruction. To the extent that human rights issues were an essential component of national reconciliation, the Office needed to be up to speed on the human rights reality prevailing in the country. For this purpose, in addition to its ongoing monitoring work with individuals, civil society groups and officials, it formulated and supported initiatives by the Iraqi authorities. These included establishing a National Centre for Missing Persons in Iraq and a National Human Rights Institution, strengthening the civil police, strengthening monitoring of prisons by the Ministry for Human Rights and supporting national human rights groups.

A Human Rights Programme was compiled, composed of projects put forward by other agencies and programmes of the UN system. These projects were grouped according to the various fields to which they related, such as education, health, the administration of justice and so on.²³ Through its interaction with other international partners and with the emerging Iraqi authorities, the Human Rights Office contributed to the overall UN effort in both the political process and that of reconstruction.

In late 2005, under the leadership of the Minister of Planning, sectoral working groups were established in Baghdad for the purpose of co-ordinating the needs of the concerned government ministries, thereby enabling the donor community to better rationalize support. One such sectoral working group was dedicated to the rule of law sector. Chaired by the Chief Justice, the working group was composed of high-level officials from the ministries of Defence, Interior, Justice, Human Rights, Labour, and Social Affairs and Planning. The Human Rights Office and the European Commission were designated as the lead donors for the purposes of ensuring co-ordination and support for this group.

Monitoring

A fundamental task for the Human Rights Office was to establish an effective monitoring system to enable it to carry out its mandate. This required establishing contact with Iraqi civil society, itself very much in its infancy – with the exception of the Kurdish region – and made up of organizations of various levels of dedication. By the end of 2005 a valuable network of such organizations had been formed, and contact with individuals and groups was reasonably sound. It also required establishing contact with Iraqi and non-Iraqi authorities.

23 Available at <http://www.uniraq.org/aboutus/HR.asp> (last visited 1 December 2007).

These monitoring activities enabled the Office to establish a reasonably complete picture of the human rights reality prevailing in the country. It also enabled the Office to identify areas in which the root causes of the problems lay. Thus the Office maintained regular contact not only with its line Ministry, the Ministry of Human Rights, but also the Ministry of Interior, of Defence and of Justice, and with the Supreme Council of the Judiciary. Starting in July 2005, the Human Rights Office issued a bimonthly public report on the situation of human rights in Iraq. These reports, although carefully worded, illustrated the steady degradation in the human rights situation.²⁴ In addition, the quarterly reports of the Secretary-General to the Security Council included updates on the human rights situation, in which similar concerns were relayed.²⁵ Through its regular meetings with the authorities, civil society, and individuals and groups, the Office worked towards the inclusion of human rights issues at the decision-making levels of government and other authorities, in an effort to obtain action to address these problems.

In the rule of law area the problems identified were consistent with those in other sectors: lack of absorption capacity, severe limitations due to security problems, political uncertainty and so on.

Humanitarian consequences of military operations and detention

In addition to the weaknesses in the national capacity, the human rights situation of was made worse by the military interventions in search of presumed terrorists. For a number of months a large part of Anbar governorate continued to be the theatre of military operations, which produced considerable adverse humanitarian consequences in terms of civilian casualties, displacement and so on. The so-called “new displacements” – to distinguish them from those that took place prior to the invasion – ran into hundreds of thousands. The use of certain measures, such as cutting off water and power, the targeting of families in search of individuals and the firepower used, including aerial attacks, all gave rise to serious allegations of violations of the law of armed conflict, including that relating to the protection of civilians and the disproportionate use of force.

