

## Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation

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The gulf war of 2003 and its aftermath have led to passionate debates among lawyers. Most of this debate has focused on questions of *jus ad bellum*, in particular the legality of the attack on Iraq by the United States (US), the United Kingdom (UK) and their allies in March 2003.<sup>1</sup> Questions of *jus in bello* have received less attention. This is unfortunate, because the occupation of Iraq by the US and the UK is one of the few instances in which States have accepted that the law of occupation is applicable to them. Hitherto the law of occupation has mostly been addressed in the context of the Israeli-occupied territories. Israel denies that the law of occupation applies to those territories *de jure*, although it has stated that it applies the law *de facto*.<sup>2</sup>

In the case of Iraq, the situation was governed not only by the law of occupation but also by United Nations Security Council resolutions. The question is how these two legal instruments relate to each other. It is argued in this article that Resolution 1483<sup>3</sup> may have made certain inroads on the law of occupation. The goals set for the occupying powers in the resolution with regard to the political and economic transformation of Iraq, as well as the resolution's reference to States contributing troops to the multinational stabilization force, opened up the possibility to go beyond some of the limits set by the law of occupation or even not to apply that law at all. A number of concrete examples are discussed below. This argument is based on the premise that the UN Security Council may derogate from international law when it is acting under Chapter VII of the UN Charter. The question whether and

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under which conditions this is a valid premise received much scholarly discussion in the 1990s.<sup>4</sup> That discussion was centred in particular on possible legal limits to the imposition of economic sanctions, as well as the subject matter of the *Lockerbie* case before the International Court of Justice (ICJ). However, these two debates have not led to definitive legal conclusions. Although the occupation of Iraq came to an end in June 2004, this does not affect the importance of reflecting on the relationship between the law of occupation and Security Council resolutions. Legislation promulgated by the occupying powers in Iraq remained in force after the transfer of authority, and consequently such legislation continues to have effect.<sup>5</sup> Nor can the eventuality of other circumstances in which the law of occupation and Security Council resolutions address the same situation be excluded.<sup>6</sup>

### A preliminary question

A preliminary question which may be asked before considering whether the Security Council can and has set aside the law of occupation is how that law can be reconciled with measures needed to initiate a transition process, i.e. a complete restructuring of a formerly authoritarian State system. In other words, is the law of occupation itself sufficient to make such a transformation possible without Security Council involvement? Although this is an important question, it is not the main focus of this article. At least

1 See e.g. Colin Warbrick, "The use of force against Iraq", *International & Comparative Law Quarterly*, Vol. 52, No. 3, 2003, p. 811 (2003); "Agora: Future implications of the Iraq conflict", *American Journal of International Law*, Vol. 97, No. 3, July 2003, p. 553.

2 On the applicability of the law of occupation in the Israeli-occupied territories, see International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, 9 July 2004. Not yet published but available at the website of the ICJ: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited 25 October 2004).

3 SC Res. 1483, 22 May 2003.

4 See e.g. Gabriel Oosthuizen, "Playing the devil's advocate: The United Nations Security Council is unbound by law", *Leiden Journal of International Law*, Vol. 12, No. 3, 1999, p. 549; Bernd Martenczuk, "The Security Council, the International Court and judicial review: What lessons from Lockerbie?", *European Journal of International Law*, Vol. 10, No. 3, 1999, p. 517; Terry Gill, "Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter", *Netherlands Yearbook of International Law*, Vol. 26, 1995, p. 33.

5 Thus the validity of the Coalition Provisional Authority's legislation which was in breach of occupation law and which is still in force could be disputed insofar as it has not been explicitly ratified by the interim government.

6 Consider for example the possible scenario of the UK government intervening militarily in Sudan, as it has suggested it might, and the Security Council subsequently adopting a resolution in response to the situation. See Matthew Tempest, "Blair: Nothing is ruled out in Sudan", *The Guardian*, 22 July 2004.

in the specific case of Iraq, it is very doubtful that without Security Council cover this result could have been achieved.<sup>7</sup> Moreover, as this article will demonstrate, in a number of instances States have in the case of Iraq explicitly or implicitly relied on Security Council authorization and not on the law of occupation to justify their actions and positions. This strongly suggests that in their own opinion these actions and positions went beyond the limits of the law of occupation. In this case, they themselves answered the preliminary question in the negative.

This article will not discuss in any detail the question whether the law of occupation should be amended to render it more conducive to the transformation of States. Proponents of such amendments should realize, however, that a more liberal law of occupation could encourage States to attempt regime change, because it could make it easier for them to do so without breaching the law.<sup>8</sup>

### Conflict and occupation in Iraq

After the US and UK armed forces, supported by a small number of troops from Australia and Poland, defeated the Iraqi armed forces, they became the *de facto* authority in Iraq. The two countries took steps to put in place a postwar administration. This administration, initially known as the Office of Reconstruction and Humanitarian Aid (ORHA), was headed by retired US General Hay Garner, who reported to the Pentagon. A few months later, L. Paul Bremer III, a US diplomat, was appointed to direct the postwar administration, renamed the Coalition Provisional Authority (CPA).<sup>9</sup> The CPA arrogated broad powers to itself.<sup>10</sup> On 16 June 2003 it issued "Coalition Provisional Order Number 1". This Order states *inter alia* that the CPA "shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration"<sup>11</sup> and that it "is vested with all executive, legislative

<sup>7</sup> See David Scheffer, "Beyond occupation law", *American Journal of International Law*, Vol. 97, No. 4, October 2003, p. 844; Mahmoud Hmoud, "The use of force against Iraq: Occupation and Security Council Resolution 1483", *Cornell International Law Journal*, Vol. 36, 2004, p. 449. But see Eyal Benvenisti, "The Security Council and the law on occupation: Resolution 1483 on Iraq in historical perspective", at <http://www.tau.ac.il/law/members/Benvenisti/work.html> (last visited 20 October 2004).

<sup>8</sup> On regime change see Michael Reisman, "Why regime change is (almost always) a bad idea", *American Journal of International Law*, Vol. 98, No. 3, July 2004, p. 516.

<sup>9</sup> Steven. R. Weisman, "US set to name civilian to oversee Iraq", *New York Times*, 2 May 2003.

<sup>10</sup> Mike Allen, "Expert on terrorism to direct rebuilding", *The Washington Post*, 2 May 2003.

