

Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference

*Rüdiger Wolfrum**

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I. Introduction

Since the beginning of the war of the United States and its allies (the Coalition) against Iraq this state has undergone four different stages: (1.) the war which ended officially on 1 May 2003¹; (2.) the period of belligerent occupation by the United States and its allies; the end of which was marked by the formal “resumption of sovereignty” through

¹ On 1 May 2003 President Bush declared the end of “major” military operations in Iraq. Some speculation developed from this wording. It has been argued that the President did not declare the end of the war so as not to be obliged to release the prisoners of war and to be further in the position to arrest people accused of war crimes, see in this respect, M. Hmond, “The Use of Force against Iraq: Occupation and Security Council Resolution 1483”, *Cornell Int’l L. J.* 36 (2004), 443 et seq. (444). This is not the case as will be shown below. The continuation of the period of belligerent occupation depends upon whether the United States or rather the Coalition Military Forces exercise control over Iraq whereas the former government does not. In fact, the letter of 8 May 2003 of the Permanent Representatives of the United States and the United Kingdom, to which S/RES/1483 (2003) of 22 May 2003 refers, states: “... recognizing the specific authorities, responsibilities and obligations under applicable international law of these states as occupying powers under unified command”.

the “Interim Government” on 28 June 2004, respectively 1 July (3.) and (4.) the period under the “Transitional Government” until the takeover by an elected government, which is scheduled for December 2005. The term “Interim Government” used within this article refers to the government established on 1 July 2004 which lasted until the election of the Transitional National Assembly on 30 January 2005 which formed a “Transitional Government”. In spite of the different stages Iraq has gone through since the beginning of the war by the United States and its allies, the process of transition of Iraq from belligerent occupation to an Interim Government and then to the Transitional Government was a gradual one, since the functions of each of the respective governments of Iraq increased. Nevertheless different rules of international law govern each of these periods.

The following article will deal with the second² and, in particular, the third and fourth stages, namely when Iraq was under the belligerent occupation of the United States and its allies and the periods thereafter when the governmental authority was assumed by the Interim Government and the Transitional Government respectively. As far as the period of occupation is concerned the article will also deal with the question whether the occupying forces lived up to the applicable international law, whether the respective international norms are adequate in a situation where the change of a governmental system seems to be the prerequisite for a return to a sustainable peace and whether the Security Council modified the legal situation. The stages after 28 June 2004 raise the question concerning the legitimacy of the establishment of the Interim Government and the Transitional Government respectively and concern their status, taking into consideration the functions exercised and the prerogatives enjoyed by the United States and its allies.

² The war against Iraq, particularly the question whether it was legal under international law or, at least, legitimate has been extensively covered in literature.

II. The Period of Belligerent Occupation

1. Applicable Law

Belligerent or military occupation places the *de facto* ruling authority in the hands of the occupant.³ The rights of the occupant are temporary, not permanent, whereas the *de jure* sovereignty rests with the respective state whose territory has been occupied.⁴ International law governing this situation and limiting the powers of the occupying power is enshrined in arts 42-56 of the Hague Regulations,⁵ the Fourth Geneva Convention, in particular arts 27-34 and 47-78,⁶ in Additional Protocol I⁷ as well as in customary international law.⁸ The respective rules of

³ See also *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, 2004, 274 et seq.; A. Roberts, "What is a Military Occupation?", *BYIL* 55 (1984), 249 et seq.; C. McCarthy, "The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq", *Journal of Conflict & Security Law* 10 (2005), 43 et seq. (45).

⁴ Belligerent occupation does not confer sovereignty upon the occupant, see McCarthy, see note 3, 49; on the historical development of this issue see R.R. Baxter, "The Duty of Obedience to a Belligerent Occupant", *BYIL* 27 (1950), 235 et seq.; M. Greenspan, *The Modern Law of Land Warfare*, 1959, 217.

⁵ Annex to the Convention Respecting the Laws and Customs of War on Land of 18 October 1907 (authentic text French), reprinted in: D. Schindler/ J. Toman, *The Laws of Armed Conflicts*, 1988, 63 et seq. The International Military Tribunal of Nuremberg had stated that the Hague Regulations constituted customary international law, cf. Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Vol. XXII, 497.

⁶ Article 154 Fourth Geneva Convention states that it complements the Hague Regulations. This is underlined by Greenspan, see note 4, 213 whereas H.P. Gasser in: D. Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflict*, 1995, states that the dominant law is the Fourth Geneva Convention (241). For a comparison of the provisions of the Fourth Geneva Convention and of the Hague Regulations, see J. Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in the Time of War*, 1958, 614.

⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, *ILM* 16 (1977), 1391 et seq.

⁸ Under the Fourth Geneva Convention the meaning of the notion of "occupation" is wider than under the Hague Regulations. According to article

international humanitarian law apply whenever a belligerent state occupies the territory of the adversary or a part thereof.⁹ The applicability of international humanitarian law does not depend upon whether the military occupation was in conformity with international law (as, for example, in the case of self-defense) or not. The applicable international humanitarian law deals with particular aspects of a belligerent occupation. Given the technical and, in particular, political changes that have occurred in modern warfare, international humanitarian law can no longer be considered comprehensive. For example new weapon technology requires a redefinition of leading principles of international humanitarian law. What is even more relevant for the complex dealt with in this contribution is the increasing lack of differentiation between civilians and combatants. Apart from that international humanitarian law is supplemented by international human rights law.¹⁰

42 of the Hague Regulations it is essential that an occupied territory is “... actually placed under the authority of the hostile army”, whereas under article 2 (2) of the Fourth Geneva Convention the rules of belligerent occupation also apply in cases where the occupation meets no armed resistance. The broadened ambit of belligerent occupation means that there exists no intermediate period between what might be referred to as invasion phase and the inauguration of a stable military occupation. Also cases are covered where the occupation is not in fact the outcome of a military confrontation.

⁹ C. Greenwood, “The Administration of Occupied Territories in International Law”, in: E. Playfair (ed.), *International Law and the Administration of Occupied Territories*, 1992, 241 et seq. (243).

¹⁰ As to the application of general international human rights standards see J.A. Frowein, “The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation”, *Isr. Y. B. Hum. Rts* 28 (1998), 1 et seq. (9 et. seq.). He points out that international humanitarian law is to be considered as *lex specialis*. A detailed analysis is contained in Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2004, 20 et seq. He emphasizes, though, that the norms of international humanitarian law protecting human rights address states as beneficiaries rather than individuals. One has to take into account though that the U.S. Government seems to advocate the non-applicability of human rights treaties to U.S. forces abroad, see the Report of the U.S. Defense Department, Working Group on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations, of 6 March 2003. The U.S. Government advances two main arguments to endorse its position, namely that international human rights treaties do not apply outside the United States and that, as far as the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is concerned for the United States, according to its under-

According to article 42 Hague Regulations a territory is considered occupied when it “is actually placed under the authority of the hostile army”. This is a factual issue,¹¹ no proclamation to that extent is needed. It is only decisive that the former government has been rendered incapable of publicly exercising its authority in the respective area and that the occupying power is in a position to substitute its own authority for that of the former government. At least after 1 May 2003 Iraq in its totality had to be considered as militarily occupied in spite of the ongoing terrorist attacks or the calls from some political or religious leaders to resist the allied forces. The formerly disputed issue whether the rules of military occupation apply only during the course of actual warfare has been resolved by article 6 Fourth Geneva Convention according to which the Convention continues to apply to the occupied territory despite the general close of military operation in a conflict.

standing issued upon ratification, torture is meant to embrace only any act inflicting severe physical or mental pain that is specifically intended to cause such pain or suffering. As far as the first argument is concerned it has to be noted that the Human Rights Committee has consistently held that pursuant to article 2 para. 1 of the Covenant on Civil and Political Rights the rights enshrined must be respected in any place, where the respective government effectively exercises its jurisdiction. As for the second argument one cannot but state that such understanding runs counter to object and purpose of the International Covenant on Civil and Political Rights, as for details see A. Cassese, “Are International Human Rights Treaties and Customary Rules on Torture Binding upon U.S. Troops in Iraq?”, *Journal of International Criminal Justice* 2 (2004), 872 et seq. Finally, the U.S. Government should take into account that the International Criminal Tribunal for the Former Yugoslavia held in the *Furundžija* case that the prohibition of torture contained in international humanitarian law constitutes *jus cogens*, ICTY, Trial Chamber, *Prosecutor v. Furundžija*, Judgment (1998), Case IT-95-17/1, *ILR* 121, 213 et seq. (254-257, 260 (1)).

¹¹ See article 42 Hague Regulations; this provision is supplemented by article 27 of the Fourth Geneva Convention. The Proclamation of occupation by the United States is only relevant to the extent that the population of the areas under the effective authority of the United States became aware of the existence of occupation. Such proclamation can neither bring occupation into existence nor postpone the applicability of the international humanitarian law rules on belligerent occupation. A. Roberts, “The End of Occupation: Iraq 2004”, *ICLQ* 54 (2005), 27 et seq. (30/31), indicates that in the political statements made by the U.S. and the U.K. governments the word “occupation” was avoided, whereas it was used in S/RES/1483 (2003) of 22 May 2003.

One issue has to be taken into consideration concerning the applicability of the Fourth Geneva Convention. According to article 6 para. 3, the application of this Convention ceases one year after the general close of military operations. However, as long as the Occupying Power exercises the functions of a government the arts 1 to 12, 27, 29 to 34, 47, 49, 51 to 53, 59, 61 to 77 and 143 Fourth Geneva Convention remain applicable. This rule has been modified by article 3 lit. (b) Additional Protocol I according to which the application of the Conventions and of the Protocol shall cease, in the case of occupied territories, on the termination of occupation.

In respect of Iraq the application of that provision is problematic. This provision cannot be considered to be part of customary international law; thus for those of the occupying states, such as the United States, which are not a party to Additional Protocol I, the Fourth Geneva Convention will be only temporarily applicable in its entirety, and for others until military occupation comes to an end. This means in essence that the applicable rules will differ among the occupying states, namely, the United States and the United Kingdom on the one hand and the others such as Japan, Italy and Poland on the other. The issue of replacement of the humanitarian rules on occupation by human rights rules was discussed *in abstracto* at the Diplomatic Conference of Geneva in 1949 which adopted the Four Geneva Conventions. It was argued that one year after the close of hostilities, the authorities of the occupied state will and should have regained most of their responsibilities and, accordingly, there would be no further justification for applying rules accommodating the security interests of the occupying power.¹² This is not a merely academic issue. For example, article 78 Fourth Geneva Convention dealing with security measures, in particular internments, does not belong to the core issues applicable for the whole period of occupation. In consequence thereof internment activities of the United States in Iraq have been covered by the stricter rules of general international human rights since 1 May 2004.