Another serious human rights issue resulting (principally) from these military interventions was the taking into custody of large numbers of men, in the hope that some of them were terrorists who were being sought. These arrests produced thousands of detainees, mostly held under MNF custody in detention facilities (including Abu Ghraib and Camp Bucca) run by them. In its report for the period 1 April to 30 June 2007, the Human Rights Office gave the number of Iraqis in detention as of the end of June 2007 as 44,235, made up of detainees, security internees and sentenced prisoners. Of these, 21,107 were held in MNF custody.²⁶

24 The reports are available at <http://www.uniraq.org/aboutus/HR.asp> (last visited 20 October 2007).

25 The reports are available at <http://www.un.org/documents/repsc.htm> (last visited 22 November 2007).

26 Human Rights Report 1 April–30 June 2007, available at <http://www.iraqanalysis.org/info/346>, paragraph 57 (last visited 20 October 2007).

The human rights situation remained serious; arbitrary arrests and detentions, and summary executions continued to occur regularly. Allegations of torture remained rife and rampant, with evidence emerging from interviews and from observing that the bodies of many deceased bore signs of summary and arbitrary execution. The number of abductions remained high.

Reconciliation, sovereignty and inclusiveness

The restoration in post-invasion Iraq of a sovereign and independent state presented extraordinary challenges. The official end of the occupation – as determined by Security Council Resolution 1546 (2004) – altered the technical nature of the governing structures in Iraq. The CPA had de facto power by virtue of the military conquest of Iraq and the removal by force of the governing regime; the process of restoring a sovereign government consistent with the resolution presented serious challenges, given the fact that the “fully sovereign and independent Interim Government of Iraq” itself resulted from the invasion and occupation of Iraq, contrary to – among others – Article 2 of the UN Charter.

The challenge was that of creating a fully sovereign and independent government out of a temporary (foreign) civilian administration governing during military occupation. The process of consulting the people of Iraq – an essential condition for a government to be fully sovereign and independent – was a particularly complex one, given the fact that the ousted regime had consistently violated human rights and acted against many of its own people. The reports of the Special Rapporteur of the Commission on Human Rights of the United Nations between 1992 and 2004 contained ample and well-documented evidence of these violations.²⁷

The absence of legitimacy

The process of establishing legitimacy in Iraq following the invasion was further complicated by the fact that the Iraqi people had no say in choosing their interim authorities – nor, for that matter, in getting their country invaded. The Interim Governing Council, which was appointed by the CPA, had no legitimacy (as far as “sovereignty” is concerned) and was certainly not inclusive. It was dissolved on 1 June 2004 in anticipation of the CPA itself handing over power (on 28 June 2004) to an Iraq Interim Government (the Allawi government). This government had been appointed under the CPA and was also neither inclusive nor “sovereign”. The fact that these institutions were acknowledged by the Security Council did not necessarily make them acceptable to the Iraqi people.

27 The reports of the Special Rapporteurs on Iraq between 1991 and 2004 and related documents are available at <http://www.ohchr.org/english/countries/iq/mandate/index.htm> (last visited 20 October 2007).

The National Council, acting as a kind of legislative watchdog, was appointed by the National Conference convened on 17 August 2004. The conference was intended to reflect all sectors of the Iraqi people. It was convened following the recommendation of UN Special Representative Brahimi following consultations in Iraq and the dropping of the Bremer proposal for a regional “caucus” process. The National Conference did not produce the hoped-for inclusiveness. At the conference, the then newly appointed Special Representative Qazi emphasized – as he consistently did subsequently – the need to ensure the inclusion of all Iraqi groups in the process of national reconciliation and restoration of sovereignty and independence.²⁸ This was – and remained – an essential condition in the reconstruction of Iraq.

The lack of inclusiveness

In the circumstances, with the US military campaign taking place within the mainly Sunni areas of Iraq, this inclusiveness was not likely to happen. The two attacks on Falluja in 2004 (April and November), and the military campaign in Ramadi, Haditha, Qa'im, Talafar and elsewhere produced further “exclusion”. Furthermore, the absence of effective law enforcement and the administration of a severely limited justice system in most of the country (the Kurdish region being a notable exception, having different problems) did not produce the inclusion required for national reconciliation. The election of the Transitional Assembly at the end of January 2005 further exacerbated the lack of inclusiveness in the

