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Mahmoud Hmoud

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Hmoud, Mahmoud (2003) "Use of Force against Iraq: Occupation and Security Council Resolution 1483, The," *Cornell International Law Journal*: Vol. 36: Iss. 3, Article 2.

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The Use of Force Against Iraq: Occupation and Security Council Resolution 1483

Mahmoud Hmoud†

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Introduction

On March 18, 2003, the United States launched a military attack against Iraq, which resulted in the overthrow of the ruling Baathist party and the ouster of Iraqi president Saddam Hussein. In a letter dated March 20, 2003, the U.S. Permanent Representative to the United Nations informed the President of the Security Council that U.S. led coalition forces had commenced military operations in Iraq. The letter provided that military intervention was “necessary in view of Iraq’s continued material breaches of its disarmament obligations under relevant Security Council Resolution 1441.” The letter stated “the operations are substantial and will secure compliance with those obligations. . . [T]he actions being taken are authorized under existing [Security Council] resolutions, including its resolutions 678 and 687.”

† The Author would like to note that this article is written in his personal capacity and does not reflect the views of the Jordanian Government.

The legal basis offered by the United States was that Security Council Resolution 687 imposed a series of obligations on Iraq, including extensive disarmament obligations, which were conditions of the ceasefire the resolution established. A material breach of these obligations by Iraq would eliminate the basis for the ceasefire and revive the authority to use force under Resolution 678. According to the United States, because Iraq was in material breach of its disarmament obligations, which the Security Council affirmed in Resolution 1441, and because Iraq refused to comply when given a final warning to do so (thus committing a further material breach), military action could be justified as an "appropriate response." The letter also asserted the United States' right to self-defense as another basis for the military attack against Iraq.

The United States based its legal argument for the invasion of Iraq on two grounds: (1) the enforcement of relevant Security Council resolutions and (2) self-defense against the threat posed by Iraq. On the political level, the U.S. administration made clear months prior to the war that the U.S. policy regarding Iraq involved changing Saddam Hussein's regime and disarming Iraq. In order to avoid accusations that U.S. military action in Iraq violated international law, including the principle of non-interference in the domestic affairs of other states provided for in the United Nations Charter, the U.S. administration argued that military action was necessary to disarm Iraq and to eliminate the threat Iraq posed to international peace and security.

The U.S. military ousted the ruling Baathist regime nearly three weeks after military operations commenced. The U.S. led coalition subsequently established effective control of the territory of Iraq, thus assuming the rights and obligations of the occupying power under the relevant rules of international law. Despite their rapid victory in Iraq, the United States and the United Kingdom, the two main contributors to the coalition, faced many obstacles to transforming their military success into a political victory. Several issues determined the nature and extent of political success achieved from the military invasion of Iraq.

The first issue was that the use of force against Iraq was highly controversial both on the political and legal levels. This was reflected by the strong objections raised by key U.S. allies and major global powers, including France, Russia, China and Germany, who were members of the Security Council at the time military operations began. Prior to the war, those countries, and most members of the Council, expressed views that imminent use of force against Iraq was unjustified or that the Security Council did not authorize the use of imminent force. Public debates of the Council indicated significant opposition to the military attack by members of the United Nations. Few supported the United States and United Kingdom's position that relevant Security Council resolutions authorized the use of force.

The second issue that emerged was the question of the status of the Coalition in Iraq: whether it is a legal occupying power or a belligerent one.

Answering this question determines the scope and nature of rights and obligations of the Coalition vis-à-vis Iraq.

A third issue that the United States had to cope with was the United Nations imposed sanction on the Iraqi regime. The financial and economic prohibitions imposed on Iraq under Security Council Resolution 661 and subsequent relevant resolutions would have substantially impeded the United States' future plan for the reconstruction and economic rehabilitation of Iraq. Most significantly, the limitations imposed on the Iraqi oil industry and oil export would deprive the country of its major source of income, which would be necessary for rebuilding Iraq on all levels. Related to this issue was the oil-for-food program established under Security Council Resolution 986, which allows for a United Nations controlled and administered system for the export of limited amounts of oil to finance the purchase by Iraq of humanitarian and essential civilian goods. The system employed a United Nations held escrow account in order to guarantee that the former Iraqi government would not be able to acquire cash revenues, thus limiting its capabilities on all levels. The oil-for-food program, following the change of regime in Iraq, would have been a major obstacle to the Coalition's efforts to reconstruct Iraq using the country's financial resources.

The issue of lifting of sanctions was legally related to the "disarmament of Iraq." Security Council Resolutions 687, 1284 and 1441 imposed a set of conditions (and a road map) for the suspension and the eventual lifting of the economic and financial sanctions on Iraq. The resolutions required Iraq to undergo a stringent inspection, verification and monitoring regime, conducted by the United Nation Monitoring Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) before sanctions would be lifted by the Security Council. The sanctions on Iraq were designed to guarantee that even if international inspectors verified that Iraq had disarmed, the ultimate decision of lifting sanctions remained with the Security Council, whose permanent members have veto power. Accordingly, to be able to allow Iraq to trade freely, acquire foreign aid and receive foreign direct investment, a complicated and time-consuming set of disarmament steps have to be undertaken. Despite political assertions to the contrary, the disarmament obligations of Iraq are the duty of the State and do not expire by virtue of the ouster of Saddam Hussein's regime.