2. General Objective of the International Norms on Belligerent Occupation

As already indicated the international norms on belligerent occupation referred to are meant to cover a transitional period only, i.e. until the

¹² Pictet, see note 6, 43.

government of the occupied state has reorganized itself. They try to strike – in that period – a balance between the security interests of the occupying power and the presumed interests of the population of the occupied state by preserving the *status quo ante* as far as the unity of the respective state is concerned and the maintenance of the existing legal order to the extent that the security interests of the occupying power so permit. International law, in principle, does not legitimize the introduction of political changes.¹³ This is true even in those cases – and Iraq undoubtedly was such a case – where respective changes in government may be necessary for the transformation from a totalitarian regime into a democratic political system and thus to eradicate the causes of conflict. Stating that such a change may contribute to the restoration of peace does not yet answer whether unilateral actions allegedly pursuing such a purpose conform to existing international law.¹⁴

3. Obligations of the Belligerent Occupant

a. Restoration, Maintenance of Peace and Re-establishment of an Effective Infrastructure – the Rules of International Humanitarian Law

It is the main obligation of the belligerent occupant to restore and maintain, as far as possible, public order and safety.¹⁵ The U.S. Army

¹³ Pictet, see note 6, 273, who states that unwarranted interferences in the domestic affairs of an occupied territory “... are incompatible with the traditional concept of occupation ... according to which the occupying power was to be considered as merely being a de facto administrator. The provision of the Hague Regulations is not applicable only to the inhabitants of the occupied territory; it also protects the separate existence of the state, its institutions and its laws”.

¹⁴ See on this issue the second contribution of R. Wolfrum, in this Volume.

¹⁵ Article 43 Hague Regulations: “The authority of the legitimate power having in fact passed to the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” This provision is supplemented by article 27 Fourth Geneva Convention which, in its last sentence, states that the occupying power may take such measures of control and security as may be necessary as a result of the war. No further specification is provided for, leaving it to the discretion of the occupying power which measures to choose. How-

Field Manual 27-10 cites this obligation of the occupying power accurately: “... The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety ...”.¹⁶ The reference to the fact that the transfer of authority is the result of a factual development emphasizes again that this does not mean a transfer of sovereignty. It is this point which has been highlighted by the Security Council in respect of Iraq when it referred to the territorial integrity and sovereignty of Iraq.¹⁷

The obligation to ensure and restore public order and safety entails police functions with the view to protect, for example, museums, hospitals, the public infrastructure, public buildings, embassies and consulates against looting or destruction.¹⁸ The actual attitude taken by United States troops in the first days in Baghdad did not seem to reflect that obligation adequately. The occupant, on the other hand, is not responsible for the effects of terrorist attacks, though, as long as adequate precautionary measures have been taken.

Since the responsibilities of the belligerent are of a merely temporary nature it must – as a matter of principle – refrain from interfering in the legal order of the occupied territory¹⁹ or in its governmental

ever, article 27 Fourth Geneva Convention contains certain restrictions implementing the general obligation of humane treatment. Further restrictions are contained in arts 41 to 43, 78 and 79 to 135 (Regulations for the Treatment of Internees) Fourth Geneva Convention. Apart from that one may argue that law enforcement measures – different from fighting pockets of resistance where the laws of armed conflict apply – should be guided by the 1979 UN Code of Conduct for Law Enforcement Officials and the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

¹⁶ The U.K. Manual of the Law of Armed Conflict, see note 3, does not refer to this very basic principle.

¹⁷ S/RES/1472 (2003) of 28 March 2003; 1500 (2003) of 14 August 2003; 1511 (2003) of 16 October 2003.

¹⁸ Regulations issued by the occupying power falling under this category include amongst others regulations concerning child welfare, labor, food, hygiene and public health; cf. Pictet, see note 6, 337.

¹⁹ Pictet, see note 6; different obviously E. Benvenisti, “The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective”, *Israel Defense Forces Law Review* 1 (2003), 19 et seq. (30). He bases his argument predominantly on the fact that the French text of article 43 of the Hague Regulations referring to “L’ordre et la vie publics”, is broader than “public order and safety”. In no case would the French word-

structure²⁰ unless its security interests demand otherwise. It is this general principle that has come under discussion. Article 64 Fourth Geneva Convention stipulates that the penal laws of the occupied territory shall remain in force. It gives expression to the general principle of the law of occupation, namely the continuity of the legal system which applies to the whole of law. Concerning penal law article 64 Fourth Geneva Convention provides for two exceptions. Penal laws may be repealed or suspended by the occupying power in cases where they constitute a threat to its own security or an obstacle to the application of the Convention. The first possibility is self-explanatory. The second one is to be understood as heralding a general principle. It enables the occupying power to abrogate any law not in conformity with the human rights standards enshrined in the Fourth Geneva Convention²¹ or to which this Convention alludes, namely rules which adversely affect racial or religious minorities (article 27 Fourth Geneva Convention) or are incompatible with the requirement of humane treatment.

According to article 23 lit. (h) Hague Regulations the right of the inhabitants of the occupied territory to take legal action in the local courts must not be affected. The courts of the occupied territory retain jurisdiction to deal with any of the inhabitants' cases that are neither of a military nature nor affect the security of the occupying forces. The latter cases are to be dealt with by the authorities of the occupying forces.²²

According to article 49 Fourth Geneva Convention the occupying power is prohibited from transferring civilians from the occupied territory to another country. Article 147 of the Fourth Geneva Convention further lists unlawful deportation or transfer or unlawful confinement of protected persons as a grave breach of the Convention. Additionally collective punishment is prohibited.²³ These rules which are to be con-

ing cover far-reaching re-organizational measures which determine the future of the occupied state.

²⁰ See below.

²¹ Emphasized in the U.K. Manual of the Law of Armed Conflict, see note 3, 283-284.

²² U.K. Manual of the Law of Armed Conflict, see note 3, 284.

²³ See article 50 of the Hague Regulations of 1907, see note 5, which provides: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible".

sidered as forming part of customary international law thus limit the means of the occupying force to suppress further internal resistance.

The occupying power is further responsible for ensuring hygiene and public health²⁴ as well as food and medical supply.²⁵ In that respect the occupying power has to co-operate with the respective local and national authorities. If such authorities have ceased to exist or have been dissolved by the occupying power the respective responsibilities devolve upon the latter. This can be put more generally: the more an occupying power interferes with administration of an occupied territory the more responsibilities for the well-being of the population devolve upon the occupying power. It is doubtful whether this has been realized by the occupying powers of Iraq.

Under article 59 Fourth Geneva Convention the occupying power is under the obligation, if the whole or part of the population of an occupied territory is inadequately supplied, to agree to relief schemes on behalf of the said population, and must facilitate them by all means at its disposal. Such schemes may be undertaken by states or impartial organizations. Every effort is to be made to protect the respective consignments. The occupant cannot refuse the assistance of particular non-governmental organizations unless such assistance poses a threat to the security of the former. However, relief consignments do not relieve the occupying power of its respective responsibility.²⁶

One element within the broader obligation of an occupying power to restore and maintain good order and security is to provide protection for cultural property. The protection of cultural property reflects the general principle of international humanitarian law that military activities should be directed against military objects only. Apart from that modern international law also considers cultural property as being of relevance for the international community at large and therefore its protection, in particular, in times of war is a matter of consequence.²⁷ Cultural property is also exposed to destruction or damage during occupation. International humanitarian law has therefore developed a scheme

²⁴ Article 56 Fourth Geneva Convention.

²⁵ Article 55 Fourth Geneva Convention.

²⁶ Article 60 Fourth Geneva Convention.

²⁷ For details see Dinstein, see note 10, 152 et seq.; R. Wolfrum, "Protection of Cultural Property in Armed Conflict", *Isr. Y. B. Hum. Rts.* 32 (2002), 305 et seq.

for the protection in this situation.²⁸ The safeguarding and preserving of cultural property remains, in principle, within the competence of the authorities of the occupied country. The occupying power should support them as far as possible²⁹ and should, in particular, not prevent them from discharging their duties.

In two special cases the occupying power itself has to take necessary measures, first when cultural property has been damaged by military operations. When such damage occurs during a period of occupation, the responsibility of the occupying power is apparently greater. Its duty in this case, however, is limited to the most necessary measures i.e. those which cover a situation which threatens the very existence of cultural property or its deterioration.³⁰ The same applies for the situation where the national authorities are unable to act.³¹

Secondly, a party to a conflict is obliged to prevent the export of cultural property from a territory which it occupies during an international armed conflict. If such property is transferred from the occupied territory into the territory of another state, the latter is under an obligation to protect such property.³² Property illegally exported from a territory under occupation has to be returned at the close of hostilities to the competent authorities of the country previously occupied.³³ The former occupying power is to pay an indemnity to those who hold such property in good faith.³⁴ Cultural property deposited by one state in the territory of another state party must be returned by the latter at the close of hostilities.³⁵ This provision is mainly addressed to the powers with custody of objects in their jurisdiction or in territories occupied by them. In such territories they may not confiscate cultural property.

²⁸ In particular the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and the respective Protocol, as well as the two Additional Protocols to the Geneva Conventions are of relevance.

²⁹ Article 5 (1) of the 1954 Hague Convention.

³⁰ Article 5 (2) *ibid.*; J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, 1996, 85.

³¹ Article 5 (2) *ibid.*

³² See on this cases the Protocol for the Protection of Cultural Property in the Event of Armed Conflict of 1954.

³³ Section I (3) of the 1954 Protocol.

³⁴ Section I (4) of the 1954 Protocol.

³⁵ Section II (5) of the 1954 Protocol.