28 See, e.g., Speech of the Special Representative of the Secretary-General United Nations Assistance Mission for Iraq, Inaugural session of the Kurdistan National Assembly, 4 June 2005/Erbil: “The extraordinary diversity of peoples of this region, encompassing Kurds, Arabs, Turcoman, Assyrians and many others, is a priceless national asset. The Kurdistan National Assembly accordingly has a historic opportunity to demonstrate that the new era in Iraq will be one where democratic principles are enshrined in effective participatory institutions, where differences can be vigorously but responsibly debated in public, where political leaders are accountable to the electorate and where government is conducted with a compelling sense of public service and transparency. You have the opportunity and capability and, dare I say, obligation to provide a beacon and example to the rest of Iraq.”

Remarks of Mr Ashraf Jehangir Qazi to the Preparatory Meeting for the Conference for Iraqi National Accord, 19 November 2005: “In the course of 2006, the Secretary-General has directed me to ensure that the work of the United Nations Assistance Mission for Iraq supports national reconciliation. Accordingly after the election and formation of the permanent government, we will devote our efforts in regard to the political process, human rights, humanitarian assistance and development and reconstruction as well as institutional capacity building to bolstering the work of those who are trying to bring Iraq's communities to a new level of mutual understanding and toleration. This will not be easy nor will it yield immediate results. We will continue to work with all Iraqis involved to ensure that the crimes of the past, and of the present, are dealt with fairly and transparently. It seems repetitive to say that Iraq's citizens have suffered too much for too long – yet it is glaringly true.”

Ambassador Ashraf Jehangir Qazi, Speech to the National Conference, 15 August 2004, available at <http://www0.un.org/apps/news/story.asp?NewsID=11638&Cr=Iraq&Cr1> (last visited 1 December, 2007): “Voicing deep regret over the loss of life and casualties suffered by the Iraqi people, he emphasized the importance of a broad and inclusive political process and moderation in advancing the political transition. The most immediate goal, he said, is the election of a “credible and inclusive” Interim Council to ensure successful elections by the end of January 2005 and the transition of Iraq to a constitutional democracy by the end of that year.”

political process of return to sovereignty, and deprived the drafting of the constitution of an essential requirement of its very *raison d'être*. The Iraqi Interim Government was in place until 7 April 2005, when, following the elections, the Transitional National Government (the al-Jaafari government) took over.

Thus the entire transition process envisaged at the end of the Coalition Provisional Authority failed to produce the essential element on which a sovereign Iraq could be built: the popular participation of the country in all its component elements. The participation of some Sunni groups in the 15 October 2005 referendum was an encouraging sign that this lack of inclusiveness was finally being reversed. The significant feature of the Sunni participation in the referendum was the massive rejection of the draft constitution, coming very close to a veto of the draft.²⁹ That dramatically showed the extent of the effect of the lack of inclusiveness in the political process up to then – and the urgent need to address it.

The elections of 15 December 2005 reflected a wider participation by Sunni groups. This was particularly significant, given the fact that the US military campaign – with a short lull during the polling – continued unabated in Sunni areas. The negotiations on the constitution would resume in a Review Committee, in accordance with Article 142 of the Constitution, to address the concerns of those – mostly Sunni – who had not participated in the constitution-making process in the Transitional Government.

By the time that this enhanced participation in the political process started to take place, the level of violence had assumed a life and a momentum of its own. The progress in restoring an inclusive political process was not reflected in the day-to-day life in the country.