The role of the United Nations in Iraq is a highly relevant factor. The organization's relationship with the U.S. administration became tense during the months and weeks preceding the military invasion of Iraq. Two main elements led to such tension: (1) the situation in the Security Council, including the negotiations pertaining to Security Council Resolution 1441 and the blocking of a United States/United Kingdom sponsored draft resolution that was intended to secure an "explicit or implicit" authorization for the use of force and (2) the briefings and reports made by the chief international inspectors, Mr. Hans Blix of UNMOVIC and Dr. Mohammad E.L. Baradei of the IAEA, to the Security Council prior to the launching of

military operations. The U.S. administration considered these briefings and reports unsatisfactory because Mr. Blix and Dr. El-Baradei made only technical pronouncements in relation to the inspections in Iraq and never declared Iraq to be in "further material breach." The United States viewed this position as the main political and legal obstacle to convincing the Security Council to authorize the use of force. Following the military victory in Iraq, the Bush Administration was determined to preserve the leading and central role in Iraq to the Coalition, thus limiting any role the United Nations would be able to play. The U.S. aim was to assert the Coalition's authority over Iraq and make the necessary decisions in relation to Iraq's political and economic future without interference.

In addition to the above mentioned issues, the United States would have only be able to justify military action in Iraq if a new Council resolution was adopted authorizing the Coalition to exercise authority in Iraq. A mandate from the Council was especially crucial given that the use of force and the resulting occupation were legally questionable. Without such a mandate, any Coalition action in Iraq or on behalf of Iraq would face major legal, political and impediments. On May 22, 2003, following weeks of closed door debates in the Security Council, Resolution 1483 was adopted, with fourteen votes in favor and no abstentions or votes against (Syria, which did not participate in the voting session, later that day sent a letter to the President of the Council informing him that it endorsed the Resolution). Three issues are key to understanding the goals the United States sought to achieve through diplomacy: (1) the legality of the use of force in Iraq, (2) the status of occupation and (3) the effects of Resolution 1483.

I. The Legality of the Use of Force

As previously noted, the United States contended that the military operations against Iraq was legally justified on two grounds: (1) the enforcement of relevant Security Council resolutions concerning the disarmament of Iraq, in order to restore international peace and security, and (2) United States' right to self-defense against the threat posed by Iraq.

A. Rejecting the U.S. Argument that Security Council Resolutions Authorized Military Action in Iraq

The United States argued that Resolution 678 authorizes the use of force against Iraq by United Nations Member States, and that due to Iraq's continual material breaches of its disarmament obligations, the ceasefire established under resolution 687 terminated. Thus, the termination of the ceasefire revived the original authority to use force. There are several weaknesses to this contention that undermine the U.S. legal position. First, Paragraph 2 of Resolution 678 "authorizes Member States co-operating with the Government of Kuwait unless Iraq or on before 15 January 1991 fully implements the [previous] resolutions, to use all necessary means to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area." Accord-

ingly, the authorization to use force had two conditions: (1) Iraq did not implement the relevant Security Council resolutions adopted prior to Resolution 678 dated 22 November 1990 and (2) the use of force was to uphold and implement resolution 660 and relevant subsequent resolutions.

The Security Council does not grant authority to use force to enforce Council resolutions subsequent to 678 and the use of force is conditioned on Iraq's non-implementation of prior resolutions. As the language of Paragraph 2 and the *travaux préparatoire* of Resolution 678 indicate, the authorization was intended to allow the restoration of Kuwait's sovereignty and the withdrawal of Iraqi troops from it. In addition, Iraq's disarmament obligations exist in Resolution 687 of April 3, 1991 and relevant subsequent resolutions. There is nothing in Resolution 678 that indicates the authorization to use force would extend to *future* obligations imposed on Iraq, namely the disarmament obligations.

Secondly, under Section (I) of Resolution 687, the Security Council declared that "upon official notification by Iraq to the United Nations Secretary General and to the Security Council of its acceptance of the provision of resolution 687, a formal ceasefire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678." The Council also decided to "remain seized of the matter and to take further steps as may be required [to implement Resolution 687] and to secure peace and security in the area."

Subsequently, the government of Iraq sent a letter in which it accepted the obligation under Resolution 687. From the language of Section (I), the Council makes clear that the Security Council established the ceasefire between Iraq and the Allied forces. The Council, which authorized the use of force according to its powers and functions under Article 42 of the United Nations' Charter, was the only entity to suspend such authorization. It did so by establishing the ceasefire. In order to revoke the ceasefire and reestablish any prior authorization, the Security Council would have to make a decision to this effect. The Council affirmed this conclusion when it decided to remain in charge on the matter and to take any further steps necessary to implement Resolution 687. The Council specified that only the Security Council could authorize any further action in the future, including the use of force against Iraq.

The Security Council adopted Resolution 1441 on November 8, 2002, following months of intense negotiation. The first draft of the Resolution submitted by the United States contained an explicit authorization to Member States of the United Nations to use all necessary means to enforce the disarmament obligations of Iraq, as contained in the draft resolution and previous Security Council resolutions. However, the explicit language was dropped at a latter stage due to the objection of several Council members, including China, France, Germany, Mexico, Russia and Syria. Those members refused to include a language in the resolution to authorize the use of force in case of future Iraqi non-compliance. They insisted on a two-step approach whereby the Council would have to meet again to determine what measures to take if Iraq failed to fulfil its obligations.