Violations of these duties must be prosecuted and are liable to penal or disciplinary sanctions.³⁶

After having taken over the control of Baghdad the Coalition Forces have neglected their obligation under general international law to protect the Iraqi National Museum. Neither the United States nor the United Kingdom is party to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.³⁷ Nevertheless, it is more than doubtful whether the Coalition Provisional Authority has lived up to its general obligation under international law to provide for effective protection of the museums and the sites of archaeological relevance. In keeping with the said international agreement, S/RES/1483 obliges all Member States to take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraqi National Museum, the National Library and other locations in Iraq. It is worth noting that this covers the period since 6 August 1990.³⁸ Chapter VII of the UN Charter is binding upon all states and forms the basis for the treatment of cultural property removed from Iraq since 6 August 1990.

b. The Role of the Coalition in Respect of the Political Restructuring of Iraq

As already indicated under international humanitarian law, the occupying power must not politically restructure the occupied state. This is reflected in article 43 Hague Regulations which has received detailed supplementation in the Fourth Geneva Convention. According to the latter, in restoring and maintaining peace and security the laws in force of the occupied state shall be respected at all times unless the occupant is absolutely prevented from doing so.³⁹

This provision – read literally – seems to be difficult to reconcile with present day realities. M. Greenspan argues that where wars are fought to achieve a change of a particular political regime, as was the case in World War II, the military occupant cannot be under an obligation to uphold the regime fought against. This is, in his view, particu-

³⁶ Article 28 of the 1954 Hague Convention.

³⁷ Reprinted in Schindler/ Toman, see note 5, 745 et seq.

³⁸ S/RES/1483 (2003) of 22 May 2003 operative para. 7.

³⁹ This principle is emphasized in the U.K. Manual of the Law of Armed Conflict, see note 3, 277.

larly true in the case where the change of the political regime is the only effective means to secure peace. On that basis a wider interpretation of article 43 Hague Regulations has been argued.⁴⁰ Such an interpretation, however, would deprive article 43 Hague Regulations of all its meaning making it dependent upon the objectives pursued by the occupant when entering the war.⁴¹ As much as it was legitimate to overthrow the totalitarian government of Germany and to introduce the rule of law and democracy in Germany there are now definite limits of international humanitarian law which hinder the occupant from freely and unilaterally changing the structure and the political system of an occupied state. Those limits are specified in the Fourth Geneva Convention.⁴²

Changes in the political structure of the occupied state can only be made by the population of that state or representative institutions. A dominant influence exercised by the occupying power in this respect would go beyond its authorization under the respective rules of belligerent occupation and would be in violation of the principle of self-determination. In consequence thereof Regulation 1, Section 2 of the Coalition Provisional Authority states that all legislation in force in Iraq on 16 April 2003 shall remain in force unless replaced by the Coalition Provisional Authority or superseded by legislation.⁴³ Nevertheless the Coalition Provisional Authority has significantly changed, in particular, the Iraqi legal order pertaining to its economic structure. It has further heavily influenced the political reorganization of Iraq.

⁴⁰ Greenspan, see note 6.

⁴¹ It should be noted that the U.S. Iraq Liberation Act of 1998 (Public Law 105-338-Oct. 31, 1998) already stated under Section 3: "It should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime."

⁴² J.J. Paust, "The United States as Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War", *Suffolk Transnational Law Review* 17 (2003), 1 (16 et seq.); H.H. Perritt, Jr., "Structures and Standards for Political Trusteeship", *University of California International Law and Foreign Affairs* 8 (2003), 385 et seq. (393 et seq.), who argues that the Allied Occupation of Germany and of Japan had its basis on a political trusteeship equaled with the mandate or the trusteeship system of the League of Nations and the United Nation respectively. However, this is not the place to deal with the military administration of Germany and Japan.

⁴³ CPA Regulation 1 of 16 May 2003.

Stated in more general terms, international humanitarian law is not designed to provide for post-conflict peace building in that it does not provide for the restructuring of a state even if this restructuring is the only means to reach a sustainable peace.

It should be noted, though, that international law is not unaware that an interrelation may exist between the structure of a state and its influence on the peace in a region. International law is equally aware that the population of a state may need assistance in establishing a representative government. The means of assistance international law may provide in such situations differ significantly.⁴⁴

Finally, it is worth considering whether general conclusions may be drawn from the situation in Iraq, in particular, taking into account the role the Security Council played in this respect. For example, under the mandate system of the League of Nations or the trusteeship system of the United Nations⁴⁵ states have been authorized to administer certain territories with the view to prepare the respective population for self-government.⁴⁶ This not only opened the possibility for the states concerned to establish governmental structures based upon democracy and the rule of law but also obliged states to perform such a function. E. de Wet gives an overview of the instances and the format used for the administration of territories on behalf of the United Nations.⁴⁷ The mandate system as well as the trusteeship system, however, applied only to post-colonial situations. Other means are the involvement of states, with or without the authorization of the United Nations or a regional organization, or of the United Nations itself as in the cases of Cambodia, East Timor or Kosovo.

⁴⁴ For details see the second contribution of R. Wolfrum, in this Volume.

⁴⁵ See in this respect the contribution by N. Matz, in this Volume.

⁴⁶ See article 22 Covenant of the League of Nations, reprinted as Annex in the contribution of N. Matz; according to Article 76 lit. (b) UN Charter it is the basic objective of the trusteeship system "... to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned ...".

⁴⁷ E. de Wet, "The Direct Administration of Territories by the United Nations and its Members in the Post Cold War Era: Legal Bases and Implications for National Law", *Max Planck UNYB* 8 (2004), 291 et seq.; cf. also R. Caplan, *International Governance of War-Torn Territories*, 2005.

c. The Role of the Coalition Forces as Belligerent Occupants as Modified by Security Council Resolution 1483

Having briefly outlined the obligations of the Coalition Forces under international humanitarian law and the inherent restrictions concerning a political restructuring of Iraq it is necessary to consider whether and to what extent Security Council Resolution 1483 and subsequent resolutions of the Security Council mandate the Coalition to take steps which go beyond the narrow confines set by international humanitarian law. Such possibility exists in accordance with Article 103 UN Charter.⁴⁸ It is another question whether and to what extent the Charter itself contains inherent limits for the Security Council in this respect.

That the governments of the United States and the United Kingdom tried to gain international legitimization for their interim administration of Iraq can be taken from the letter of the United States and the United Kingdom of 8 May 2003 to the Security Council.⁴⁹ The two governments attempted to achieve legitimacy for the Coalition's belligerent occupation of Iraq. They further attempted to have the Coalition provided with the authority to govern and administer Iraq for an extended period of time and to reconstruct it politically and economically, to lift the economic sanctions and to end the Oil for Food Program. The two governments achieved some but not all of these objectives. Other members of the Security Council were particularly careful in not providing for an *ex post* legitimization of the invasion of Iraq. They also did not give the Coalition a totally free hand in the reorganization of Iraq.

Security Council Resolution 1483 gives the Coalition the mandate to administer Iraq and to work towards its political and economic reorganization.⁵⁰ This mandate goes beyond the powers assigned to a bel-

⁴⁸ See D.J. Scheffer, "Beyond Occupation Law", *AJIL* 97 (2003), 842 (843 et seq.). Article 103 UN Charter constitutes a conflict of laws rule rather than a form of hierarchy; see R. Bernhardt, "Art. 103", marginal note 6, in: B. Simma (ed.), *The Charter of the United Nations*, 2nd edition, 2002.

⁴⁹ Doc. S/2003/538.

⁵⁰ Para. 4 of S/RES/1483 (2003) of 22 May 2003 reads: "Calls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future." For a more restrictive interpretation see T. Marauhn,

ligerent occupant under international humanitarian law, in general. This is particularly true in respect of the political reorganization. The power of the Security Council to modify international humanitarian law in respect of the occupation of Iraq rests in its powers under Chapter VII of the UN Charter. The ultimate motive of the Security Council to broaden the mandate of the coalition forces may rest in the fact that the Security Council frequently has accused Iraq of having violated Security Council Resolutions and thus having been in breach of international law.⁵¹ Apart from that in S/RES/1441 (2002) the Security Council referred to S/RES/688 (1991) which stated that one of the major threats the regime of Saddam Hussein posed was its oppression of the Iraqi people. On that basis the mandate for a political reorganization of Iraq is to be seen as a contribution towards the restoration and preservation of peace in the region.

It is to be noted that S/RES/1483 distinguished between the “Authority”, which refers to the United States and the United Kingdom,⁵² and other states.⁵³ Only the powers and functions of the former have been broadened whereas other states are called upon “to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”. This differentiation of the states militarily engaged in Iraq is remarkable since the distribution of responsibilities is an unequal one. This may reflect realities. However, it is questionable whether it is possible to have several states bound by the rules of the Fourth Geneva Convention

“Konfliktbewältigung statt Legalisierung”, *Vereinte Nationen* 51 (2003), 113 et seq. (117); T. Bruha, “Irak-Krieg und Vereinte Nationen”, *AVR* 41 (2003), 295 et seq. (311); H.H. Perritt, Jr., “Iraq and the Future of United States Foreign Policy: Failures of Legitimacy”, *Syracuse Journal of International Law and Commerce* 31 (2004), 149 (152), speaks of a political trusteeship.

⁵¹ As to the interpretation of Security Council resolutions in general, M.C. Wood, “The Interpretation of Security Council Resolutions”, *Max Planck UNYB* 2 (1998), 73 et seq.

⁵² See S/RES/1483 (2003) of 22 May 2003, Preamble.

⁵³ See S/RES/1483 operative paras 4 and 6 referring to the “Authority” as compared to para. 5 referring to “all concerned” which means the Authority and all other states militarily involved in Iraq.

concerning the administration of occupied Iraq whereas the United States and the United Kingdom are not.⁵⁴

Although the powers of the Coalition have been expanded, S/RES/1483 also establishes some limits; the exact scope of such limits can only be established indirectly, though. When operative para. 5 of Security Council Resolution 1483 calls on “all concerned” to comply with their obligations under international law, including the Geneva Conventions and Hague Regulations, this means that the said Resolution does not mean to override international humanitarian law completely but it has to be read and interpreted in the context of the former. In particular the Resolution reaffirms the right of the Iraqi people to self-determination⁵⁵ and thus emphasizes that the process set into motion to restructure the government of Iraq must ultimately lead to a truly representative and democratically elected government.⁵⁶ This is further emphasized by the fact that the Coalition is meant to assist the people of Iraq⁵⁷ which means that the leading role is to be played by the people of Iraq. To put it differently, the Coalition must not impose its vision concerning a reorganized Iraq on the respective Iraqi institutions. It also must not set prejudices that would limit the liberty of Iraqi organs in the shaping of a new legal order for Iraq. Thus the Security Council gives the Coalition a certain leeway to reach a stage where a truly representative government has been established without compromising on the objective to be achieved. The Coalition has not kept within this limit, in particular, not as far as the national economic order is concerned, as will be seen.⁵⁸

In particular, the reference to the integrity of the state of Iraq excludes any attempt to fragmentize Iraq. This rules out promotion of or preparation for a secession of the predominantly Kurdish populated areas from Iraq. It does not, however, exclude the establishment of a fed-

⁵⁴ Roberts, see note 11, 33 points out that the wording may have its roots in domestic concerns of states such as Japan which supplied forces with a strictly humanitarian mission.