<sup>11</sup> Coalition Provisional Authority Regulation Number 1, 16 May 2003, CPA/REG/16 May 2003/01, Section 1 (1).

and judicial authority necessary to achieve its objectives, to be exercised under relevant UN Security Council resolutions.”<sup>12</sup>

## Application of the law of occupation

### Scope of application

At some point in this period, the US and the UK became occupying powers under international humanitarian law.<sup>13</sup> Both the Regulations annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land,<sup>14</sup> and the Fourth Geneva Convention of 1949<sup>15</sup> contain provisions on occupation. Article 42 of the 1907 Hague Regulations provides that: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”<sup>16</sup>

The said article makes clear that whether or not a territory is occupied is a question of fact. Neither the occupant nor any other party is required to declare that there is an occupation. The article also appears to require that the occupant is actually exercising control over the territory. As the American Military Tribunal sitting at Nuremberg also made clear in the *Hostages* trial, this requirement must not be read restrictively. It is sufficient that the occupying forces “could at any time they desired assume physical control of any part of the country.”<sup>17</sup> In the cases of Greece and Yugoslavia, with which the Tribunal was dealing, the fact that there were guerrilla operations against the Germans and that the guerrillas were able to control sections of those countries at various times did not detract from the conclusion that there was an occupation. It is submitted that the same applies to Iraq.

<sup>12</sup> *Ibid.*, Section 1 (2).

<sup>13</sup> As discussed below, a territory becomes occupied when it is actually placed under the control of the occupying forces. It is submitted that the precise point in time at which this occurred in the case of Iraq could only be ascertained by commanders on the ground. In any event it can safely be said that on 1 May 2003, when President Bush declared the end of major combat operations, Iraq was occupied.

<sup>14</sup> Regulations respecting the Laws and Customs of War on Land, annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, 2 AJIL Supp. 90 (1908), TS No. 539, 205 Parry’s TS 277 (Hague Regulations).

<sup>15</sup> Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (Fourth Geneva Convention).

<sup>16</sup> *United States v. Wilhelm List and others (the Hostages Trial)*, United States Military Tribunal, Nuremberg, VIII Law Reports of Trials of War Criminals 55 (1949).

<sup>17</sup> *Ibid.*, at 56. See also Gerard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, p. 28.

Common Article 2 of the 1949 Geneva Conventions provides that the Conventions apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. The ICRC Commentary to the Fourth Geneva Convention states that the term “occupation” as used in that Convention has a wider meaning than it has in Article 42 of the Regulations annexed to Hague Convention (IV) of 1907. According to the Commentary, so far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 of the Hague Regulations.<sup>18</sup> This point of view was also adopted by Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia in its judgment in *Prosecutor v. Naletilić and Martinović*. The Trial Chamber gave a twofold definition of “occupation”. It held that for the purposes of Article 42 of the Hague Regulations of 1907, actual control of the territory is required,<sup>19</sup> and listed a number of factors helpful in determining whether actual control is established. The Chamber adopted a different test with regard to occupation in the sense of the Fourth Geneva Convention of 1949. According to the Chamber, the application of the law of occupation as it affects “individuals” as civilians under that Convention does not require the occupying power to have actual authority. For the purposes of those individuals’ rights, a state of occupation exists once they fall into “the hands of the Occupying Power.”<sup>20</sup> The Trial Chamber’s interpretation of the scope of application of the Fourth Geneva Convention’s provisions on occupation is questionable. It appears to conflate the determination of “protected person” with the determination of an occupation, and does not recognize that the Convention contains a number of provisions that apply specifically to occupied territories.

The ICJ’s Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, although it addressed the law of occupation, did not take an explicit position on the question of scope considered above.<sup>21</sup>

<sup>18</sup> Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, p. 60.

<sup>19</sup> *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgment, Case No. IT-98-34-T, Tr. Ch. I, 31 March 2003, para. 218.

<sup>20</sup> *Ibid.*, para. 221.

<sup>21</sup> *Op. cit.* (note 2).

## Content

The applicability of the law of occupation places certain obligations on the occupying power. The essence of the law of occupation is that the occupation will be of limited duration.<sup>22</sup> During that period, the occupying power is given limited managerial powers and certain obligations, as set out in the 1907 Hague Regulations and the Fourth Geneva Convention of 1949. These obligations include the prohibition on taking possession of cash, funds, and realizable securities other than those which are strictly the property of the State;<sup>23</sup> the obligation to administer public buildings, real estate, forests and agricultural estates belonging to the hostile State in accordance with the rules of usufruct;<sup>24</sup> and the obligation for the occupying power to ensure, to the fullest extent of the means available to it, the food and medical supplies of the population.<sup>25</sup>

An important obligation from the law of occupation is the stipulation in Article 43 of the Hague Regulations that the occupying power must respect, unless absolutely prevented, the laws in force in the country. In 1949 this article was supplemented by Article 64 of the Fourth Geneva Convention.<sup>26</sup> The drafters of the Hague Regulations seem to have viewed military necessity as the only relevant consideration that could “absolutely prevent” an occupying power from respecting the law in force.<sup>27</sup> In later years certain commentators have maintained that other considerations can also legitimize replacing legislation, notably the welfare of the population of the occupied territory.<sup>28</sup> Some

<sup>22</sup> See e.g. Hans Peter Gasser, “Protection of the civilian population”, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 242.

<sup>23</sup> Hague Regulations, Art. 53.

<sup>24</sup> *Ibid.*, Art. 55.

<sup>25</sup> Fourth Geneva Convention, Art. 55.

<sup>26</sup> This article reads:

“The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, 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.”

<sup>27</sup> Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, p. 14.

<sup>28</sup> See e.g. Allan Gerson, “War, conquered territory, and military occupation in the contemporary international legal system”, *Harvard International Law Journal*, Vol. 18, No. 3, Summer 1977, p. 535; Odile Debbasch, *L’Occupation Militaire: Pouvoirs Reconus aux Forces Armées Hors de Leur Territoire National*, Pichon et Durand-Auzias, Paris, 1962, p. 172.

authors even go so far as to affirm that sufficient justification is all that is needed to deviate from local legislation.<sup>29</sup> It appears to be currently widely accepted in legal doctrine that the welfare of the local population may justify deviation from the legislation in force.<sup>30</sup> Such a view reflects the fact that respect for the human person is at the root of modern international humanitarian law, as well as the increasing ascendancy of human rights and their influence on the interpretation of humanitarian law. It should be noted, however, that using a subjective criterion such as “sufficient justification” might lead to abuse, as the occupying power will define what is reasonable from its own socio-economic perspective. That an occupying power’s definition of what is absolutely necessary will also be largely determined by its own socio-economic perspective, which may be very different from that of the population of the occupied territory, cautions against accepting a broad definition of what may absolutely prevent respecting the laws in force.