Intense negotiations, accompanied by a highly charged political atmosphere, led to the adoption of complex and ambiguous Resolution 1441. In that resolution the Council decided that Iraq remained in material breach of its disarmament obligation under relevant Council resolutions and gave Iraq a “final opportunity to comply with its disarmament obligations.” The material breach language was a compromise. The Council recognized that Iraq continued to “materially” breach its disarmament obligations, but would not authorize, *under the resolution*, the use of force for the existing material breaches or future ones. Resolution 1441 also established an enhanced inspection regime that UNMOVIC and the IAEA would supervise. Paragraph 2 of the Resolution states that the aim of establishing this new regime is to bring to “full and verified completion the disarmament process established by [relevant] resolutions of the Council.” This language is key in determining whether the U.S. position in February 2003 and March 2003 was consistent with Resolution 1441. During that period, the United States attempted to block efforts in the Council to develop the program for the verifiable disarmament of Iraq provided for under Security Council’s Resolution 1284. The program, which was to be prepared by UNMOVIC and IAEA inspectors for approval by the Council, would have decided the key remaining disarmament tasks, to be performed by Iraq and proposed a long term verification system of Iraq’s potential weapons of mass destruction (WMD) related sites.

Resolution 1441 also provided that Iraq would be committing a further material breach if (1) it did not provide UNMOVIC, IAEA and the Security Council, within 30 days from the date of adoption of Resolution 1441 with a currently accurate, full and complete declaration of all aspects of its programs to develop chemical, biological and nuclear weapons including any holding and precise locations of such weapons and (2) Iraq did not comply and fully cooperate in the implementation of Resolution 1441, including Iraq’s immediate unconditional and active cooperation with UNMOVIC and IAEA. Finally, Resolution 1441 stated that any further material breach by Iraq would be reported to the Council, which would then have to consider the situation.

Despite the general perception that the Council had determined at the time of the adoption of Resolution 1441 that Iraq possessed weapons of mass destruction, both the *travaux preparatoire* and the language of the Resolution only suggest that at the time Iraq possessed *or* formerly possessed, WMD *programs*. Secretary Powell, on several occasions before and after the adoption of the Resolution, stated that Iraq had to declare the whereabouts of the weapons of mass destruction unaccounted for *or* provide proof that it had previously destroyed them.

Iraq submitted its declaration concerning its weapons of mass destruction programs before the deadline. However, UNMOVIC and IAEA decided that the declaration was not as complete and accurate as required by Resolution 1441. The international inspectors returned to Iraq and were permitted full and unimpeded access as required by Resolution 1441. Iraq’s cooperation developed as time passed. However, up to the time the war

started, the chief international inspectors, Mr. Blix and Dr. El-Baradei, never declared Iraq to be in *full active cooperation*, despite recognizing that Iraq was becoming progressively more cooperative with the inspectors.

Mr. Blix and Dr. El-Baradei did not at any stage prior to the war report that Iraq was in *further* material breach. This led to tension between the Bush administration and chief international inspectors, especially Mr. Blix. The United States adopted an extreme interpretation of the relevant paragraphs of Resolution 1441 and declared that *any* State can report a further material breach by Iraq to the Council. This interpretation was not supported by the *travaux préparatoire* or the plain meaning of the relevant paragraphs of Resolution 1441. However, the United States declared on several occasions that Iraq had committed further material breach(es).

Mr. Blix and Dr. El-Baradei confined their reports to factual and technical information on the fulfillment of their mandates in accordance with the Council's resolutions and sought to avoid making legal conclusions on Iraq's compliance. The reports did contain information on Iraqi "failures" to comply in full. Although the Council held several meetings subsequent to the adoption of Resolution 1441 to discuss the reports of the international inspectors and the Iraqi situation, the Council never determined that Iraq was in further material breach nor did it decide further measures to secure Iraq's compliance (as required in Resolution 687).

Under Paragraph 13 of Resolution 1441, the Council recalled that it has repeatedly warned Iraq that it will face "serious consequences" if Iraq continued to violate its obligations. This paragraph does not amount to an authorization to use force. However, the United States insisted on including the "serious consequences" language to strengthen its argument that it is an "implicit" authorization for the use of force, that is, that serious consequence would result from material breaches of obligations (the proportionality principle). The shortcoming of this argument is inherent because it applies (or adapts) the law of treaties and the international law principles related to State responsibility to Security Council resolutions. The basis for the United States' argument to use force in the context of Iraq's material breaches was the application of the principles of the 1969 Vienna Convention in the Law of Treaties. Article 60 of the Convention allows parties to a treaty to terminate it or suspend its operation, in whole or in part, in relation to a party that committed a natural breach of that treaty. The United States argued that because Iraq materially breached the ceasefire sanctioned by the Security Council under Resolution 687, the ceasefire terminated and the authorization to use force under Resolution 687 was revived.

The maintenance and restoration of international peace and security is an independent collective security regime executed by the Security Council. The decisions by the Council in the exercise of its authority under Chapter VII of the United Nations Charter are *not treaties*. Rather, they are executive decisions binding on all States. Only the Council determines the scope and manner of their implementation and the consequences of their breaches. Accordingly, it is not up to a member state to make decisions related to the United Nations system of collective security

that the Security Council does not specifically sanction. In the case of the ceasefire, the Security Council, who decided to implement the ceasefire, is also the entity that must decide to terminate it. Terminating it, after all, means to take measures to restore international peace and security against a threat posed to it. The Security Council did not resort to Article 39 of the Charter to determine that Iraq's disarmament failures constituted a threat to international peace and security. Such a determination is a prerequisite to authorize measures (including the use of force) to restore international peace and security or to terminate the ceasefire between Iraq and the States that cooperated with the liberation of Kuwait in 1991. This assumes that the termination of the ceasefire by the Council revived the authorization to use force under Resolution 678, which it did not, for the reasons explained above.