⁵⁵ Preamble.

⁵⁶ S/RES/1483 (2003) of 22 May 2003, see operative paras 4, 8 lit. (c), 9; this concurs with the approach advocated in the presentation by F.L. Kirgis, “Security Council Resolution 1483 on the Rebuilding of Iraq”, *ASIL Insights* (2003), available at <www.asil.org/insights.htm>.

⁵⁷ S/RES/1483 (2003) of 22 May 2003, operative paras 1 and 4.

⁵⁸ See below.

eral system vesting the Kurdish region with autonomy even exceeding the one which existed, at least theoretically, previously.

Further, S/RES/1483 does not compromise on the temporary nature of the administrative powers of the Coalition. Although the Security Council does not provide for a time frame in which the governmental powers are to be transferred back to Iraqi organs, para. 9 of S/RES/1483 expresses its support for the creation of a transitional Iraqi administration. This, at least, indicates that the Security Council expected a procedure to be set into motion that would provide for a step-by-step return of governmental authority to an Iraqi administration.⁵⁹ This is not an equivalent to a clear-cut time frame in which full governmental power was to be returned from the Coalition to an Iraqi government. Nevertheless, this procedure at least reflects that belligerent occupation by the Coalition has to be transitional.

The declared intent of the Coalition to restructure and in particular to re-establish the security forces of Iraq conforms to the basic principles of international humanitarian law, namely that it is for the population of the territory under occupation to reorganize itself and to establish the necessary institutions for the preservation of internal peace and security. The respective efforts of the Coalition are endorsed by the Security Council without qualifying them.

Finally para. 8 lit. (c) of S/RES/1483 provides that the UN Special Representative for Iraq would have to work intensively with the Coalition and the Iraqi people to restore and establish national and local institutions of representative governance. This principle has not been fully implemented. The influence of the UN Special Representative concerning the composition of the Interim Governing Council and the subsequent Interim Iraqi Government was, in fact, limited.

One may conclude that S/RES/1483 has modified international humanitarian law on belligerent occupation as far as Iraq is concerned to an extent that legalized the efforts of the Coalition to restructure Iraq politically. Apart from this fact which is of significance in itself for the situation prevailing in Iraq, the Security Council has developed a model. It is the main feature of this model to entrust particular states with the post-conflict management of a state and thus, in principle, fol-

⁵⁹ Highly critical on para. 9, Hmond, see note 1, 449 who interprets this paragraph as giving the Coalition unlimited power for an unlimited period of time. This interpretation has been overtaken by events.

lows the pattern of the “coalition of the willing” used in the war against Iraq mandated by S/RES/678 (1990) of 29 November 1990.⁶⁰

d. The Coalition Provisional Authority – General Functions and Status

The situation of Iraq during the period of belligerent occupation is illustrated best by the status of the Coalition Provisional Authority.

The Coalition Provisional Authority (CPA) was established shortly after the forces of the United States and its allies took control over Baghdad on 9 April 2003.⁶¹ Its mandate was to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, (including advancing efforts to restore and establish national and local institutions for a representative government) and facilitating economic recovery, sustainable reconstruction and development.⁶² This mandate concurs with the obligations of the occupying power under international humanitarian law. It is further modified and endorsed by S/RES/1483. Further elements concerning the administration of Iraq are contained in S/RES/1511 (2003) of 16 October 2003 and S/RES/1546 (2004) of 8 June 2004.

The authority of the Governments of the United States and of the United Kingdom to establish such an institution rests in the respective rules of international humanitarian law, in particular those rules which oblige the occupying power to restore and maintain public order and security. This not only requires the undertaking of necessary activities but mandates also the establishment of the corresponding organizational infrastructure.⁶³ On the U.S. national level the authority to set

⁶⁰ Operative para. 2 refers to “Member-States co-operating with the Government of Kuwait”.

⁶¹ A thorough assessment of, in particular, the origin of the CPA is provided by L.E. Halchin, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities*, Congressional Research Service – Library of Congress, April 29, 2004.

⁶² U.S. Office of Management and Budget, Report to Congress Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act 2003 (Public Law 108-11, June 2, 2003, 2).

⁶³ See in this respect the letter of the Permanent Representative of the United States and of the United Kingdom to the President of the UN Security Council of 8 May 2003. Its relevant part reads: “In order to meet these objectives and obligations in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing

up, together with the Allies, the CPA may be derived from the Presidential War Power Authority. This does not make the CPA an American Federal Agency,⁶⁴ though, since this would ignore the fact that the Authority had been established jointly by the United States and the United Kingdom even though the CPA reported to the U.S. Department of Defense and applied, for example, U.S. rules on procurement.

Further it is impossible to consider the CPA as having been established by S/RES/1483. The Security Council merely takes note of the establishment of this Authority – and thus endorses it, including its mandate – and further re-emphasizes the application of the United Nations Charter as well as of the international humanitarian law.⁶⁵ The CPA thus constituted an institution of its own, based upon international humanitarian law, in particular article 43 of the Hague Regulations, and on a respective agreement between the United States and the United Kingdom.⁶⁶ Accordingly, the United States and the United Kingdom were jointly responsible for this Authority and in case of violations of international law would have to face the respective liability jointly.

S/RES/1511 reaffirmed the administration of Iraq by the CPA; this can be taken as an acquiescence of the Security Council in this form of civil administration.⁶⁷ By endorsing the roadmap concerning the transitional resumption of governmental authority by Iraqi institutions, in particular the Interim Government in S/RES/1546 (2004) of 8 June

command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction”, Doc. S/2003/538 of 8 May 2003.

⁶⁴ This possibility is discussed by Halchin, see note 61, 6-7.

⁶⁵ The respective preambular paragraph of the resolution reads: “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”).”

⁶⁶ See Roberts, see note 11, 35.

⁶⁷ De Wet, see note 47, 316.

2004, the Security Council re-emphasized the temporary nature of the CPA.⁶⁸

In this context it is worth emphasizing that the CPA was established differently from NATO's Stabilization Force (SFOR) in Bosnia. Although this force is also composed of a Coalition it is overseen by an international organization, namely NATO, and its establishment was explicitly authorized by the Security Council.⁶⁹ Accordingly, the Coalition against Iraq opted for a less international organizational structure for the management of the post-conflict period thus following more closely the traditional pattern envisaged by the Hague Regulations than the Coalition against former Yugoslavia, which made use of the possibilities opened under Chapter VII of the UN Charter.

e. The Structural Reform concerning Foreign Investment, the Financial Market, Taxation and Privatization

The CPA Order 39 of 19 September 2003 promulgated a radical reform of the Iraqi legislation concerning foreign investment.⁷⁰ According to this Order the complete foreign ownership of business in all sectors of the Iraqi economy is permitted. This does not apply though to the extraction and initial processing of natural resources.⁷¹ This Order also permits unrestricted, tax free transfer of all profits to foreign states.⁷² Foreigners and foreign-owned enterprises cannot purchase land; there is the possibility of a lease up to 40 years and the lease can be renewed for another such period.⁷³ Foreign-owned retail business must provide a \$ 100,000 bond before conducting business in Iraq. Apart from these exceptions the Order stipulates that, in general, foreigners and Iraqis are treated equally as far as investment is concerned.⁷⁴

This Order deviates radically from the pre-existing law, in particular the Iraqi Civil Code and the Iraqi Commercial Code which prohibited investment in, and establishment of, companies in Iraq by foreigners who are not resident citizens of Arab countries. The abolition of privileges for Arab citizens is worth noting.

⁶⁸ At para. 2.

⁶⁹ S/RES/1088 (1996) of 12 December 1996, operative para. 18.

⁷⁰ See in particular McCarthy, see note 3, 52 et seq.

⁷¹ CPA Order No. 39, Section 6 (1).

⁷² Ibid. Section 7 (2) lit. (d).

⁷³ Ibid. Section 8 (2).

⁷⁴ Ibid. Section 13.

The banking system has been transformed from a state-controlled system to a system which provides for the establishment of up to six foreign banks over the next five years.⁷⁵ Further changes have been introduced in respect of the taxation system,⁷⁶ and a new currency has been issued.

Many sectors of the Iraqi public sector have been privatized; this includes, *inter alia*, primary and secondary education.⁷⁷

Generally speaking Iraq has been transformed by the CPA from a centrally controlled socialist system into one which is free market oriented.⁷⁸ Although it may be questioned whether the belligerent occupant had the legitimacy to introduce such changes, it is beyond doubt that they were mandatory if Iraq is to recover economically.⁷⁹

The nature of these changes is such that it may be difficult for a future democratically elected Iraqi government to reverse them. These reforms go considerably beyond what is necessary to re-establish public order and civil life as provided for under article 43 of the Hague Regulations and the respective provisions of the Fourth Geneva Convention. Such changes in the economic sector have not been mandated by respective Security Council Resolutions. The political and economic desirability of such reforms is a separate question from the more limited issue of the necessity of reform for the purpose of re-establishing public order and civil life. All that is desirable but not strictly necessary and goes beyond the aim of re-establishing public order and civil life has to be left to the institutions of Iraq based upon democratic elections. Otherwise, the underlying assumption that sovereignty remains with the occupied state would become quite meaningless.

f. The Use of Natural and other Resources by the Occupying Power

A crucial restriction which international humanitarian law imposes upon the belligerent occupant is the rules on the use of natural resources. According to the international rules on military occupation the occupying powers are restricted in using the natural resources of Iraq.

⁷⁵ CPA Order 40 of 16 September 2003.

⁷⁶ CPA Order 37 of 16 September 2003.

⁷⁷ See, for further details, McCarthy, see note 3, 54.

⁷⁸ McCarthy, see note 3, 55.

⁷⁹ See report of the UN Secretary-General of 17 July 2003, Doc. S/2003/715, para. 84.