#### The US and UK as occupying powers in Iraq

The US and the UK addressed a letter to the President of the UN Security Council on 8 May 2003 in which they stated that they would strictly abide by their obligations under international law.<sup>31</sup> According to that letter, the obligations include those relating to the essential humanitarian needs of the people of Iraq. This appears to be a reference to the law of occupation, which includes the duty for an occupying power to ensure the food and medical supplies of the population to the fullest extent of the means available to it.<sup>32</sup> However, the US does not appear to have said explicitly at that time that it was an occupying power. At a briefing on 7 April 2003, a US Department of Defense official stated that at that moment the US was not a military occupier or occupation force in the technical sense of the law of war.<sup>33</sup> The official said that it is not “until the fighting has concluded and is very conclusive, [that] you reach the point where technically there might be a military occupation (...) and a declaration of occupation is issued.”<sup>34</sup> On 25 April 2003, US Secretary of Defense Rumsfeld suggested that the US would become an

<sup>29</sup> Ernst. H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, Carnegie Endowment for International Peace, Washington, 1942, p. 89.

<sup>30</sup> Von Glahn, *op. cit.* (note 17), p. 97; Gerson, *op. cit.* (note 28), p. 538.

<sup>31</sup> Letter from the Permanent Representatives of the United Kingdom and the United States to the United Nations addressed to the President of the Security Council, of 8 May 2003, UN Doc. S/2003/538.

<sup>32</sup> *Op. cit.* (note 25).

<sup>33</sup> Briefing on Geneva Convention, EPWs and War Crimes, 7 April 2003, Department of Defense.

<sup>34</sup> *Ibid.*

occupying power at the moment the war was declared over.<sup>35</sup> This indicates that the US considered that it became an occupying power at the latest on 1 May 2003, when President Bush declared the end of major combat operations in Iraq.<sup>36</sup> At a later date US officials did explicitly state that the US is an occupying power.<sup>37</sup> UK officials have on several occasions expressly referred to the UK as an occupying power in Iraq.<sup>38</sup>

On 28 June 2004 the occupying powers transferred full sovereignty to an Iraqi interim government and dissolved the CPA.<sup>39</sup> The transfer of authority, originally scheduled for 30 June 2004, had already been anticipated in UN Security Council Resolution 1546 of 8 June 2004. Operative paragraph 2 of that resolution stated that the Council: “Welcomes that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty.”<sup>40</sup>

The said statement raises the question as to the point in time at which the occupation of Iraq ends. This question is not dispositive for the subject under discussion in this article, i.e. the relationship between Resolution 1483 and the law of occupation and the possibility for the Security Council to set aside that law. It is, however, an important question in its own right. According to Lauterpacht, occupation comes to an end when an occupant withdraws from a territory, or is driven out of it.<sup>41</sup> The law of occupation itself, in Article 6 of the Fourth Geneva Convention, merely states that its application shall cease one year after the general close of military operations, but that some provisions remain in force for the duration of the occupation. In other words, the application of the law of occupation ends at the moment there is no longer effective control over the occupied territory,<sup>42</sup> for without effective control there is no

<sup>35</sup> Department of Defense News Briefing — Secretary Rumsfeld and General Myers, 25 April 2003.

<sup>36</sup> Amy Goldstein & Karen DeYoung, “Bush to say major combat has ended”, *The Washington Post*, 1 May 2003.

<sup>37</sup> See e.g. Rajiv Chandrasekaran, “The final word on Iraq’s future: Bremer consults and cajoles, but in the end, he’s the boss”, *The Washington Post*, 18 June 2003, p. A01.

<sup>38</sup> See e.g. written statement to the House of Commons by the Foreign Secretary Jack Straw on a timetable for a new constitution and elections in Iraq, 20 November 2003.

<sup>39</sup> Rajiv Chandrasekaran, “U.S. hands authority to Iraq two days early: Fear of attacks hastens move — interim leaders assume power”, *The Washington Post*, 29 June 2004, at A.01. The UN, the US and Iraqi political figures were involved in selecting the members of the interim government.

<sup>40</sup> SC Res. 1546, 8 June 2004.

<sup>41</sup> H. Lauterpacht (ed.), *Oppenheim’s International Law: A Treatise*, Vol. 2: *War, Disputes, and Neutrality*, Longman, London, 1952, p. 436.

<sup>42</sup> Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II: *The Law of Armed Conflict*, Stevens, London, 1968, p. 317.



occupation. Besides the two instances mentioned by Lauterpacht, that law may also cease to apply where troops of the former occupying power remain in the territory of the formerly occupied territory but the legitimate power is no longer in the hands of the occupant. This is a question of fact, but international recognition, in particular by the UN Security Council, may be an indicator.<sup>43</sup> Of importance in this connection is the announcement made by the President of the Security Council in a press statement on 28 June 2004: "The members of the Security Council welcome the handover of full responsibility and authority for governing Iraq to the fully sovereign and independent Interim Government of Iraq, thus ending the occupation of the country."<sup>44</sup>

As for the facts, media reports suggest that the US and UK did effectively hand over administrative authority on 28 June.<sup>45</sup> The same is also implied by the statement by US Secretary of State Colin Powell that the troops would leave Iraq if the Iraqi government asked them to.<sup>46</sup> In conclusion, the occupation appears to have ended on 28 June 2004.

### The Stabilization Force Iraq

After the US and the UK had captured the whole of Iraq, they started a diplomatic campaign to convince as many States as possible to contribute military personnel to a Stabilization Force Iraq (SFIR), with the task of maintaining a secure environment there in which the CPA could function. A number of nations decided to contribute troops to the force, under the command of the US. One of these, Poland, accepted the invitation to take up command of a multinational division. The US and the UK found that many nations were reluctant to contribute troops to an international force in Iraq. One reason for this reluctance was the broad public opposition to the invasion of Iraq and the way in which Washington ignored the majority view of the United Nations Security Council in the run-up to the invasion.<sup>47</sup> Another reason was that many nations were uncomfortable with the idea that they might become occupying powers upon deciding to participate in

<sup>43</sup> Marco Sassòli, "Article 43 of the Hague Regulations and peace operations in the twenty-first century", background paper prepared for informal high-level expert meeting on Current Challenges to International Humanitarian Law, Cambridge, 25–27 June 2004.

<sup>44</sup> Press statement by Security Council President of 28 June 2004, UN Doc. SC/8136.

<sup>45</sup> Robin Wright, Rajiv Chandrasekaran, "U.S. now taking supporting role in Iraq, officials say", *The Washington Post*, 22 September 2004.

<sup>46</sup> Glenn Kessler, "Powell says troops would leave if new leaders asked", *The Washington Post*, 15 May 2004.