Paragraphs 12 and 13 of Resolution 1441 must be read together. As such, the steps that the Security Council would take to authorize measures against Iraq to secure its compliance are as follows: (1) a finding by UNOMVIC Executive Chairman and/or the IAEA Director-General that Iraq was interfering with the inspection activities or failing to comply with its disarmament obligations; (2) the Council is then to meet to consider the situation and whether Iraq's actions reach the level of threats to international peace and security and (3) if the Council so decides, then it must determine how to implement its repeated warnings to Iraq of serious consequences as a result of its continued violations of its obligations. Paragraph 13 only *recalls* that it has repeatedly warned Iraq. It does not *decide* that such violations will give rise to serious consequences. The paragraph merely connects the "serious consequences" language to the issue of convening the Council to consider how to secure international peace and security. This can only mean that the Council is the entity to determine the serious consequences, that is, the measures to restore international peace and security.

The United States, United Kingdom, and Spain submitted a Draft Resolution to the Security Council on February 24, 2003 that would not have explicitly authorize the use of force against Iraq, but would implicitly do so by endorsing the United States and United Kingdom's legal position on the use of force against Iraq. According that draft, the Council would decide whether: (1) Iraq committed a further material breach of its obligations under the relevant Council's resolutions; (2) Iraq's non-compliance with the Council resolution and proliferation of weapons of mass destructions constituted a threat to international peace and security; (3) the Council is determined to restore international peace and security; and (4) Iraq has failed to take the final opportunity afforded to it by resolution 1441.

The political situation at the time the draft resolution was submitted made the goal of the draft clear: a tacit acquiescence by the Council to the potential military action by the Coalition led forces against Iraq. This led many Council members to oppose the draft. Among them were China, France and Russia, which officially declared that they would veto the draft. As a result, the cosponsors submitted an amended draft that contained an

ultimatum for Iraq to comply by March 17, 2003. According to the amended draft, Iraq would not only be required to unconditionally, fully and actively cooperate with regard to its obligations under Resolution 1441, but it would have to yield its possession of weapons of mass destructions. The amended draft merely escalated the contentious situation in the Council.

On March 17, 2003, it became clear that the draft resolution would only obtain four supporting votes, so the co-sponsors issued a statement declaring that they would not pursue a vote on their draft. This “non-action” by the Council on the draft resolution is not without legal merit. It reflects the will of the body entrusted with taking enforcement measures to restore international peace and security in case of a threat or breach to it. This supports the conclusion that the Council did not approve at that time of the use of force by certain member states to enforce Security Council’s resolutions. The contention that such members were acting on behalf of the United Nations and the Security Council is rebuffed by the non-approval of the draft resolution, which was interpreted, politically and legally, to be a tacit acquiescence to the forthcoming military operation.

B. Rejecting the U.S. Argument of Self-Defense

Without going into extensive details, one can conclude that the self-defense justification for the war on Iraq stands on weak legal grounds. First, Iraq did not declare war on the United States, or other members of the Coalition prior to the military invasion by those States. It did not launch a military attack on any of those States or on other States which are allied to them under collective self-defensive pacts. Second, there is no evidence that Iraq aided or sponsored hostile acts amounting to acts of war against the States that attacked Iraq. No links were established between Iraq and terrorist organizations targeting such States. Further, no claim was made that Iraq was involved directly or indirectly in the terrorist attacks of September 11, 2001. Third, Article 51 of the United Nations Charter reserves the right of States to defend themselves individually or collectively, in case of an armed attack directed against them. The right to self-defense is suspended once the Security Council becomes seized on the matter and takes the necessary measures to protect the attacked State and end the belligerency against it. The right to self-defense only resumes if the Council fails to take such measures at the appropriate time. The war against Iraq clearly did not fit the framework of Article 51. Iraq did not launch military attack against another state and the Council was never consulted regarding a potential military attack by Iraq or asked to take measures to prevent such an attack.

The anticipatory self-defense doctrine is, at best, controversial under international law. It became a weak argument after the creation of the collective security system of the United Nations. Most international jurists agree that anticipatory self-defense is only legal if the potential military attack against a state was so imminent that it had no time to consult with the Security Council, or if the Council was approached but was not able to

take the necessary measures at the right time to prevent the attack. In addition, the so-called preemptive strike must adhere to the conditions of the "Webster Formulation," which is the core international law on the issue. According to Webster's, self-defense must be confined to cases in which "the necessity of that self-defense is instant, overwhelming, leaving no choice of means, and no moment for deliberation." The force applied must be reasonable and non-excessive.

It was never demonstrated that the threat posed by Iraq against the members of the Coalition was instant or overwhelming. Since the adoption of Resolution 1441, the international inspectors have not discovered any proscribed material that poses a threat to the security and sovereignty of the Coalition members. The reports of UNMOVIC and the IAEA demonstrated continuous progress in terms of Iraqi active cooperation and full cooperation in terms of access to the inspected sites. Accordingly, the military operation was not necessary and other choices of action existed, including the continuation of the inspection process. Further, the Coalition's military operations did not satisfy the proportionality requirement of self-defense. The operation was intended, and resulted, in the overthrow of a governing regime of a sovereign nation and the occupation of its territory for an indefinite period of time.