The failing administration

The Transitional National Assembly was unable to provide the country with a working system of administration of justice. That sector, in particular the police, was not functioning. Economic instability continued to create considerable unemployment and hardship. The absence of basic services such as electricity reflected the plight of the country. This lack of security – physical and economic –

29 Report of the Secretary-General to the Security Council, UN Doc. S/2005/766, 7 December 2005, paragraph 10: “In accordance with the Transitional Administrative Law, the referendum was to be considered successful and the draft constitution ratified if a majority of the voters approved and if two thirds of the voters in three or more governorates did not reject it. According to the final certified results released by the Electoral Commission on 25 October, 64.6 per cent of all eligible voters turned out to participate in the referendum, with 79 per cent voting in favour and 21 per cent against. A total of 9,852,291 votes were cast from 6,235 polling centres and more than 32,000 polling stations. Two governorates voted by more than two thirds to reject the constitution: Al Anbar (3 per cent yes, 97 per cent no); and Salahaddin (18 per cent yes, 82 per cent no). While a majority of voters in Ninewa rejected the constitution (45 per cent yes, 55 per cent no), the outcome fell short of the two thirds majority threshold required to qualify as a “no” vote. Thus, given that the majority of the electorate voted in favour of the constitution and only two governorates voted against it, the Board of Commissioners of the Electoral Commission decided that the draft constitution was adopted.”

produced a situation of further lawlessness, violence and instability. The extent of the criminal element thus produced was – and continued to be – grossly underestimated. In the Transitional Government, the Ministry of the Interior further complicated the situation by giving the police force a partisan image by bringing in militias from the political parties which now formed part of the government. Several serious attacks on civilians were attributed to such units, so that the police force, rather than providing protection, was in such cases the perpetrator of violence against the very civilians whom it was established to protect.

The absence of functioning, internal accountability mechanisms in the Ministry of Interior – in spite of a Human Rights Department and an Inspectorate-General – gave such elements virtual freedom to operate. The Transitional National Government also manifested no political will to address this very serious situation. In late 2005, US forces raided a bunker in which the ministry was holding some 170 detainees, many of whom had been tortured. Investigations announced by the Prime Minister at the time, as well as subsequent reports of other sites of the unlawful detention of thousands of others, remained without any conclusion.³⁰ The Special Representative of the Secretary-General as well as the High Commissioner for Human Rights had offered international support to the government to conduct such investigations to support efforts at addressing illegal detention. This strengthened the view that the government was unable to carry out the basic obligation of protecting its own citizens against arbitrary arrest, detention and torture. It also exemplified the level to which the protection of the right to life had sunk, with ever-increasing reports of mass summary executions. The fact that the Minister of Interior was himself a former militia leader did not help. Thus by this time, Iraq faced a schizoid existence where on the one hand a political dialogue continued, while on the other the situation in the streets continued to deteriorate, giving rise to speculation about the existence of a civil war.

How is the continuing military intervention by US forces to be reconciled with the attainment of a sovereign and independent Iraq post-28 June 2004?

The US military intervention and a sovereign Iraq

The military intervention had been justified by invoking the request of the Iraqi authorities – respectively the Interim and the Transitional Government – and the response of the US authorities – respectively Secretaries of State Colin Powell and Condoleezza Rice – as formulated in letters annexed to Security Council

30 See www.uniraq.org, Human Rights Reports: Report for 1 November 2005 to 31 December 2005, paragraphs 7 to 11; Report for 1 January 2006 to 28 February 2006, paragraph 28; Report for 1 March 2006 to 30 April 2006, p. 7. See also Amnesty International, "Iraq: one year on, still no justice for torture victims", public statement, 10 November 2006 (AI Index MDE14/038/2006/ (Public)).

Resolutions 1546 (2004)³¹ and 1637 (2005).³² This exchange of letters confirmed the status of the thousands of detainees taken into custody in such military operations as that of “internment for imperative reasons of security”. As such, they were to be protected by the provisions of the Fourth Geneva Convention relating to such a category of detainees. The numbers, duration and conditions under which such persons were held was not consistent with the provisions of the Fourth Geneva Convention, and the Human Rights Office of UNAMI repeatedly raised this issue with the Iraqis and the US military authorities.