<sup>47</sup> Guy Dinmore, James Politi, Mark Odell, "US struggles to top up Allied force in Iraq", *Financial Times*, 2 July 2003.

the Stabilization Force. Leaving aside the effects of Security Council Resolution 1483, the manner in which many States participate in the Stabilization Force would appear to make them occupying powers. As Lijnzaad comments, carrying out tasks under the command or instruction of an occupying power tends to confer occupying power status on those cooperating with them.<sup>48</sup> This depends to a large extent on the nature of the activities undertaken in occupied territory, as well as on the command structure and the room left for national decision-making.

In an attempt to avoid becoming an occupying power, certain troop-contributing nations have limited the tasks they perform. Norway, for example, has insisted that its troops in Iraq are only carrying out “humanitarian” tasks and that consequently Norway has not become an occupying power.<sup>49</sup> This claim is not uncontroversial, as the Norwegian Defence Department has conceded that the Norwegians will be assigned to a combination of military and humanitarian work.<sup>50</sup> A similar claim by other troop-contributing nations which have not limited the tasks of their forces in the way Norway has done are even less likely to stand up to legal scrutiny. This impression was reinforced by Coalition Provisional Authority Order No. 17,<sup>51</sup> which determined the legal status of personnel of “Coalition Forces” and specified that they were subject to the exclusive jurisdiction of their sending State. The Order did not make a distinction between Coalition forces personnel from the US and the UK and those from other States. They were all included in the definition of “Coalition Personnel” as being:

“All non-Iraqi military and civilian personnel assigned to or under the command of the Commander, Coalition Forces, or all forces employed by a Coalition State including attached civilians, as well as all non-Iraqi military and civilian personnel assigned to, or under the direction or control of the Administrator of the CPA.”<sup>52</sup>

<sup>48</sup> Liesbeth Lijnzaad, “How not to be an occupying power: Some reflections on UN Security Council Resolution 1483 and the contemporary law of occupation”, in L. Lijnzaad, J. van Sambeek & B. Tahzib-Lie (eds.), *Making the Voice of Humanity Heard*, Martinus Nijhoff, Leiden/London, 2003, p. 298. See also Hmoud, *op. cit.* (note 7), p. 451.

<sup>49</sup> “Norway’s role in Iraq catches more flak”, *Aftenposten*, 9 December 2003.

<sup>50</sup> “Norwegian soldiers head for Iraq”, *Aftenposten*, 26 June 2003.

<sup>51</sup> Coalition Provisional Order No. 17, Status of the Coalition, Foreign Liaison Missions, their Personnel and Contractors, 26 June 2003, CPA/ORD/26 June 2003/17. The Order was revised on 27 June 2004 and the privileges and immunities accorded to Coalition personnel were greatly extended. See CPA Order No. 17 (revised) of 27 June 2004, CPA/ORD/27 June 2004/17.

<sup>52</sup> *Ibid.*, Section 1 (1).

In short, without Security Council involvement it appears highly unlikely that a State contributing troops to SFIR would not become an occupying power.

### **Security Council Resolution 1483 and the law of occupation**

Concern over the status of occupying power was one of the elements that played an important role in the drafting of UN Security Council Resolution 1483. This resolution was the result of the perceived need to set out the process of stabilization and political transition in Iraq after the conflict, including the role of the United Nations in that process. On 9 May 2003, the US, the UK and Spain informally circulated a draft resolution in the Security Council. The draft resolution closely followed the intentions of the US and UK in Iraq as formulated in their letter to the President of the Security Council of the previous day.<sup>53</sup> The letter referred to the establishment of the Coalition Provisional Authority to exercise powers of government temporarily and, as necessary, to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction. As stated above, the letter also suggested that the US and the UK considered themselves to be occupying powers in the sense of international humanitarian law.

The draft resolution contained a preambular paragraph taking note of the letter and “recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers and the responsibilities of others working now or in the future with them under unified command (the Authority)”.<sup>54</sup> In a statement to the House of Commons UK Foreign Secretary Jack Straw reaffirmed that this paragraph constituted acceptance of the status of occupying power.<sup>55</sup> The draft resolution did not at first exclude the possibility that other States contributing troops to the Stabilization Force would also become occupying powers. According to the initial text, they would become part of the Authority together with the US and the UK.<sup>56</sup> But the original draft underwent a large number of revisions to take into account the wishes of interested parties. Among them were France, Germany and the Russian Federation, which

<sup>53</sup> *Op. cit.* (note 31).

<sup>54</sup> Draft Security Council Resolution of 9 May 2003, copy on file with the author.

<sup>55</sup> Statement by the Foreign Secretary, Jack Straw, to the House of Commons, 12 May 2003, Vol. 405, Part 392, column 22.

<sup>56</sup> Lijnzaad, *op. cit.* (note 48), p. 295.

demanded that the resolution provide for a larger role for the United Nations. Other interested parties included potential troop-contributing nations to a Stabilization Force in Iraq. The concerns of the latter States led to the insertion of a further paragraph in a revised draft resolution of 15 May: “Welcoming the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment and other resources under the Authority...”

The draft of 15 May repeated the preambular paragraph in the version of 9 May, which referred to the obligations of the US and UK and of other States working with them. In the final version of the resolution, however, a clear distinction has been drawn between the US and the UK, on the one hand, and other States working with them. In this version, preambular paragraphs 13 and 14 read:

“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...”<sup>57</sup>

The insertion of preambular paragraph 14 led to an ambiguous situation. The paragraph could be interpreted as a factual observation by the Security Council that other States did not meet the criteria under international humanitarian law for the status of occupying power. On the other hand, it could also be a decision by the Security Council, acting under Chapter VII of the UN Charter, to take away a status of occupying power that would otherwise exist. The latter interpretation would be a far-reaching one on the basis of a mere preambular paragraph. Nevertheless, at least one government has argued that this is the correct interpretation of Resolution 1483. The government of the Netherlands stated, in reply to a question by a Member of Parliament, that the determination by the Security Council in preambular paragraph 14 is an authoritative determination of the status of troop-contributing nations to the Stabilization Force.<sup>58</sup> According to the said

<sup>57</sup> SC Res. 1483, preambular paras. 13-14.

<sup>58</sup> Kamerstukken TK 2002-03, 23 432, No. 116, at 8; Kamerstukken TK 2002-03, 23 432, No. 117, at 20.

government, this determination is binding on UN member States on the basis of Article 25 of the UN Charter. Moreover, Article 103 of the UN Charter stipulates that in the event of a conflict between the obligations of member States under the UN Charter and their obligations under another treaty, their obligations under the Charter prevail.