Article 55 Hague Regulations formulates the leading principle according to which the occupying state is only the administrator and usufructuary of public buildings, real estate, forests and agricultural works belonging to the occupied state.⁸⁰ Although this provision does not mention oil the latter is, considering the object and purpose of this provision, covered under this provision.

In respect of the export of oil an arrangement has been reached within the framework of the United Nations⁸¹ which meets the basic principle under article 55 Hague Regulations. According to the arrangements decided upon in the Security Council a Development Fund for Iraq was established.⁸² All export sales of petroleum, petroleum products and natural gas are to be made consistent with international market best practices. All proceeds from such sales have to be deposited into the Development Fund. Five per cent of the proceeds are set aside for the Compensation Fund.⁸³ S/RES/1483 stipulated that the Development Fund was to be disbursed at the discretion of the Authority (para. 13), but this was later changed, when the Interim Government of Iraq assumed full responsibility in June 2004.⁸⁴ To make sure that the proceeds from oil exports are used for the restructuring of Iraq these proceeds have been declared to be immune from confiscation.⁸⁵

g. State Responsibility

A violation of the norms of armed conflict by the armed forces or – during the period of occupation – by state officials or persons working under the authority of the occupying power involves the international responsibility of that state, which may be liable to pay compensation for that violation. The transfer of governmental powers from the government of Iraq to the Coalition results in the transfer of international responsibility from the former to the latter. The United States has addressed this issue and provides for compensation on the basis of the Foreign Claims Act which covers damages resulting from United States military activities abroad. According to guidelines for the applicability

⁸⁰ The U.K. Manual of the Law of Armed Conflict, see note 3, 303 does not elaborate upon this issue.

⁸¹ S/RES/1483 (2003) of 22 May 2003.

⁸² S/RES/1483 (2003) of 22 May 2003, operative para. 12.

⁸³ Operative para. 21, *ibid.*

⁸⁴ S/RES/1546 (2004) of 8 June 2004 operative para. 24.

⁸⁵ S/RES/1483 operative para. 22 and S/RES/1546 operative para. 27.

of that Act in Iraq only damages are covered resulting from military activities committed after 1 May 2003, the day of the proclamation of belligerent occupation. The Act does not cover damages resulting from military action. Apart from that, no procedure has been set in motion to cover state responsibility resulting from activities of the personnel of the CPA. Therefore, this regime is not embracing enough to cover the state responsibility which may result from violations of international law attributable to the Coalition. Accordingly, the United States and the United Kingdom are separately and commonly responsible for the respective acts.

4. The Interim Governing Council

a. Establishment of the Interim Governing Council

As already indicated, the Security Council was particularly concerned that the people of Iraq would be put into the position “to reform their institutions and rebuild their country”.⁸⁶ Although S/RES/1483 does not refer to democracy it at least speaks of a “representative government”.⁸⁷ S/RES/1546 in this respect goes a decisive step further since it speaks in its operative part of “Iraq’s political transition to democratic government” and “democratic elections”.⁸⁸ In keeping with international humanitarian law the Coalition was obliged to gradually transfer governmental functions back to Iraqi institutions.

The first step for a transfer of governmental functions back to Iraq was the establishment of the Iraqi Interim Governing Council on 13 July 2003. The Interim Governing Council consisted of 25 members, who were appointed by the CPA. It was meant to represent the full spectrum of the Iraqi society. This Council appointed a nine-member rotational leadership committee from among its members, and on 11 August 2003 the Interim Governing Council formed a 25-member constitutional preparatory committee.

According to CPA Regulation No. 6 of 13 July 2003, the establishment of the Interim Governing Council was legitimized by reference to the powers and functions of the CPA and Security Council Resolution

⁸⁶ S/RES/1483 (2003) of 22 May 2003 operative para. 1.

⁸⁷ Preamble *ibid.*

⁸⁸ Operative para. 4 *ibid.*

1483. This reference is of significance since it reflects the attempt to give the Interim Governing Council some international legitimacy. In fact, the relevant part of that resolution is phrased broadly enough to cover the establishment of such a Council.⁸⁹ It remains doubtful, though, whether one can speak in this context of the formation of an “Iraqi Interim Administration” “by the people of Iraq”. The respective decisions were taken by the Administrator of the CPA directly. Neither the people of Iraq nor the Special Representative of the Secretary-General were able to influence the procedure of selecting the members of the Governing Council. In respect of the people of Iraq the Administrator of the CPA had no choice – given the total lack of representative bodies – but to select the members of the Interim Governing Council based upon its own authority.

More intensive consultations with the UN Special Representative, however, would have not only been possible but necessary to meet the standards as enshrined in Resolution 1483.⁹⁰ Given the way the Governing Council was established⁹¹ it is understandable that the Security Council in S/RES/1500 (2003) of 14 August 2003 only welcomed this development 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”. This means that the Security Council considered the occupying powers as those which were fully responsible for the present administration of Iraq and its future development. The statements of the members of the Security Council clearly indicate their ambivalence in this respect. Whereas the representative of France expressed his dissatisfaction with the resolution, the representative of Germany spoke of an important first step in the development towards an internationally recognized representative government. The representatives of the United States, the United Kingdom and of Spain took a more positive view.⁹² In spite of the divergent views

⁸⁹ The respective part reads: “[The Security Council] ... 9. Supports the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority; ...” See also the more positive view in S/RES/1511 (2003) of 16 October 2003, operative para. 4.

⁹⁰ Note has to be taken of the fact, though, that the UN Special Representative was assassinated in August 2003.

⁹¹ Critical in this respect Roberts, see note 11, 38.

⁹² See Doc. S/PV/4808 of 14 August 2003.

and wording of Security Council Resolution 1500 which clearly reflects a compromise, this Resolution contains, apart from the establishment of the United Nations Assistance Mission for Iraq (UNAMI), the important message that the Security Council accepts the Interim Governing Council as a representative Iraqi interlocutor and thus legitimizes its establishment.⁹³

b. Status and Functions of the Interim Governing Council in Respect of the Reorganization of Iraq

The status and functions of the Interim Governing Council of Iraq are detailed in CPA Regulation Number 6 of 13 July 2003. It was meant to act as the principle body of Iraqi interim administration. Its task was to act as “representative of the Iraqi people” and to ensure “that the Iraqi people’s interests are represented in both the interim administration and in determining the means of establishing an internationally recognized, representative government”. The reference to “means” seems to indicate that the Interim Governing Council should not establish the government. This is confirmed in Section 2 of Regulation Number 6 where *vis-à-vis* the CPA the Governing Council is restricted to a consultative role.

The establishment of the Governing Iraqi Interim Council was covered by S/RES/1483. However, its status was overrated in particular by S/RES/1511. The functions of the Interim Council were limited.

As already indicated above, the Coalition Provisional Authority has restructured Iraq in particular as far as its economic and political system is concerned. Reference is to be made in this respect to the above mentioned Order 39 concerning foreign investment, Order 40 altering the banking system, Order 54 on trade liberalization policy, Order 56 concerning the Central Bank Law and Order 61 amending the Iraqi Company Law. It is to be discussed whether such changes, which have no foundation in international humanitarian law have been legitimized by the Interim Governing Council. At least this body was – retroactively – approved by S/RES/1483 and 1511.⁹⁴

⁹³ See also in this respect the terminology used by the Report of the Secretary-General pursuant to para. 24 of S/RES/1483, Doc. S/2003/715 of 17 July 2003.

⁹⁴ In S/RES/1511 (2003) of 16 October 2003 operative para. 4 states: “Determines that the Governing Council and its ministers are the principle bodies of the Iraqi interim administration, which, without prejudice to its further

All these Orders referred to above indicate that they have been adopted in close co-operation with the Interim Governing Council. However, this does not seem sufficient to establish a linkage between the population of Iraq and the Coalition Provisional Authority which would legitimize such far-reaching structural changes. The Interim Governing Council was established by the Coalition Provisional Authority. Although it was meant to represent the political spectrum of Iraqi society the latter was not directly involved in the process of establishment. Certainly the Security Council welcomed the creation of the Interim Governing Council and refers to this organ as embodying the sovereignty of the state of Iraq. This does not mean that the Security Council endorsed that far-reaching structural changes in Iraq were to be undertaken in the transitional period by this organ or, even less, by the Coalition Provisional Authority with some unsubstantial involvement of the Interim Governing Council. Finally, it has to be noted that the involvement of the Interim Governing Council in the drafting of these Orders was of a recommendatory nature, only.

Therefore all these changes, particularly in the economic sector, lack legitimacy. The situation would have been different if the Security Council had mandated the Occupying Powers to undertake such measures.

c. The Iraqi Special Tribunal

In order to set the legal framework for the prosecution of crimes allegedly committed by high-level members of the Ba'ath Party regime for particular crimes, the Interim Governing Council on 10 December 2003 promulgated the Statute for an Iraqi Special Tribunal.⁹⁵ Although a considerable degree of similarities exists between the Statute of the Iraqi Special Tribunal and the Statutes of International and Mixed Tribunals, i.e. the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Serious Criminal Offences Panels in East Timor (SCOPET), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and – to a lesser extent – the war crimes trials taking place un-

evolution, embodies the sovereignty of the State of Iraq during the transitional period...”.

⁹⁵ Available at <http://www.cpa-iraq.org/human_rights/statute.htm>.

der the emergency justice system in Kosovo⁹⁶ – there are also marked differences.

The Iraqi Special Tribunal is clearly not an international court as the ICC, the ICTY or the ICTR. It is even less international than the mixed tribunals. However, it is equally not a genuine Iraqi Tribunal. It is first of all not fully embedded in the Iraqi judicial system nor does it only apply Iraqi criminal or Iraqi criminal procedural law. Articles 11 to 13 of the Statute contain a list of crimes which is almost identical to the respective list contained in arts 6 to 8 of the ICC Statute. The Statute of the Iraqi Special Tribunal contains in article 14 only three additional offences drawn from Iraqi criminal law, i.e. manipulation of the judiciary, squandering of public resources and abusive pursuit of policies that might lead to war against an Arab country.

In respect of the general principles which govern the proceeding before the Iraqi Special Tribunal the Statute mostly follows established international standards. It enshrines the *ne bis in idem* principle and it provides for the responsibility of the accomplice and the superior and excludes superior orders as defense. In its organizational structure the Iraqi Special Tribunal follows that of the ICC, namely by providing for Pre-trial, Trial and Appeal Chambers. A strong Prosecution and a Department for Administration were also established. Finally, the Statute of the Iraqi Special Tribunal establishes that the former enjoys primacy *vis-à-vis* domestic Iraqi courts. In that respect it follows the example of the ICTY and the ICTR rather than of the ICC.