In addition it should be borne in mind that the protection of civilian persons under international humanitarian law was additional to the protection of civilians rendered necessary by hostilities. The protection under this law was therefore supplementary to that afforded by international human rights law. This is particularly important with regard to protection of the right to life, and protection from arbitrary detention, torture and so on. Civilians are therefore to enjoy reinforced protection during abnormal conditions due to armed conflict. In its most recent report on the human rights situation in Iraq, the Human Rights Office sets out continuing disparities in the interpretation by the US authorities of the applicability of human rights law and international humanitarian law.³³

Concluding observations

The human rights situation was already very serious in the years leading up to the invasion. The reports of the Special Rapporteur of the Council for Human Rights documented the egregious violations reported during the period immediately following the 1991 Gulf war.³⁴ Prior to that, Iraq had been the scene of violations, notorious among them, but by no means alone, the chemical weapons attacks on the people of Halabja and Suleimaniya. The war with Iran had generated massive violations, as may be attested by the mass graves that are now a matter of record – testimony to the inability of the international community to address such situations.

The invasion created in the minds of many Iraqis the hope and expectation that they would no longer have to fear for their safety and security, and that a new era of freedom and respect for human rights was about to dawn. Sadly, this has not been the case; since the invasion, the human rights situation has continued to deteriorate. Already, in his first report under Resolution 1483 (2003),

31 UN Doc. S/RES/1546 (2004), Annex: Text of letters from the Prime Minister of the Interim Government of Iraq Dr Ayad Allawi and United States Secretary of State Colin L. Powell to the President of the Council of 5 June 2004.

32 UN Doc. S/RES/1637 (2005), Annex I, Letter dated 27 October 2005 from the Prime Minister of Iraq addressed to the President of the Security Council; Annex II: Letter dated 29 October 2005 from the Secretary of State of the United States of America to the President of the Security Council.

33 See Human Rights Report, 1 April–30 June 2007, paragraphs 68–81, available at <http://www.uniraq.org/FileLib/misc/HR%20Report%20Apr%20Jun%202007%20EN.pdf> (last visited 30 January 2008).

34 Reports of the Special Rapporteurs on Iraq between 1991 and 2004, above, note 27.

the Secretary-General had shared the concerns registered by Special Representative Vieira de Mello.³⁵ The December 2003 report confirmed further deterioration regarding human rights activities, largely attributed to the parallel deterioration in security.³⁶

What went wrong? The serious human rights situation resulted from a number of complex factors. In the first place, on the purely civilian level, the state structures for the protection of the individual did not function. The dissolution of the police force and of the army created a vacuum in protection. The need for the reconstruction of these two essential arms of the state was underestimated and it was thus left to the foreign forces, mainly those of the United States and the United Kingdom, to provide protection. The absence or non-functioning of institutions of the administration of justice system created an environment in which crime expanded exponentially, including criminal acts perpetrated as acts of terror.

The general instability was further compounded by the “war on terror”. The presence in Iraq of US forces in such large numbers provided an attraction for those groups who considered the United States their enemy. They made their way to Iraq where they targeted the US military and other installations, including those considered vital for the reconstruction of the country. Groups such as Al Qaeda, that had never set foot in Iraq before the invasion, now made it their battle ground in their war on the United States. The military engagement in the quest for terrorists compounded the threat by creating large numbers of detainees, held in US custody for prolonged periods. The great majority of these detainees being innocent, there was little doubt that several of them would be more prone to becoming terrorists once they were released.

A third factor was the failure to ensure a sufficiently inclusive political process; this strengthened the hand of those opposition elements that advocated violence, and weakened the more moderate groups. The political “dialogue” was partly conducted through acts of violence. Some of this violence deteriorated into what the media conveniently labelled “sectarian”, namely, Shia vs. Sunni – not entirely correct.

A fourth factor was the presence of private security groups, many of them foreigners, whose lucrative income for providing security provided the best incentive to perpetuate insecurity. In the prevailing situation in Iraq, it was very easy to provoke fear and insecurity – especially when your own national police was either not protecting you or outright hounding you. The lack of security and the corresponding increase in violence brought about an exodus of international governmental and non-governmental organizations. In these circumstances, the main non-Iraqi presence remained that of US official and non- (or quasi-) governmental US organizations.