Nor is this the only way in which Resolution 1483 has been invoked as setting aside part of the law of occupation. On 19 September 2003 Paul Bremer enacted CPA Order No. 39.<sup>59</sup> This Order made important changes to Iraqi investment law. It replaced all previously existing foreign investment law in Iraq, and essentially opened up the Iraqi economy to foreign investment to an unprecedented degree. It allowed, and until rescinded by the Iraqi government continues to allow, for example, foreign investors to own Iraqi companies fully with no requirements for the reinvestment of profits back into the country, something that had previously been restricted by the Iraqi constitution to the citizens of Arab countries. Immediately, questions arose as to the legality of Order No. 39. A number of commentators maintained that it was contrary to the nature of the law of occupation as a temporary regime designed to make limited inroads on the occupied country's existing governmental, administrative and economic structures.<sup>60</sup> In particular, they argued that it violated Article 43 of the Hague Regulations. It would be very difficult to claim that a fundamental revision of Iraq's investment law would be such a necessity for the US and the UK that they would be absolutely prevented from respecting the legislation in force unless that revision took place.

The CPA appears, however, to have considered that Resolution 1483 gave it licence to act in contravention of the law of occupation. Order No. 39 claims to be consistent with that resolution. US officials say US actions in Iraq were authorized in general terms by Resolution 1483.<sup>61</sup> A UK government official stated in the House of Lords that his government was "confident that their policies and actions in Iraq are right and consistent with the UK's international obligations."<sup>62</sup> The UK Secretary of State for Foreign and

<sup>59</sup> Coalition Provisional Authority Order No. 39, Foreign Investment, 19 September 2003, CPA/ORD/19 September 2003/39. This Order was revised in CPA Order 46 of 20 December 2003, CPA/ORD/20 December 2003/46.

<sup>60</sup> Thomas Catán, "Iraq business deals may be invalid, law experts warn", *Financial Times*, 2 November 2003; Daphne Eviatar, "Free-market Iraq? Not so fast", 10 January 2004, *New York Times*.

<sup>61</sup> "Questions raised about legality of US attempts to transform Iraq", *Pakistan Tribune*, 14 January 2004.

<sup>62</sup> *Hansard*, House of Lords, Vol. 653 (145), c. 293WA.

Commonwealth Affairs has said that his government “[is] therefore satisfied that Security Council Resolution 1483 provides a sound legal basis for the policy goals of the CPA Foreign Investment Order.”<sup>63</sup> In a written answer to a question from a member of parliament, the Dutch Minister of Foreign Affairs commented that it did not consider Order No. 39 as a violation of international law, given the object and purpose of the Hague Regulations and the Fourth Geneva Convention, the request for assistance to the Iraqi people through economic restructuring measures in Resolution 1483, the object and purpose of Order No. 39 and its genesis.<sup>64</sup> The government appears to suggest that if Order No. 39 violates the law of occupation, this was authorized by Resolution 1483.

The two challenges to the law of occupation on the basis of Resolution 1483 discussed above raise two important questions which will be analysed below. The first question is whether the Security Council is authorized to derogate from the law of occupation. The second question is whether it has done so in this particular case.

First, however, other challenges made by the CPA to the law of occupation, in the sense of taking actions which were arguably not in conformity with the law of occupation, will be considered. One of these was the revision of the tax system of Iraq. CPA Order 37 set out a tax strategy for Iraq for the year 2003.<sup>65</sup> Its preamble included the statement that the CPA was determined to complete a broad review of taxes in Iraq.<sup>66</sup> It is difficult to see how the CPA was “absolutely prevented” from respecting the existing tax system. Article 48 of the Hague Regulations provides that the occupant may collect the taxes, dues and tolls imposed for the benefit of the State, but must do so as far as possible in accordance with the rules of assessment and incidence in force. Some legal doctrine interprets this as not permitting the occupant to create new and additional taxes, either for his own benefit or for that of the occupied territory.<sup>67</sup> It has also been suggested in legal doctrine that the exception of Article 43 of the Hague Regulations may be interpreted more extensively the longer an occupation lasts, in particular in regard to the rules on taxation.<sup>68</sup> In comparison with other occupations such as that of the Israeli-occupied territories, however, the

<sup>63</sup> HC Deb. 20 November 2000 c. 1304W.

<sup>64</sup> Aanhangsel Handelingen II 2003/04, No. 720.

<sup>65</sup> CPA/ORD/19 September 2003/37.

<sup>66</sup> *Ibid.*, preambular para. 4.

<sup>67</sup> Glahn, *op. cit.* (note 17), p. 150.

<sup>68</sup> Sassòli, *op. cit.* (note 43).

occupation of Iraq does not classify as a prolonged occupation. It is also difficult to see why the occupying powers needed to make changes to Iraqi company law in CPA Order 64.<sup>69</sup> These changes would seem to reflect the preferences of the US for a liberal economy rather than an absolute necessity for the security of the occupying powers or for the welfare of the Iraqi population. Scheffer names the Security Council's decision regarding the Development Fund for Iraq, the management of petroleum, petroleum products and natural gas, and the formation of an Iraqi interim administration as a transitional administration run by Iraqis, as examples of additional obligations placed on the US and UK by the Security Council which are prohibited by a strict reading of the law of occupation.<sup>70</sup> In contrast to the two examples given above concerning the status of certain troop-contributing nations and CPA Order 39, however, these challenges do not appear to have been defended on the ground that they were actions going beyond the law of occupation that were mandated by the Security Council, which is the focus of this article.

### **Can the Security Council derogate from the law of occupation?**

The UN Charter and general international law are the sources of the powers and obligations of the UN Security Council. The UN Charter is a treaty, and as such the organization and its organs must respect the division of competences and limitations on power in that treaty.<sup>71</sup>

Article 24 of the UN Charter recognizes the particular role of the Security Council in the UN structure. It provides that the Council has primary responsibility for the maintenance of international peace and security. In discharging that responsibility, however, the "Security Council shall act in accordance with the Purposes and Principles of the United Nations." The purposes of the organization are set out in Article 1 of the Charter. Article 1, paragraph 1, provides that one of the purposes of the organization is the maintenance of international peace and security.<sup>72</sup>

<sup>69</sup> CPA/ORD/5 March 2004/64.

<sup>70</sup> Scheffer, *op. cit.* (note 7), p. 846.

<sup>71</sup> Ian Brownlie, *Principles of Public International Law*, Clarendon Press, London, 1998, p. 697; *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A. Ch., 2 October 1995, para. 28.