One of the main differences between the Iraqi Special Tribunal and the international or mixed tribunals rests in its composition.⁹⁷ The Statute provides that the judges shall be Iraqi nationals to be selected by the Iraqi government (Governing Council)⁹⁸ and that expert assistance would be provided by non-Iraqis.⁹⁹ This composition of the Tribunal does not harmonize with the fact that the criminal law as well as the

⁹⁶ See L.A. Dickinson, “The Promise of Hybrid Courts”, *AJIL* 97 (2003), 295 et seq. (296-298).

⁹⁷ Critical in this respect M.P. Scharf, “Is It International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice”, *Journal of International Criminal Justice* 2 (2004), 330 et seq.

⁹⁸ Article 28 and article 5 lit. (c) of the Statute, although the Governing Council, if it deems necessary, may appoint non-Iraqi judges in accordance with article 4 lit. (d) of the Statute.

⁹⁹ Articles 6 lit. (b) and 7 lit. (n) of the Statute; the role of foreign advisers is quite unclear.

procedure – apart from the sentencing standards¹⁰⁰ – will be international in nature rather than Iraqi.¹⁰¹

The Iraqi Special Tribunal is different from most international and mixed tribunals by its jurisdiction *ratione temporis* which exceeds by far that of the other comparable tribunals. It covers the events from 17 July 1968 (date of the coup d'état by the Ba'ath Party) to 1 May 2003 (declaration of the “end of major hostilities”).¹⁰² In comparison the jurisdiction of the ICTY covers crimes from 1991 to the present, that of the ICTR crimes which took place in 1994, that of the Special Court for Sierra Leone the time from 1996 to the present and the one of the ECCC the time from 1975 to 1979. The only exception is the SCOPET which is vested with unlimited temporary jurisdiction although in practice all investigations seem to address crimes committed around the 1999 referendum.¹⁰³

The jurisdiction *ratione temporis* of the Iraqi Special Tribunal does not match with the law it is meant to apply. The jurisdiction *ratione temporis* covers three major military campaigns (the 1980-1988 Iran-Iraq war, the 1990-1991 Gulf War and the War of 2003), and the crimes committed in the context of them. In this respect the applicable criminal law is appropriate. It is less appropriate in respect of atrocities committed by the Ba'ath party regime unrelated to an armed conflict such as repression of political opponents and human rights abuses unless they amount to genocide or crimes against humanity. More generally it is an open question whether the prosecution of human rights abuses and the oppression of political opponents, unless they amount to genocide or crimes against humanity, is not in violation of the principle that criminal law cannot be applied retroactively. Given the jurisprudence of the

¹⁰⁰ Article 24 of the Statute generally refers to Iraqi sentencing standards, but instructs consideration of international precedents in relation to offences having no counterpart under Iraqi law. This may be compared with article 24 of the ICTY Statute. The possibility to apply the death penalty departs from the model applied in international or mixed tribunals.

¹⁰¹ Critical in this respect Y. Shany, “Does One Size Fit All? Reading the Jurisdictional Provisions of the New Iraqi Special Tribunal Statute in the Light of the Statutes of International Criminal Tribunals”, *Journal of International Criminal Justice* 2 (2004), 338 et seq. (341 et seq.).

¹⁰² Article 1 lit. (b) of the Statute.

¹⁰³ S. Katzenstein, “Hybrid Tribunals: Searching for Justice in East Timor”, *Harvard Human Rights Journal* 16 (2003), 245 et seq. (274); critical in respect of the jurisdiction *ratione temporis* of the Iraqi Special Tribunal, Shany, see note 101, 340, 341.

International Military Tribunal of Nuremberg one may question whether, until the jurisprudence of the ICTR, the crime against humanity does not require a nexus to an armed conflict.¹⁰⁴ This view has been consolidated in the latter sense only in the jurisprudence of the ICTY and the ICTR. Equally it was only this jurisprudence which provided for the application of war crimes designed for international conflicts to non-international conflicts.¹⁰⁵ This may be of particular relevance for serious crimes committed against parts of the Iraqi population without amounting to crimes against humanity or genocide. In this context it is worth noting that the Statute of the Iraqi Special Tribunal contains no clear reference to the *nullum crimen, nulla poena sine lege* principle.¹⁰⁶

Furthermore the Statute of the Iraqi Special Tribunal differs from the International Military Tribunal as far as it concerns the crime of aggression. The former may, in accordance with article 14 lit. c of the Statute prosecute the “abuse of position and the pursuit of policies that may lead to the threat of war or the use of armed forces of Iraq against an Arab country ...”. This crime has been taken from the Iraqi criminal law.

In general, one has to conclude that the Iraqi Special Tribunal constitutes an ill-conceived attempt to work off the crimes committed by the former governmental regime of Iraq. The initiators wanted to avoid this Tribunal being seen as the executor of victor’s justice without, however, leaving the establishment of that Tribunal to Iraq. The result is a national tribunal with some elements borrowed from international criminal law which will be considered as a special court to serve only one purpose. The court violates the basic principle also enshrined in international criminal law, namely, the prohibition to apply criminal law retroactively.

¹⁰⁴ Article 5 of the Statute of the ICTY requires such nexus whereas the Secretary-General’s Report on Aspects Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, *ILM* 32 (1993), 1159 et seq. (1173), held such a nexus not to be necessary; in favor of the latter G. Dahm/ J. Delbrück/ R. Wolfrum, *Lehrbuch des Völkerrechts* I/3, 2002.

¹⁰⁵ The first judgment to do so was the decision on jurisdiction in the Tadić Case by the Appeals Chamber, IT-94-1 AR 72 of 2 October 1995.

¹⁰⁶ Shany, see note 101, 344, 345 discusses whether it may be introduced through the reference to Iraqi law.

5. From the Interim Governing Council to the Interim Government

a. Establishment of the Interim Government

On 15 November 2003 the Interim Governing Council and the CPA concluded an agreement on the timetable and program for the drafting of a new constitution and holding of elections under that constitution as well as on a course of action to restore Iraq's sovereignty and to end the occupation by 30 June 2004. This agreement stipulated that, through a CPA-supervised process of caucuses held in the 18 governorates of Iraq, a Transitional National Assembly was to be established by 31 May 2004 and that this Assembly would then elect an executive branch and appoint ministers. The agreement also set forth a specific timetable for the constitutional process. The elections were held on 31 January 2005 for a constitutional convention which has to elaborate a constitution to be approved in a referendum. The Assembly is meant to provide the draft of a permanent constitution by 15 August 2005. This draft is to be presented for general referendum no later than 15 October 2005. Article 61(c) of the Transitional Administrative Law provides that a permanent constitution can be ratified if a majority of the voters in Iraq approved it and if two thirds of the voters in three or more of Iraq's eighteen governorates do not reject it. This provision modifies the decision-making process for the referendum in favor of the major minority groups in Iraq. According to this road-map national elections for a new Iraqi government will be held, based on the new constitution, by 31 December 2005.

The Security Council endorsed the formation of a sovereign Interim Government for Iraq¹⁰⁷ and welcomed the end of occupation from 30 June 2004. Security Council Resolution 1546 endorsed the date for elections on 31 January 2005, the formation of a Transitional National Assembly to draft a constitution and the 31 December 2005 date for the election of a constitution-based government.

Resolution 1546 further reconfirms the presence of the Multinational Force under unified command. The Security Council considers the presence of the Multinational Force as being justified by a respective request of the Interim Government.¹⁰⁸ In that respect reference is made to two corresponding letters from the Prime Minister of the In-

¹⁰⁷ S/RES/1546 (2004) of 8 June 2004, operative para. 1.

¹⁰⁸ *Ibid.*, para. 9.

terim Government of Iraq and the U.S. Secretary of State in which the Prime Minister requests the mandate of the Security Council for the presence of the Multinational Force to the conditions set out in the letter of the Secretary of State. The Multinational Force has the task to take all necessary measures to ensure safety and stability in Iraq. Its mandate will be reviewed after twelve months or if the Government of Iraq so requests.¹⁰⁹ A special unit within the Multinational Force was set up which has the task of protecting the UN activities in Iraq.

b. Law of Administration/ Interim Constitution

On 8 March 2004 the Iraqi Governing Council signed the so-called Law of Administration for the State of Iraq for the Transitional Period, which is the new Iraqi interim constitution and serves from 30 June 2004, when the CPA returned the governmental functions. This law also provides a framework for continued co-operation among Iraq and the members of the Coalition. The law will expire after a permanent constitution has been approved and elections have been held.

The Law of Administration has all the features of a national constitution: supremacy in respect of all other national legal norms; a particular procedure for amendment; the establishment of the governmental structure for Iraq; a catalogue of fundamental rights etc. In respect of fundamental rights the Law of Administration provides for the respect of individual human rights. The respective catalogue of human rights, in general, reflects international human rights standards.

The Iraqi Interim Government consists of the National Assembly, the Presidency Council, the Council of Ministers (including the Prime Minister), and the judicial authority. The system is to be republican, federal, democratic with a separation of powers.¹¹⁰ Two particularities are to be mentioned in the context of this article. According to article 7 of the Law of Administration, Islam is the official religion of the state and to be considered a source of legislation. This formula follows an approach contrary to the one in Western European states, which pro-

¹⁰⁹ The respective operative para. 12 reads: “Decides further that the mandate of the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out in paragraph four above, and declares that it will terminate this mandate earlier if requested by the Government of Iraq.”

¹¹⁰ Article 4.

vide for a separation of state and religion – and even goes further than the respective formula in the Afghan constitution.¹¹¹ The other particularity is the confirmation of the establishment of the Iraqi Special Tribunal.¹¹²

Apart from the road-map already referred to, neither Security Council Resolution 1546 nor the Transitional Administrative Law provide for details about the process concerning the drafting of the constitution. One significant guiding principle has been formulated. According to article 60 of the Transitional Administrative Law, the National Assembly must carry out its constitution-writing responsibility “in part by encouraging debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from citizens of Iraq”. The same idea is reflected in Security Council Resolution 1546 which states that the Special Representative of the UN Secretary-General and the United Nations Assistance Mission for Iraq, “as requested by the government of Iraq” shall promote national dialogue and consensus building on the drafting of a national constitution by the people of Iraq.¹¹³ This indicates two elements of the constitution-making process; it rests in the responsibility of Iraq and must not be driven from the outside. The constitution-making for Afghanistan followed the same approach. Further, the process is to be an all embracing one and to include the population as such, namely the civil society. Whether there exists such an Iraqi civil society in the meaning used in West-European societies is a different matter. One cannot exclude that, in practice, this opens the constitution-making process to non-Iraqi dominated or, at least influenced groups, and thus runs counter to the first guiding principle, namely that the constitution-making process is the responsibility of Iraq.

c. The Interim Government of Iraq – Sovereign and Independent?

aa. Introduction

In the first preambular paragraph, Resolution 1546 welcomes “... 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”. It is doubtful whether this qualification is cor-

¹¹¹ See the contribution of E. Afsah/ A.H. Guhr, in this Volume.