35 UN Doc. S/2003/715, Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003), 17 July 2003.

36 UN Doc. S/2003/1149, 5 December 2003, in particular paragraphs 14, 23, 83 and 96.

The restoration and reconstruction effort was further hampered by a lack of definition of the role of the United Nations and that of the United States. Two levels of communication persisted with the Iraqi authorities: a largely bilateral course followed by the United States and a multilateral one followed, in accordance with its mandate, by the United Nations, in which the United States also participated. There was no real co-ordination between these two levels of communication in so far as the reconstruction and restoration efforts were concerned. The military dimension, where the United States acted on behalf of the Iraqi authorities, complicated the relationship further.

Thus the situation in Iraq continued to deteriorate. The search for national reconciliation has emerged as the priority issue in the current mandate under Security Council Resolution 1770 (2007). The international community has yet to be given the opportunity to fulfil the objectives of the UN Charter and ensure the dignity of the people of Iraq.



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Since the beginning of the war in 2003, an estimated 4 million Iraqis have fled their homes. Although some of them went back in the second half of 2007, most are still internally displaced or in neighbouring States, particularly Syria, Jordan and the Gulf States.



25/04/2003 © ICRC/Johan Sahlberg

This photo shows a gathering in front of a mobile phone office, made available by ICRC in collaboration with Iraqi Red Crescent to civilian population to contact their relatives. After the attack on the delegation in Baghdad in October 2003, the ICRC limited its presence in Iraq to safer areas such as northern Iraq. From its office in Amman, it nevertheless carries out prison visits and health, assistance and sanitation projects in the most affected areas of Iraq. The projects are implemented either directly or through remote control mechanisms.



© UN Photo by Timothy Sopp

The UN's role in Iraq has been limited for political and security reasons. This photo shows a partial view of the United Nations mission in Baghdad that was destroyed by a truck bomb on 19 August 2003, killing at least 20 UN staff. This forced the UN to pull out of Iraq completely, until it agreed to help construct a new interim government in February 2004.



11/2002 © Federation/Christopher Black

The Iraqi Red Crescent is one of the main humanitarian organizations in Iraq. It has 300 offices and an outreach network of 100,000 volunteers and employees. Its work includes assisting society's most vulnerable members, providing health services, carrying out water and sanitation projects, and collecting and delivering "Red Cross messages", brief personal messages to relatives made otherwise unreachable by conflict.



09/04/2003 © ICRC/Benoit Schaeffer

On 20 March, 2003, the “coalition of the willing”, led by the US and Britain invaded Iraq and ousted the government of Saddam Hussein within a few weeks. Since then, however, the presence of the foreign troops has encountered violent resistance.



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Terrorist acts, such as suicide bombings and hostage taking, are a method of warfare often used by violent groups in Iraq. They are directed against foreign civilian targets, as well as against Iraqi clerics, political leaders, journalists, doctors, teachers and ordinary citizens.



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The Abu Ghraib torture photos went around the world in 2003, fanning the fires of anti-American sentiment in the Arab world and considerably damaging the image of the foreign troops in Iraq.



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About 23,000 internees were held by the multinational forces at the end of 2007, and many thousands more are held by the Iraqi authorities. Among them are children, women and elderly people.



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The statute of the Iraqi Special Tribunal was enacted by the Iraqi Governing Council on 10 December 2003. The Tribunal has jurisdiction over war crimes, crimes against humanity and genocide, as well as three crimes under Iraqi law. So far it has passed sentence on a number of former high-ranking leaders of the Baath party, including Saddam Hussein.



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After the fall of Saddam, Iraq fell into a state of chaos and violence. There was fighting between the foreign troops and insurgents, as well as between Sunni and Shia militant groups. In the second half of 2007 however, attacks finally became less frequent as temporary ceasefires and alliances were negotiated.