II. The Occupation of Iraq

On May 1, 2003, President Bush declared the end of "major" military operations in Iraq. At that point, it was obvious that Saddam Hussein's regime was no longer governing Iraq. Thus, why didn't the United States declare the end of "war" in Iraq since it established "effective control" over its territory?

There are several political and legal reasons that might have induced the U.S. administration not to officially declare the end of the war. One reason is that the Coalition would have had to release the Iraqi prisoners of war and cease pursuit of members of the former political leadership in Iraq (unless they committed serious violations of international humanitarian law during the war). When the United States released a list of names of fifty-five senior members of the Baath party and former political and military leaders of Iraq for detention purposes, it did not suggest that *all* of those pursued were involved in war crimes. Ending the war officially, would have undermined the legal grounds for pursuing *all* of the individuals on that list.

Another important reason for not official ending the war as that was the ongoing negotiations at the Security Council regarding a U.S. sponsored draft resolution on Iraq. The main U.S. objective during such negotiations was to earn the Council's recognition of the United States as the governing authority over Iraq for an indefinite period of time. Declaring the end of the war during that period would have weakened the U.S. argument against several members of the Council. Those members could have requested an end to occupation as soon as possible, the transfer of author-

ity, in the interim, to the United Nations and the eventual creation of an Iraqi government to assume the sovereign authorities in Iraq. Those were not the immediate goals for the U.S. government.

However, another obstacle remained for the United States. The legality of the Coalition's occupation of Iraq was, at best, questionable. As explained earlier, the use of force that led to the occupation of Iraq stood on weak legal ground. As a result, the occupation of Iraq was an illegal act that should not be recognized by the international community.

Under modern international law, occupation can be legal in two situations. Under a self-defense justification, a State (or States) may legally occupy the territory of another, or part of it, in the exercise of self-defense against the military threat of that State, and to the extent necessary to end such a threat. If and when such threat ends, the occupying State(s) can no longer exercise control over the territory of the other State and has to withdraw its troops. Had the U.S. declared the end of war on May 1, 2003, it would have been compelled to withdraw its troops from Iraq because the threat posed by Iraq would have no longer existed.

Occupation is also legal if there is a mandate by the Security Council authorizing such occupation. It is clear that when the military operation against Iraq commenced, the Security Council had not authorized the Coalition to occupy the Iraqi territory. Accordingly, there was no Council mandate to this effect.

Based on the above, prior to the adoption of Resolution 1483, the U.S. occupation of Iraq that followed the overthrow of the Saddam Hussein regime was illegal. This creates at least three legal consequences. First, the Coalition should have withdrawn immediately from Iraq. State responsibility for the illegal occupation results if there was no immediate withdrawal. Second, until such withdrawal takes place, the Coalition could not act in Iraq outside the limits of The Hague Regulations of 1907 and the Geneva Conventions of 1949. The rules of those Regulations and Conventions apply to the occupant whether or not the occupation was legal. Third, illegal occupation renders acts of the occupant, outside the boundaries of The Hague Regulations and the Geneva Conventions, null and void. In its advisory opinion concerning the illegal presence of South Africa in Namibia, the International Court of Justice held that States are under legal obligation to consider South Africa's presence in Namibia as null and void. It concluded that States shall not recognize South Africa's actions on *behalf of Namibia*, including treaty relations, diplomatic relations and economic dealings.

Applying this to the situation in Iraq leads to the following conclusions: (1) the Coalition may only be considered as an "administrator of necessity" and may not assume the Iraqi government's authorities and responsibilities in Iraq; (2) the Coalition may not conduct political, economic or foreign relations on behalf of Iraq during the occupation and other States must boycott the Coalition in its actions on behalf of Iraq; (3) any national government, whether interim or permanent that is installed by the Coalition is not recognized by the international community nor are

its actions on behalf of Iraq and (4) the Coalition may not change the national laws in Iraq or perform political or economic changes in that country. Again, such actions would be null and void.

In order to achieve the Coalition's declared goals in Iraq, including the restructuring of the political and economic process, it was imperative to earn international recognition of the legality of occupation and its authority to implement structural changes there. Under the prevailing international circumstances, this must be achieved through a Security Council resolution.

III. Security Council Resolution 1483

A. History of the Enactment of Resolution 1483

Upon the declaration by President Bush of the end of major military operations in Iraq, the United States launched a diplomatic campaign for the adoption of a new Security Council resolution. The United States, backed by a prompt military victory, had major political and diplomatic leverage in negotiating a new Council's resolution. Other Council members who resisted the United States' efforts to authorize the use of force prior to the war were not in a position to challenge such efforts. They had no immediate strategies to deal with the military and political realities that emerged upon the Coalition's swift victory. What role the United Nations could play under the existing circumstances was not clear to them. Their governments were unsure if and how they could contribute to the political and economic reconstruction of Iraq, assuming that the Coalition was willing to allow them to participate in such endeavor. Those members were also not willing to further alienate the United States following the diplomatic encounters prior to and during the war that led to the weakening of their relationships with the United States. On the other side, the United States was not sure of all the goals it wanted to achieve in relation to the new situation in Iraq, and through a new Council resolution. Yet, the letter sent on May 8, 2003 by the Permanent Representatives of the United States and the United Kingdom to the Security Council, together with the negotiations records, revealed several U.S. goals, including: (1) legalization of the Coalition's occupation of Iraq; (2) providing the Coalition with the authority to govern and administer Iraq for an indefinite period of time, including the authority for the political and economic reconstruction; (3) giving the international community and the United Nations only an assisting role in Iraq, subject to the Coalition's control; (4) lifting the economic and civilian sanctions on Iraq without tying it to the fulfillment of Iraq's disarmament obligations under relevant Security Council resolutions; and (5) ending the oil-for-food program in Iraq, which included oil and civilian goods contracts for billions of U.S. dollars.