¹¹² Article 48.

¹¹³ S/RES/1546 (2004) of 8 June 2004, operative para. 7 (a) (iii).

rect, given the restrictions the Interim Government of Iraq faces in respect of security issues and in respect of the laws, regulations, orders and directives issued by the CPA.

According to the well known dictum of Judge Huber in the Arbitral Award on the Island of Palmas Case “... sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the function of a state.”¹¹⁴ It is generally accepted that national sovereignty has undergone significant modifications due to the constraints international law places on the freedom of action of states. However, the constraints imposed upon the Interim Government of Iraq and thereafter the Transitional Government of Iraq do not derive from rules developed by the community of states in a process Iraq was able to participate in. The restraints the Iraqi government is under are those of the Coalition. Neither the Interim nor the Transitional Government of Iraq can be qualified as having the prime responsibility for the conduct of governmental affairs in Iraq. As long as this has not been achieved Iraq must be considered to remain – in spite of pronouncements to the contrary – under belligerent occupation.¹¹⁵ Note should be taken that the restraints of the Iraqi government also devolve from the respective Security Council Resolutions.

Only as far as the management of oil resources and revenues based thereon are concerned has the Interim Government regained some freedom.¹¹⁶ The restrictions concerning security issues reflect the real situation. The Interim Government lacked some of the competences required for it to be considered sovereign. Apart from that the Interim and the Transitional Government must not take decisions affecting Iraq’s destiny beyond the limited interim period.

bb. Restoration and Maintenance of Security in Iraq under the Interim and the Transitional Government and the Status of the Multinational Force

The question concerning restoration and maintenance of security in Iraq is closely linked to the functions of the Multinational Force in Iraq. Two issues are decisive concerning the Multinational Force in Iraq: the basis of its continuous presence and the decision concerning

¹¹⁴ RIAA Vol. 2 (1949), 829 et seq.

¹¹⁵ This view is shared by Roberts, see note 11, 41 et seq.

¹¹⁶ See above.

its engagement. Both issues are regulated by S/RES/1546. The respective provisions concern the issues which were discussed most controversially.

The Security Council assumes – as has been indicated already – that the presence of the Multinational Force¹¹⁷ in Iraq is based upon the “request of the incoming Interim Government”.¹¹⁸ Therefore the Security Council reaffirms the authorization for the Multinational Force. This wording in fact changes the basis for the presence of the Multinational Force and its very nature. Whereas the authorization of the presence of such force in S/RES/1511 was solely based upon the competencies of the Security Council under Chapter VII of the UN Charter (“to take all necessary measures to contribute to the maintenance of security and stability in Iraq ...”), and thus the Multinational Force has to be considered a force falling under Article 48 of the UN Charter, its presence is now based upon the request of the Interim Government. This renders the Multinational Force technically a peace-keeping force albeit with a robust mandate. The connection between the former authorization and the new one is established through the word “reaffirms” in para. 9 of S/RES/1546, which is constructively ambiguous enough to allow also the interpretation that the basis for the presence of the Multinational Force in Iraq remains, at least partially, S/RES/1511 (2003)¹¹⁹ and thus Chapter VII of the UN Charter.

The litmus test for the position of the Interim Government of Iraq in this respect, that is to say its sovereignty and independence as far as security is concerned, is whether the mandate of the Multinational Force would automatically be terminated upon the request of the Interim Government; this would mean that a respective resolution of the Security Council ending the mandate of the Multinational Force would be of a merely declaratory nature.¹²⁰ This alternative would be the logical one since, according to S/RES/1546 para. 9, the presence of the Mul-

¹¹⁷ Within this “Multinational Force” shall exist a “distinct entity” to provide security for the UN presence (see operative para. 13 of S/RES/1546).

¹¹⁸ S/RES/1546 (2004) of 8 June 2004, operative para. 9.

¹¹⁹ See the statements made in this respect.

¹²⁰ Operative para. 12 of S/RES/1546 reads: “Decides further that the mandate of the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out in paragraph four above, and declares that it will terminate this mandate earlier if requested by the Government of Iraq.”

tinational Force is based upon the request of the incoming Interim Government. That being the case the Interim Government should have the power to terminate the mandate. The alternative would be that, irrespective of such a request, the Security Council could argue that the necessary degree of stability in Iraq had not been achieved at the moment the request was made and therefore could decline such a request. It goes without saying that, if such decision of the Security Council were made and implemented, the nature of the Multinational Force would change back from a peace-keeping force being established with the consent of the state concerned to an interventionist force having its basis in Article 48 UN Charter.

It is a further question whether the wording of para. 12 of S/RES/1546 excludes the possibility of a veto. According to S/RES/1546 a request to withdraw the Multinational Force can be launched by the Government of Iraq, not the Interim Government.¹²¹ Taken literally this could be read to mean that the request for review may only be made by the Government of Iraq enjoying democratic legitimacy. The Prime Minister of Iraq in his letter, attached to Resolution 1546, though, refers to the Transitional Government in this respect.¹²² This wording seems to indicate that the Transitional Government may claim the right to initiate the review of the presence of the Multinational Force, but it does not include the Interim Government. Apart from the wording on the review of the presence of the Multinational Force in Iraq, this provision, in respect of the expiry of the mandate, should be taken into account.

Para. 12 in connection with para. 4 of S/RES/1546 states that the mandate of the Multinational Force will expire when a constitutionally elected Government of Iraq has been established, namely by 31 December 2005. This expiry is an automatic one; no further decision of the Security Council is needed in this case to terminate the mandate of the Multinational Force. This is logical. The Security Council has entrusted the Coalition to work for the establishment of a representative government which can only mean a government which has been democratically legitimized. Only such government – this is the presumption – will constitute the stabilizing factor which guarantees peace and security in the region. Until then this guarantee has to be provided for by

¹²¹ See the wording of para. 12, above.

¹²² The Government requests the Security Council to review the mandate of the Multinational Force at the request of the Transitional Government of Iraq, or twelve months from the date on which this resolution was adopted.

the Multinational Force. It goes without saying that such a government of Iraq could ask for the further presence of the Multinational Force.

Taking the provisions in connection with the presence of the Multinational Force together with the reference in the second line of para. 12 of S/RES/1546 to “Government of Iraq” they cannot refer to the democratically elected government only. The government of Iraq does not have to request the review of the presence of the Multinational Force the presence of the latter ends automatically. Therefore this terminology can only mean to refer to the Transitional Government. This would harmonize Security Council Resolution 1546 with the wording of the letter of the Prime Minister of Iraq to which this Security Council Resolution equally refers. Thus before the establishment of a “constitutionally elected government”, as para. 4 (c) terms it, the Interim Government of Iraq could not request the review of the mandate of the Multinational Force.

The Security Council has committed itself to terminate the mandate of the Multinational Force, if so requested by the Transitional Iraqi Government. This means, however, that the Security Council would have to adopt a resolution to terminate the mandate of the Multinational Force if it acted upon such a request which confirms that the Multinational Force is considered technically as a peace-keeping force. This also rules out a veto against such a resolution requested by the Transitional Government of Iraq.

A further question in this respect is whether and to what extent the Interim Government of Iraq and thereafter the Transitional Government have been able to influence the military activities of the Multinational Force. The respective rules are contained in para. 11 of S/RES/1546 and in the two letters attached to the Resolution. They reflect a two tier approach. The Iraqi Interim Government has committed itself to develop, with the assistance of the Multinational Force, its own security forces as well as fora to co-ordinate the activities of the Iraqi forces and of the Multinational Force. These fora are also meant to allow for reaching agreement on the policy concerning “sensitive offensive operations”. The influence of the Interim Government on the military activities of the Multinational Force is an indirect one based upon procedure and the formulation of guidelines or policies. The reference to a “security partnership” in this context, thus, is a euphemism and meant to camouflage the fact that the Iraqi Interim Government will not be in a position to influence directly concrete military decisions of the Multinational Force. The role of the Transitional Government is not

enhanced, although with the buildup of Iraqi forces, its influence will increase *de facto*.

To sum up, the sovereignty of the Interim Government of Iraq concerning security issues has been significantly limited as far as the presence of the Multinational Force in Iraq is concerned as well as concerning its military activities. In respect of the former aspect the role of the Transitional Government is stronger since it may request the withdrawal of the Multinational Force. This will also improve its standing and influence regarding concrete military activities of the Multinational Force. The nature of the Multinational Force oscillates between a peace-keeping force with a robust mandate and an intervention force.

cc. General Restraints imposed upon the Interim and the Transitional Government by the Security Council

As indicated above, the governments of Iraq are not only restrained by the remaining presence of the coalition in Iraq and the dominance of the latter as far as security issues are concerned but also by the resolutions of the Security Council. These restraints are mostly of a general nature – with the exception of the use of natural resources. Nevertheless, they reflect the position of the Security Council concerning the future development of Iraq.

The Security Council emphasizes that “the sovereignty of Iraq resides in the State of Iraq”.¹²³ This means that the Coalition and the governments of Iraq have only a temporary mandate and must not take decisions which affect Iraq’s future beyond the limited interim period. This later point is reiterated explicitly in operative paragraph 1 of S/RES/1511 (2003).

All Security Council Resolutions reaffirm the independence, sovereignty, unity and territorial integrity of Iraq.¹²⁴ This excludes any fragmentation of Iraq. This does not rule out, though, the establishment of a federal system.¹²⁵

¹²³ See S/RES/1511 (2003) of 16 October 2003, second preambular paragraph.

¹²⁴ See S/RES/1483 (2003) of 22 May 2003; 1500 (2003) of 14 August 2003; 1511 (2003) of 16 October 2003 and 1546 (2004) of 8 June 2004.