<sup>72</sup> Article 1 (1) reads: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

This article states that the Security Council must act in conformity with the principles of justice and international law in the adjustment or settlement of international disputes. However, there is no similar obligation when the Council is acting under Chapter VII of the UN Charter. Decisions made by the Security Council under Chapter VII are binding on member States. Articles 24 and 1 (1) make clear that such a decision can derogate from international law that would otherwise be applicable.<sup>73</sup>

The *travaux préparatoires* of the UN Charter confirm this interpretation. The Dumbarton Oaks proposals did not include a reference to international law in their provisions on purposes and principles. A proposal was made at the United Nations Conference on International Organization by China, supported by the United Kingdom, the United States and the Soviet Union, to add that peaceful settlement of disputes must be brought about “with due regard for principles of justice and international law”.<sup>74</sup> Other delegations thought that this phrase was inadequate, and that “a more explicit requirement for strict observance of the principles of justice, international law, and morality should be written into the Declaration of Purposes in the Charter.”<sup>75</sup> On several occasions an amendment was introduced to place the words “in conformity with the principles of justice and international law” in the first line after the words “peace and security.” These amendments were rejected.<sup>76</sup> This indicates that the drafters considered that the Council could derogate from international law when it takes decisions under Chapter VII of the UN Charter.

The principle that the UN Security Council can derogate from international law that would otherwise be applicable is supported by Article 103 of the Charter, which provides that if the obligations of member States under the UN Charter conflict with their obligations under another international agreement, those under the Charter prevail.<sup>77</sup> Obligations “under the Charter” include obligations arising directly from provisions of the Charter

<sup>73</sup> Ruediger Wolfrum, “Article 1”, in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Oxford University Press, Oxford, 1994, p. 52.

<sup>74</sup> UNCIO III, at 622, Doc. 2 G/29.

<sup>75</sup> Summary Report of Third Meeting of Committee I/1, doc. 197, 10 May 1945, UNCIO Documents Vol. 6, pp. 281-282.

<sup>76</sup> Summary Report of the Ninth Meeting of Committee I/1, Doc. 742, I/1/23/ 1 June 1945, UNCIO Vol. 6 at 317, at 318; Verbatim Minutes of First Meeting of Commission I, 14 June 1945, Doc. 1006, UNCIO.

<sup>77</sup> Article 103 UNC reads: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”



as well as those arising from binding decisions of the UN Security Council.<sup>78</sup> This was confirmed by the ICJ in its Order on provisional measures in the *Lockerbie* case.<sup>79</sup> Several judges were more explicit in their opinions than the Order itself. Judge Oda, for example, stated in his declaration that “under the positive law of the United Nations Charter a resolution of the Security Council may have binding force, irrespective of the question whether it is consonant with international law derived from other sources.”<sup>80</sup>

Article 103 refers only to treaty obligations, not to obligations under customary international law. This does not mean, however, that obligations under the Charter do not prevail over customary international law. This result is achieved by Article 25 of the Charter,<sup>81</sup> whereby member States agree to accept and carry out the decisions of the Security Council in accordance with the Charter. There is no limitation in the article to decisions which are in conformity with customary international law.<sup>82</sup> Article 103 must be seen against the background of general rules on the resolution of conflicts between treaties.<sup>83</sup> It has the specific purpose of making clear that the general rules on conflicts between treaties do not apply.

Several commentators argue that in any event — notwithstanding Articles 25 and 103 of the Charter — the Security Council is bound by *jus cogens* norms.<sup>84</sup> They contend that the character of such norms as being hierarchically superior to all other norms of international law leads to the conclusion that the Council must respect them. This argument was also made by ad hoc Judge Lauterpacht in his separate opinion in the *Genocide* case.<sup>85</sup> The advent of

<sup>78</sup> Rudolf Bernhardt, “Article 103”, in Simma, *op. cit.* (note 73), p. 1120.

<sup>79</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom), Provisional Measures, Order, 1992*, ICJ Reports 3, at 16, para. 39.

<sup>80</sup> *Ibid.*, Declaration by Judge Oda, para. I.

<sup>81</sup> Michael Reisman, “The constitutional crisis in the United Nations”, *American Journal of International Law*, Vol. 87, No. 1, January 1993, p. 93. Interestingly, there is also State practice which appears to support the scope of application of Article 103 to customary law. An example is the statement by the Russian Federation to the Security Council on 24 March 1999 concerning Kosovo: “Article 103, precisely establishing an absolute priority of the Charter obligations before any other international obligations of the members of the Organization.”

<sup>82</sup> This limitation is not established by the words “in accordance with the Charter”. See Jost Delbrück, “Article 25”, in Simma, *op. cit.* (note 73), pp. 459-460.

<sup>83</sup> Bernhardt, *op. cit.* (note 78), p. 1118.

<sup>84</sup> Gill, *op. cit.* (note 4), p. 33.

<sup>85</sup> “The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot — as a matter of simple hierarchy of norms — extend to a conflict between a Security Council resolution and *jus cogens*.” *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Separate Opinion of Judge Lauterpacht, 1993 ICJ Reports 4, at 440.

the concept of *jus cogens* has not, however, led to amendments to the UN Charter. Even if it is true that the Security Council may not derogate from *jus cogens*, the question remains whether the category of *jus cogens* norms includes obligations arising from the law of occupation. While it has been maintained that such obligations do not appear to have the character of *jus cogens* norms,<sup>86</sup> the ICJ, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, did suggest that at least certain norms of the law of occupation may have a peremptory character. The Court held that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall, and that it is also for all States to see to it that any impediment created by the construction of the wall is brought to an end. This constituted an application of the principles in Articles 40-41 of the ILC draft articles on State responsibility, which by their own terms apply “to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.” Coupled with the ICJ’s conclusion that the law applicable to the Israeli-occupied territories includes the law of occupation, this suggests that the latter may include peremptory norms. ICTY Trial Chamber II explicitly held in its judgment in the *Kupreškić* case that: “most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character.”<sup>87</sup>

Neither Article 25 nor Article 103 of the UN Charter provides that if the Security Council derogates from particular rules of international law, it should make clear which alternative regime applies. It is difficult to accept, however, that the drafters of the UN Charter intended to create a legal vacuum when the Council does derogate from international law. A legal argument could be made that the Security Council should indicate an alternative standard on the ground that, since it acts by delegation from the UN membership as a whole, it cannot delegate powers to States without continuing to maintain close scrutiny.<sup>88</sup> It has moreover been argued that the Council must at all times retain overall authority and control over the exercise of delegated powers under Chapter VII.<sup>89</sup> The determination by the Council that States may do certain

<sup>86</sup> Scheffer, *op. cit.* (note 7), p. 852.

<sup>87</sup> *Prosecutor v. Zoran Kupreškić et al.*, Judgment, Case No. IT-95-16-T, Tr. Ch. II, 14 January 2000, para. 520.

<sup>88</sup> See e.g. Derek Bowett, “The impact of Security Council decisions on dispute settlement procedures”, *European Journal of International Law*, Vol. 5, 1994, p. 8.