One cannot ignore the fact that United States and the United Kingdom presented to the Council a draft resolution on Iraq and simultaneously sent the May 8th letter referred to above. It was clear to the members of the Council that the letter was the basis for what the Coalition needed to

achieve from the draft resolution. The letter provided that the Coalition would have responsibility and the authority to: (1) disarm Iraq of its weapons of mass destruction; (2) exercise, through the Coalition's Provisional Authority (CPA), powers of government on a temporary basis; (3) provide for the security and administration of Iraq, including the administration of the economic and financial sectors; (4) rebuild Iraq's military, security, economic and governmental institutions; (5) facilitate the efforts of the Iraqi people to create a representative government; and (6) facilitate the creation of representative institutions of government and transfer responsibilities of administration, progressively and as appropriate, to such institutions.

The preamble draft resolution stated that [the Council] *took note* of the May 8th letter and recognized the specific authorities and responsibilities under international law of the United States and the United Kingdom as occupying powers under unified Command (the "Authority"). The letter was intended to serve as a reference to the resolution if adopted, define the legal basis for the presence of the Coalition in Iraq, and delineate the scope of its authorities.

The Security Council eventually adopted the draft, with some amendments, as Resolution 1483. The Resolution provided, *inter alia*, for the following:

1. Recognition of the authorities and responsibilities of the United States and the United Kingdom under international law as occupying powers (Preamble, paragraph 13).
2. The need for the "Authority" (here, the United States and the United Kingdom) to administer Iraq effectively. (Operative paragraph 4).
3. A *supporting and assisting* role for the international community and the United Nations in Iraq (humanitarian relief, security, economic rehabilitation, rebuilding the political process. . .). (Operative paragraphs 1,2,8,9,12,15).
4. The need to bring members of the former Iraqi regime who are responsible for crimes and atrocities to justice. (Operative paragraph 3). Note that the letter of the United States and the United Kingdom Permanent Representatives stated that the Coalition would seek to bring those members to justice.
5. Termination of the sanctions against Iraq, except on military items. (Operative paragraph 10).
6. The "support" of the Council for the formation of an interim administration (IIA). The Iraqi people are to create the IIA with the help of the Authority and the United Nations Special Representative on Iraq. The aim of the IIA is to serve as a transitional administration until a permanent Iraqi government is established and assumes the responsibilities of the Authority. (Operative paragraph 9).
7. Creation of the Development Fund for Iraq to be held by the Iraqi Central Bank. The Fund's revenues, which include oil sales, returned frozen Iraqi assets, and assets of the former Iraqi government and regime members, shall be disbursed at the direction of the Authority. (Operative paragraphs 12, 13, 14, 20, 23).
8. Phasing out and eventual termination of the Oil-for-Food program. (Operative paragraphs 16, 17).

9. Immunity from legal proceedings for Iraqi oil, its revenues, and for DFI and its revenues. The immunity would last until the end of the year 2007. (Operative paragraphs 22, 23).

B. The Effect of Resolution 1483

The question then arises as to what the United States has achieved from the adoption of Resolution 1483?

1. *The Occupation of Iraq*

Absent a Security Council resolution, the Coalition's occupation of Iraq would be illegal. Thus, the Coalition's acts in Iraq or on behalf of Iraq that are *beyond* the framework of the 1907 Hague Regulations and 1949 Geneva Conventions would be considered null and void. It would have to withdraw its troops immediately and would incur legal responsibility as a consequence of such occupation. It may not assume the authorities of the Iraqi government, including the conduct of political, economic and foreign relations.

Resolution 1483 gave the Coalition the mandate to occupy Iraq and recognize the occupant's authority as provided for in the Resolution. It transformed the occupation from a belligerent one to a legal one, and created a special occupation regime that is controlled by the occupying power, instead of the Security Council. Operative paragraph 25 provides that the Council is to review the "implementation" of the resolution within 12 months of its adoption. In the preceding paragraph, the Council encourages the United States and the United Kingdom to "inform" the Council, at regular intervals, of "their efforts" under the resolution. One can hardly consider the ability of the Council to review the implementation of the resolution to be a form of control over the occupation. Both the United States and the United Kingdom have veto powers that can be used to upset future efforts to give the Council control over the occupation. Further, encouraging the two occupying powers to inform the Council of their efforts under Resolution 1483 does not amount to an obligation of *reporting* to the Council. The use of the word *report* in the draft resolution, which U.S. and U.K. negotiators fiercely fought, would have been considered an expression of the Council's determination to control the mandate it gave to the occupying power.