¹²⁵ In S/RES/1546 (2004) of 8 June 2004 the Security Council endorsed the commitment of the Interim Government to work towards a “federal, democratic, pluralist, and unified Iraq”.

The Security Council also reaffirmed the right of the Iraqi people “freely to determine their own political future”.¹²⁶ In the context in which this principle is placed it clearly goes beyond democratic elections. This refers to the constitution-making process which has to be under the responsibility of an institution which derives its legitimacy from general elections in Iraq. For these reasons the elections for a Transitional National Assembly which took place on 30 January 2005 were of particular relevance.¹²⁷ On that basis the first operative paragraph of S/RES/1546 is to be interpreted which emphasizes that the Interim Government shall refrain “from taking any actions affecting Iraq’s destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office ...”. The Coalition Provisional Authority has interpreted this constraint as limiting the Interim Government’s power to conclude treaties.

In fact, on the basis of this provision in S/RES/1546, one has to conclude that the powers of the Interim Government did not exceed the ones of the occupying forces under international humanitarian law.

It is another question, though, whether and to what extent the powers of the Transitional Government go beyond the ones of the Interim Government. This government has as a basis of legitimacy the elections of 30 January 2005, but it still lacks a constitutional basis, that is to say a constitution accepted by the Iraqi population. Therefore this government is restrained from taking actions which can be left to an Iraqi government formed on the basis of elections after an Iraqi constitution has been adopted.

The Security Council refrained from giving specific indications concerning the content of the future Iraqi constitution. It has, however, emphasized the importance of the rule of law, national reconciliation, respect for human rights including the rights of women, fundamental freedoms, and democracy including free and fair elections.¹²⁸ This may be considered to refer, albeit in a very general form, to the Agenda for Democratization.¹²⁹

¹²⁶ S/RES/1511 (2003) of 16 October 2003; 1546 (2004) of 8 June 2004, preamble.

¹²⁷ See the Report of the Secretary-General pursuant to operative para. 30 of S/RES/1546 (2004) of 8 June 2004, Doc. S/2005/141 of 7 March 2005.

¹²⁸ S/RES/1546 (2004) of 8 June 2004.

¹²⁹ Supplement to Report Doc. A/50/332 and A/51/512; on this see the second contribution of R. Wolfrum, in this Volume.

dd. Management of Natural Resources

According to paras 24 to 26 of S/RES/1546 the Interim Government assumes, upon the dissolution of the CPA, the responsibility concerning the above-mentioned Development Fund for Iraq. However, the restrictions imposed upon Iraq by para. 20 of S/RES/1483 of 22 May 2003 continue to apply. This means that all sales of oil and gas are monitored internationally and that the proceeds from all such sales have to be deposited in the Development Fund for Iraq or in the also above-mentioned Compensation Fund. The International Advisory and Monitoring Board will be enlarged by including a member nominated by the Interim Government of Iraq. This, at least, gives it the possibility to voice its interests in the procedure. As far as the continuing mandate of the Board is concerned S/RES/1546 adopts a similar but not an identical procedure as for the mandate of the Multinational Force. According to para. 25 the mandate of the Board expires definitely with the establishment of a democratically elected Iraqi Government. But the mandate may be reviewed at the request of the Interim Government or twelve months from the date of the resolution. However, the Security Council does not commit itself to terminate that mandate earlier even if the Interim Government of Iraq so requests.¹³⁰

The Interim Government of Iraq equally assumes full responsibility concerning the Oil for Food Program.¹³¹

In spite of these restrictions, the Interim Government has taken over the responsibilities from the CPA at least in respect of the assets of the Development Fund. That these funds are used predominantly for the development of Iraq has been insured by upholding the immunity of such funds against proceedings against the former government of Iraq. This provides the Interim Government with the necessary means to actively engage in the establishment and development of Iraq and its infrastructure.

ee. Continuation/ Discontinuation of Norms Issued by the CPA

Before handing over its responsibilities to the Interim Government, the CPA has issued Order No. 100 of 28 June 2004 which provides for the transition of laws, regulations, orders, and directives issued by the CPA. This Order is guided by two leading principles. All functions so

¹³⁰ Operative para. 25 of S/RES/1546 (2004) of 8 June 2004.

¹³¹ Operative para. 26 *ibid.*

far executed by the CPA devolve upon the Iraqi Interim Government. All norms issued so far by the CPA as amended in Order No. 100 remain in force unless amended or rescinded by legislation in accordance with the Law of Administration for the State of Iraq. This Order provides against the development of a vacuum but gives the Interim Government – at least after the establishment of the Parliament – the control over the normative order of Iraq. Nevertheless, the powers and functions of the Iraqi government are limited in this respect since the Law of Administration for the state of Iraq will serve as a constitution until a final one has been adopted. That means the Iraqi government will, in fact, only be able to control the normative order of Iraq after the elaboration and adoption of the Iraqi constitution. Although this procedure reflects the demands of reality in general, it is already now evident that, in particular as far as the economy of Iraq is concerned, decisions have been taken which will be difficult to revoke. These decisions are irreconcilable with international humanitarian law as well as the resolution of the Security Council emphasizing that it is the right of the Iraqi people freely to determine their own political future and control their own economic order.¹³²

ff. International Responsibility for Actions Committed by Members of the Multinational Force after 30 June 2004

According to S/RES/1546 the Interim Government of Iraq is meant to assume “governing responsibility and authority ... by 30 June 2004”. Does this mean that, under the rules of state responsibility, henceforth the conduct of soldiers of the Multinational Force, including the private groups in its service, falls under the responsibility of Iraq? Article 6 of the ILC Articles on State Responsibility covers this situation. According to this provision it is essential whether organs, including military forces, are placed at the disposal of another state. Only in this case the conduct of these organs can be attributed to the receiving state. This requires that such organs act with the consent of the receiving state and in conjunction with the machinery of said state. This is not the situation envisaged for Iraq. As already outlined above, the Interim Iraqi Government may only exercise an indirect influence upon the military activities; its influence on all other activities is even more limited. From this it must be concluded that the Multinational Force is not placed at the disposal of Iraq.

¹³² S/RES/1511 (2003) of 16 October 2003, preamble.

This is confirmed considering the status of the members of the Multinational Force as set out in the norms established by the CPA. According to CPA Order Number 17 (revised on 27 June 2004), which remains in force for the duration of the mandate of the Multinational Force, all personnel of the Coalition Forces, including their civil consultants, are immune from the Iraqi legal process.¹³³ They are subject only to the jurisdiction of the sending state.¹³⁴ Apart from that, the sending states retain the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by the law of that sending state over all persons subject to the military law of that state. Also, services and equipment contractors are not subject to Iraqi laws or regulations as far as their contracts are concerned and are immune in this respect from the Iraqi legal process.¹³⁵ Although the possibility exists to waive immunity¹³⁶ these rules confirm that the threshold of article 6 of the ILC Articles on State Responsibility has not been met.

The Multinational Force cannot be considered to have been placed at the disposal of Iraq. On the same basis it cannot be argued that these forces have been placed at the disposal of the United Nations. Accordingly, any violation committed by their members will entail international responsibility of the sending state.

III. Conclusions

The following conclusions may be drawn from the experience with the occupation of Iraq. The principle governing the transition of Iraq from the former governmental regime via the power exercised by the occupying states to a government under a new national regime is the principle of self-determination. This obliged the occupying powers to establish a transition process from belligerent occupation to full sovereignty exercised by a democratically elected and representative government for Iraq. This has been emphasized frequently by the Security Council in stressing the right of the Iraqi people to freely determine their own political future. In spite of the rhetoric to the contrary, the role of the Security Council concerning the post-conflict period of Iraq was limited. It has issued resolutions emphasizing several principles relevant for the

¹³³ Section 2, para. 1.

¹³⁴ Section 2, para. 3.

¹³⁵ Section 4.

¹³⁶ Section 5.

administration of Iraq by the occupying powers and on the transitional process leading to a new governmental regime in Iraq. They have re-confirmed the sovereignty and territorial integrity of Iraq, thus indicating that the Security Council would not accept a fragmentation of Iraq or the occupation of parts thereof by other states. This did not rule out, though, that a future constitution for Iraq would provide for a decentralized governmental system vesting territorial units with some even significant autonomy so as to accommodate ethnic or religious diversity.

All resolutions of the Security Council dealing with the post-conflict period of Iraq give some explicit guidance as to the future governmental system. In that respect they limit the Coalition as well as the Interim and the Transitional Government of Iraq. The final Government of Iraq is to be based on the free decision of the people of Iraq; it is to be representative, based upon the rule of law and affording equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender.¹³⁷ In respect of the latter topic reference is made to S/RES/1325 (2000) of 31 October 2000 calling, amongst other things, upon the Member States of the United Nations to increase the number of women in national institutions at all levels. It is astonishing that S/RES/1483 refrains from explicitly referring to democracy as the governing principle for the future constitution – the term “representative government” may be taken only to refer to a government which is representative in regard of the composition of the Iraqi population as far as ethnicity, religion and gender is concerned; equally there is no explicit reference to the protection of human rights according to international standards. This may be due to the expressed desire of representatives of the Iraqi society that “democracy should not be imposed from the outside”.¹³⁸ Nevertheless, the Interim Government of Iraq as well as the Security Council are striving for a governmental regime in Iraq based upon democratic elections whose powers are defined by a permanent constitution. This is, according to S/RES/1546 para. 4 in connection with para. 12, the condition under which the Security Council considers the further presence of the Multinational Force as being unnecessary. Thus Iraq is a clear-cut case where attempt is being made to pro-

¹³⁷ S/RES/1483 (2003) of 22 May 2003, fifth preambular paragraph.

¹³⁸ Report of the Secretary-General, see note 93, para. 19.

vide for peace through the establishment of a constitution based on democracy.¹³⁹

The post-conflict situation and the development of a representative and democratically elected government took place under the guidance of the Coalition. It acted on the basis of a vaguely phrased mandate of the Security Council. Such an approach is equivalent to the approach followed by S/RES/678 (1990) of 29 November 1990, referred to as action taken by a coalition of the willing acting under a mandate of the international community. Whether such an approach recommends itself for post-conflict management is a question which deserves further scrutiny.¹⁴⁰

¹³⁹ As to the relationship between self-determination and democracy see the second contribution of R. Wolfrum, in this Volume.

¹⁴⁰ *Ibid.*