<sup>89</sup> Danesh Sarooshi, *The United Nations and the Development of Collective Security: The delegation by the Security Council of its Chapter VII powers*, Oxford University Press, Oxford, 1999, pp. 34, 159-160.

things in Iraq that they would otherwise not be able to do constitutes such a delegation. The Council should, according to this argument, provide a standard on the basis of which it can maintain scrutiny over the way in which the delegated powers are being exercised. Another legal argument could be made that the Security Council has an obligation to act in good faith. Article 2 (2) of the UN Charter requires member States to fulfil their obligations under the Charter in good faith. At first glance this requirement seems to concern member States only, but read together with the first sentence of Article 2 it appears that it could apply to the UN as well.<sup>90</sup> In any event the principle applies to the member States participating in the decision-making process of the organization.

As Kirgis remarks, the principle of good faith is difficult to define, “but at the very least, the principle seems to require the Council to act responsibly when it carries out its Charter-based functions.”<sup>91</sup> It could be argued that an open-ended derogation from the law of occupation is irresponsible behaviour on the part of the Council. Even if there was no legal obligation for the Council to provide an alternative standard, it would be a wise policy choice for it to do so. In this respect the case of UN peace support operations is instructive. It has been claimed that the law of occupation is not applicable to those operations because they are governed by an alternative legal regime, i.e. a Security Council resolution.<sup>92</sup> However, Security Council resolutions generally do not provide a framework that establishes clear guidance for practical questions raised by the administration of territory.

In sum, the Security Council can derogate from the law of occupation at least with regard to non-peremptory norms, but if it does so it should provide an alternative standard of behaviour.

### **Has the Security Council derogated from the law of occupation in the case of Iraq?**

Whether or not the Security Council has derogated from the law of occupation in the case of Iraq is a matter of interpretation of Resolution 1483. The principles applicable to such interpretation are underdeveloped.<sup>93</sup>

<sup>90</sup> See e.g. Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart, Oxford/Portland, Or., 2004, p. 195.

<sup>91</sup> Frederic Kirgis, “Security council governance of post-conflict societies: A plea for good faith and informed decision-making”, *American Journal of International Law*, Vol. 95, No. 3, July 2001, p. 581.

<sup>92</sup> Daphna Shraga, Intervention in L. Condorelli, A.M. La Rosa & S. Scherrer (eds.), *Les Nations Unies et le Droit International Humanitaire*, Pedone, Paris, 1996, p. 433.

<sup>93</sup> See Michael Wood, “The interpretation of Security Council resolutions”, *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 73.

The principal authoritative statement in this field is a passage in the ICJ's *Namibia* Advisory Opinion:

“The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”<sup>94</sup>

An answer to the question whether the Council in Resolution 1483 altered the status of States contributing troops to the Stabilization Force is not to be found in the terms of the resolution. On the one hand preambular paragraph 14 suggests that the Council has changed the legal status of these States. On the other hand operative paragraph 5 of the resolution “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”. This paragraph could be read to mean that under the circumstances these conventions, which include the main body of the law of occupation, are applicable to all States concerned, including States working under the Authority. However, if preambular paragraph 14 is considered to have constitutively determined that States working under the Authority are not occupying powers, then in the case of those States “their obligations” simply do not include the obligations of an occupying power. They are nonetheless still bound to respect the provisions of the law of occupation which are addressed to all States party to the Geneva Conventions, including for example the obligation in Article 59 of the Fourth Geneva Convention to permit the free passage of relief to the population of an occupied territory.

The discussions leading up to the adoption of Resolution 1483 are for the most part not on public record. Much of the negotiating process of a Security Council resolution characteristically takes place in informal consultations. Nevertheless, the changes in the draft resolution suggest that the Council did alter the status of troop-contributing States. As explained

<sup>94</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971*, ICJ Reports 1971, p. 53.

above, what ultimately became preambular paragraph 13 was changed during the drafting of the resolution to attenuate the connection between these States on the one hand and the US and the UK on the other.

The record of the Security Council meeting in which the resolution was adopted can help with its interpretation,<sup>95</sup> but in this particular case it does not provide much guidance. One delegation made a clear distinction between the occupying powers and member States which, in the near future, will be involved in the rebuilding of Iraq.<sup>96</sup> It did not specify whether these other member States would, in the absence of the resolution, be occupying powers.

Subsequent State practice which shows how the resolution is interpreted by States more or less directly involved can be a supplementary means of interpretation.<sup>97</sup> As pointed out above, the Netherlands invokes Resolution 1483 in affirming its status as a non-occupying power. New Zealand appears to do likewise. In a statement issued on 11 August 2003 the Prime Minister indicated that Resolution 1483 provided the necessary multilateral cover for the deployment of New Zealand troops in Iraq. She stated that: "Under Resolution 1483, we can make a useful contribution without in any way becoming an occupying power."<sup>98</sup> On the other hand, in reply to questions by members of Parliament the New Zealand Minister of Foreign Affairs emphasized that his country's troops would not be carrying out tasks characteristic of occupying powers in the same way as the government of Denmark has done. He stated that:

"The proposed deployment of New Zealand Defence Force engineers is in fact in response to Resolution 1483, which was passed, I think unanimously, by the United Nations. These engineers are not part of the occupation forces. They are there to do the job that we said we would always be there to do, and that is to assist the civil reconstruction of Iraq."<sup>99</sup>

This State practice indicates that at least certain States contributing troops to SFIR considered that Resolution 1483 prevented them from becoming occupying powers, which they might otherwise have been.

From the terms of Resolution 1483 it is not clear whether the Security Council intended to authorize the Authority to derogate from the law of

<sup>95</sup> Wood, *op. cit.* (note 93), at 93.

<sup>96</sup> S/PV.4761 of 22 May 2003, at 10 (Cameroon),

<sup>97</sup> Wood, *op. cit.* (note 93), at 95.

<sup>98</sup> Press release, New Zealand Defence Force, 11 August 2003.

<sup>99</sup> Debates of Parliament, 30 July 2003, The Hon. Phil Goff.

occupation in the reconstruction of the Iraqi economy. Yet the language used implies a broad role for the Authority in the reconstruction of Iraq. The Coalition is called upon to “promote the welfare of the Iraqi people through the effective administration of the territory”. In addition, the resolution refers to a role for the Authority in promoting economic reconstruction, the conditions for sustainable development, and legal and judicial reform. These tasks would seem difficult to reconcile with the restrictions in the law of occupation.<sup>100</sup> According to Grant, this difficulty suggests that the Council has created a “carve out” from the Hague Regulations and the Fourth Geneva Convention.<sup>101</sup> On the other hand, Resolution 1483 explicitly 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, without making an express exception for those provisions that are difficult to reconcile with the reconstruction of Iraq.