The special occupation regime goes beyond the rights and obligations of the occupying power as provided for in the 1907 Hague Resolutions and 1949 Geneva Conventions. During the negotiations of Resolution 1483, some Council members attempted to incorporate language that would limit the authorities of the Coalition to those provided for in the Hague Regulations and the Geneva Conventions. This language would have obliged the occupying power to respect the national laws of Iraq. Further, it would have provided the Coalition with limited authority in relation to administering Iraqi governmental and economic institutions. However, U.S. and U.K. negotiators rejected such language, and the Council agreed on a general provision (Operative paragraph 5) that calls on "all concerned" to

comply with their obligations under international law, including the Geneva Conventions and Hague Regulations. The Coalition can always argue that it is respecting its obligations under those legal instruments, while exercising their extended authorities under Resolution 1483.

One way the Resolution has extended Coalition authority beyond the Hague Regulations and Geneva Conventions is that the Coalition may govern Iraq, on behalf of its sovereign government, for an indefinite period. One should note that under paragraph 9 of Resolution 1483, the Council expressed its support for the creation of an interim Iraqi administration as a transitional administration, until a permanent Iraqi government is established and assumes the responsibilities of the Coalition. The resolution did not specify the functions, terms of reference or the scope of authority of the IIA. It also does not oblige the Coalition to facilitate its creation nor does it set time limits for its establishment. In addition, by stating that only the permanent government may assume the responsibilities of the Coalition, it made clear that the IIA, if and when created, is subject to the overall authority of the Coalition and can only perform administrative responsibilities that the Coalition agrees to, and under the latter's control. Only when a permanent Iraqi government is established can sovereign authority be transferred to the Iraqis. Paragraph 9 neither sets a time frame for the creation of a permanent government, nor does it provide that the establishment of such a government entails the end of occupation and the withdrawal of the occupying power. In addition, the term "internationally recognized, representative government" was used instead of "permanent," thus making it unclear whether the government referred to is actually the one to regain Iraqi sovereignty).

The restructuring of military and security institutions goes beyond the rights given to the occupying power under international humanitarian law. However, no Council member objected to this approach when the Resolution was adopted in either official statements or during the explanation of vote.

Sub-paragraph 8(c) of Resolution 1483 provides that the United Nations Special Representative on Iraq would have to "work intensively" with the Coalition and the Iraqi people to restore and establish national and local institutions of representative governance. The right of the Coalition to "intervene" in such processes is not warranted under international humanitarian law. IHL leaves the process of rebuilding and creating local and national institutions to the people under occupation, except for the security and military needs of the occupying power. The Resolution also expanded the Coalition's authority by giving it ultimate control over the economic process, including the creation, administration and restructuring of Iraqi economic and financial institutions.

Upon the adoption of the resolution, the United States Permanent Representative informed the Council that the Development Fund for Iraq (DFI) was established. According to Resolution 1483, Iraq's Central Bank holds the DFI, thus recognizing it as an Iraqi institution. Its revenues include the proceeds of Iraq's oil sales, the remaining assets in the United Nations

escrow account established for the purposes of the Oil-For-Food program, and the frozen assets of the government of Iraq and the members of the former regime and their families. The Resolution also provides that the DFI shall disburse its funds at the direction of the Coalition and that the funds may be used for humanitarian needs, repair of Iraq's infrastructure, disarmament, economic reconstruction, and the costs of Iraqi civilian administration.

The DFI was established by the occupying powers, not the Security Council, which merely "noted" its establishment. The Council also gave the occupying powers a broad mandate over all aspects related to the DFI, including its revenues, disbursement and management. The only limitation to the occupying powers broad mandate is the establishment of an International Monitoring and Advisory Board (IAMB). Resolution 1483 governs only the Board's membership, providing that it be composed of a representative of the United Nations Secretary General and representatives of international and financial institutions. It also requests the United Nations Secretary General to report on the work of the IAMB. The only specific mandate for the IAMB under Resolution 1483 is that it "approves" the independent public accountant chosen to audit the DFI. The Resolution is silent about how the IAMB is established, what its advisory and monitoring functions would be, and the term of reference it would adopt.

Thus, Resolution 1483 gave the occupying powers extended authorities in terms of the economic process in Iraq. The Coalition completely controls the Iraqi entity responsible for the economic development. The entire economic reconstruction process is mandated to those powers, with a minimal role for the United Nations Special Representative, although subparagraph 8(c) of Resolution 1483 provides that the United Nations Special Representative will "promote" economic reconstruction in Iraq.

2. *The Assisting Role of the International Community and the United Nations*

Resolution 1483 provides an assisting role for the international community in Iraq. Such a role may become an important one, as the Resolution preserves the decision making process in relation to the extent of this assisting role to the Coalition.

a. *The Role of States*

According to the Resolution, States may perform two main functions. First, they may assist the Iraqi efforts to reform their institutions and rebuild their country. The form of assistance is neither specified nor defined. The Coalition, which assumed the governing authority of Iraq on behalf of its people during the occupation period, determines and controls such assisting role. Second, States may contribute to the stability and security of Iraq. This issue raised significant debate during the negotiations of the resolution. Under international humanitarian law, military forces that have effective control over the territory of another country or part of the country are regarded as occupants of that country, or of the part

the forces effectively control. International humanitarian law considers a country that sends troops or personnel to work under the unified command of an occupant to be an occupant as well. As such, any State that contributes to the stability and security in Iraq by sending troops or personnel to work under the unified command of the Coalition becomes an occupant. Whether the personnel or troops perform military tasks or law enforcement operations, they would be under of command of the Coalition, becoming part of the occupying forces. The United States and the United Kingdom incorporated language in the resolution to give political cover to States that want to contribute troops or police forces. Paragraph 14 of the preamble provides that States [other than the United States and the United Kingdom] that are not occupying powers are working now or in the future may work under the Authority. This language does not change the status of any State as an occupant, if the State contributes military or police forces to secure or stabilize Iraq.

b. The Coordinating, Facilitating and Assisting Role of the United Nations in Iraq

Several Security Council members advocated a central role for the United Nations in Iraq during the negotiations of Resolution 1483. Some called for a full United Nations operation in Iraq, where the organization would control the administration of the country and its political and economic reconstruction. Less ambitious members called for United Nations authority in developing the political and economic process in Iraq, including control over the rebuilding of Iraqi institutions, deciding the framework and time line for elections, and the administration of Iraq's oil industry and trade. The outcome of negotiations provided the United Nations with a vital, yet peripheral, assisting and coordinating role that does not interfere with the overall authority of the Coalition. Resolution 1483 requests that the United Nations Secretary General appoint a Special Representative who is to coordinate United Nations activities in Iraq, coordinate the humanitarian and reconstruction efforts of the United Nations and international agencies and, in coordination with the Coalition, assist the people of Iraq. On the political level, the Resolution presented the Special Representative with the task of working with the Iraqi people and the Coalition to restore national institutions and to "facilitate" a process leading to an internationally recognized, representative government of Iraq. In July 2003, the Special Representative announced the creation of a Governing Council in Iraq through a process that he facilitated. However, the Coalition approved the full composition of the Governing Council.

c. International Financial Institutions

Resolution 1483 provides that international financial institutions may assist Iraq by making financial contributions to the reconstruction of Iraq and by helping the process of restructuring Iraq's sovereign debt (Paragraphs 15 and 22).

d. The Sanctions on Iraq

Resolution 1483 lifted and terminated all forms of non-military sanctions on Iraq. Despite efforts by some Council members during the negotiations of the Resolution to suspend the sanctions against Iraq until Iraq fulfills its disarmament obligations, the United States and the United Kingdom managed to secure the total lifting of such sanctions in the Resolution.

The disarmament obligations as provided for in the relevant Security Council resolutions, most notably Resolutions 687, 1284 and 1441, condition the lifting of sanctions on the performance by "Iraq" of disarmament obligations and the verification of the process by the international inspectors. Accepting that the disarmament obligations were not legally imposed on Saddam Hussein regime but on Iraq as a State, the United States and the United Kingdom agreed to maintain such obligations in the Resolution. In exchange, the other permanent members of the Council agreed to terminate all non-military sanctions on Iraq.

e. The Oil-For-Food Program

During the negotiations of Resolution 1483, the United States argued that the Oil-For-Food Program (O.F.F.) should be terminated as a result of ending the sanctions on Iraq. The United States advanced valid reasons for its position. O.F.F. involved tens of billion of dollars worth of oil and civilian goods contracts. A significant number of those contracts were long-term, expiring after several years. In addition, the escrow account of O.F.F. held billions of dollars of funds. To finance Iraq's reconstruction from Iraq's own resources, including oil, it was necessary to terminate the program controlling, in effect, all of Iraq's financial and economic resources.

There were several obstacles to terminating O.F.F. First, the vast majority of Iraqis depended on O.F.F. for their livelihoods. If O.F.F. terminated abruptly, a human disaster would result in Iraq. The second problem was that many Council members and some U.S. allies had a significant number of contracts under O.F.F. Terminating the program would cause major financial losses to those countries. A third problem is legal. Iraq, the United Nations, and possibly the Coalition were legally liable for cancelled O.F.F. contracts. After careful consideration, the Council agreed that the program would continue for six months from the time of adoption of the resolution. During that period, the United Nations would execute contracts of humanitarian priority and of utility to the Iraqi people. Afterwards, the Coalition's Authority would be responsible for their execution.

This arrangement left a significant number of O.F.F. contracts unimplemented. Resolution 1483 provides that it will be the responsibility of the permanent Iraqi government, when created, to determine whether to fulfill such contracts. This provision protects the Coalition from civil liability for those unfulfilled contracts and the United Nations is immune from any legal or judicial process. Thus, Iraq alone is legally responsible for such contracts.

3. *Resolution 1483 and the Use of Force Against Iraq*

The Resolution does not address the legality of the use of force against Iraq whether directly or indirectly. One may argue that by recognizing the authority of the Coalition as an occupying power in Iraq, the Resolution indirectly recognizes the legality of the Coalition's use of force. This argument does not have a standing under the rules of international humanitarian law and the United Nations Charter, which require the authorization to use force to be *prior* to the commencement of military action. Recognition of the authority of the Coalition as occupants in Iraq was the most pragmatic method for the Council to manage the situation. Resolution 1483 does not indicate to the contrary. In addition, several Council members made clear that one should not interpret their votes in favor of Resolution 1483 to mean that they accept the legality to use force. The United States and the United Kingdom's official comments to the Resolution never interpreted the Resolution as recognizing the legality to use force.

Under Paragraph 11 of Resolution 1483, the Council encourages the Coalition to keep the Council informed of their activities concerning Iraq's disarmament obligations. The provision responds to the letter of May 8, 2003 in which the United States and the United Kingdom expressed their intent to search for and destroy weapons of mass destruction in Iraq. Paragraph 10 does not provide that the two countries act on behalf of the Council in enforcing its resolutions relevant to Iraq's disarmament obligations.