The record of the meeting at which Resolution 1483 was adopted offers some evidence in support of the argument that part of the law of occupation was set aside. The Spanish delegate stated that the resolution provided an appropriate legal framework for dealing with the special, anomalous and grave situation, pointing out, among other things, that it contained “guidelines for the conduct of the authorities that will be managing this transitional period in Iraq – and transparency in economic affairs is not the least relevant of these guidelines.”<sup>102</sup> This statement implies that the law of occupation was not deemed to be the only legal regime applicable. More specifically, Pakistan considered that the resolution included the delegation of certain powers by the Security Council to the occupying powers, represented by the Authority.<sup>103</sup> It could be argued that such a delegation would be unnecessary except if there were a need to derogate from existing international law.

As mentioned above, subsequent State practice (as exemplified by the Netherlands) would appear to suggest that Resolution 1483 has created a “carve out” from the law of occupation. In response to a question by a member of the House of Lords concerning the legality of Order 39, a UK government representative stated that the content of the Order was decided by the

<sup>100</sup> But see Alexander Orakhelashvili, “The post-war settlement in Iraq: The UN Security Council Resolution 1483 (2003) and general international law”, *Journal of Conflict & Security Law*, Vol. 8, 2003, p. 307.

<sup>101</sup> Thomas D. Grant, “Iraq: How to reconcile conflicting obligations of occupation and reform”, *ASIL Insight*, June 2003.

<sup>102</sup> *Op. cit.* (note 96), at 6 (Spain).

<sup>103</sup> *Ibid.*, at 11 (Pakistan).

Iraqi Interim Governing Council and endorsed by the CPA.<sup>104</sup> This could be read as implying that the CPA could in certain circumstances derogate from the law of occupation, provided the Iraqi authorities agreed. Indeed, paragraph 4 of the resolution calls upon the Authority “to promote the welfare of the Iraqi people through the effective administration of the territory”. This suggests that the Authority should consult Iraqi representatives before taking important decisions, since Iraqis are in the best position to determine what promotes their welfare. However, this does not detract from the fact that the ultimate decision, in this case the promulgation of Order 39, was made by the Authority.

### Conclusion

The situation in Iraq has focused renewed attention on the law of occupation. It is rare that States accept the status of occupying powers, as the US and the UK have done. However, the adoption of Resolution 1483 combined with the activities of the US, the UK and States assisting them in Iraq has raised questions as to the relationship between that resolution and the law of occupation. The Security Council, acting under Chapter VII of the UN Charter, appears able to derogate from at least those rules of the law of occupation which do not constitute peremptory norms of international law. Claims that the Security Council has done precisely that in Resolution 1483 are neither clearly corroborated nor clearly dismissed by an analysis of the resolution and the circumstances surrounding its adoption. The lack of clarity in this respect has been lamented by commentators, who argue that the Council should have set out a mandate of civilian and military responsibilities and UN oversight that would eclipse much of occupation law with a larger body of modern international law as a source of guidance in attaining transformational objectives.<sup>105</sup> I fully support that argument. If the Council intends to derogate from international law in a resolution, it should do so explicitly and determine the alternative regime to be applied. A decision as important as derogating from the law of occupation should not be made ambiguously. It is clear from the geopolitical situation at the time Resolution 1483 was adopted, however, that an explicit derogation was not feasible. Such a determination could have been regarded as endorsing the armed intervention in Iraq, which was unacceptable to several permanent

<sup>104</sup> *Hansard*, House of Lords, 8 October 2003, c. 293-294.

<sup>105</sup> Scheffer, *op. cit.* (note 7), p. 850.

members of the Council. In this respect an analogy between the Stabilization Force in Iraq and UN-authorized peace support operations including ISAF and KFOR is misleading.<sup>106</sup> In the case of the latter, the Security Council has set out clear mandates in enabling resolutions and has authorized the use of all necessary means to achieve those mandates. In the case of the Stabilization Force in Iraq, the Council in the first instance appears primarily to have taken note of the factual situation of the US and UK as occupying powers. Only in Resolution 1511 adopted on 16 October 2003 did the Council authorize a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq.<sup>107</sup> Resolution 1511 also expressly underscored the temporary nature of the exercise by the Coalition Provisional Authority of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in Resolution 1483 (2003).<sup>108</sup>

The foregoing analysis leads to the conclusion that developments in Iraq are not in themselves, as some maintain, an argument for revising the existing law of occupation.<sup>109</sup> That law remains an important framework for addressing such situations. In exceptional cases in which it is considered too restrictive, the Security Council may derogate from certain provisions. In a case such as Iraq, where there are divergent views as to the legitimacy of the events that have led to the occupation, there can be no derogation or only an ambiguous one, and the States concerned will have only limited latitude for reforms. More fundamental changes to the occupied territory's political, legal and economic system will have to be left to that territory's population. If such changes are considered necessary, power should be transferred to the local population as soon as possible. In the present case, this means that power should pass as soon as possible to the Iraqi people. And that is precisely what Resolution 1483 contemplated in its fourth preambular paragraph, which expresses "resolve that the day when Iraqis govern themselves must come quickly".<sup>110</sup>

<sup>106</sup> The analogy is made by Scheffer, *ibid.*, p. 859.

<sup>107</sup> SC Res. 1511, 16 October 2003.

<sup>108</sup> *Ibid.*, para. 1.

<sup>109</sup> Scheffer, *op. cit.* (note ), p. 859. See also D. P. Goodman, "The need for fundamental change in the law of belligerent occupation", *Stanford Law Review*, Vol. 37, 1985, p. 1573.

<sup>110</sup> SC Res. 1483, preambular para. 4.



## Résumé

### ***L'existentialisme en Irak : la résolution 1483 du Conseil de sécurité et le droit de l'occupation***

*Marten Zwanenburg*

*Le droit de l'occupation était une composante importante du régime juridique applicable en Irak jusqu'au transfert de souveraineté au gouvernement intérimaire irakien, en juin 2004. Les résolutions du Conseil de sécurité relatives à l'Irak, en particulier la résolution 1483, constituaient, elles aussi, un élément significatif de ce régime juridique, un élément qui n'était cependant pas nécessairement compatible à tous égards avec le droit de l'occupation. L'auteur examine la relation entre le droit de l'occupation et la résolution 1483 du Conseil de sécurité en Irak et la question de savoir si – et le cas échéant, à quelles conditions – le Conseil de sécurité peut déroger au droit de l'occupation. Il analyse à cette fin les articles pertinents de la Charte des Nations Unies. L'article soulève ensuite une interrogation: le Conseil de sécurité a-t-il effectivement dérogé au droit de l'occupation dans le cas de l'Irak? Pour y répondre, l'auteur étudie la résolution 1483 ainsi que la pratique des États en la matière.*