
**AN OPINION GIVEN TO THE CAMPAIGN FOR
NUCLEAR DISARMAMENT (CND) : RABINDER SINGH
QC AND CHARLOTTE KILROY, 23 JULY 2003**

**15. In the Matter of the Legality of the Occupation of Iraq
by UK Armed Forces**

OPINION

1. We are asked to advise the Campaign for Nuclear Disarmament (CND) and Peacerights on the legality of the occupation of Iraq by the armed forces of the United Kingdom (UK) and the United States (US). In particular we are asked to consider the effect that UN Security Council Resolution 1483 adopted on 22 May 2003 (“**Resolution 1483**”) has on the lawfulness of the occupation.

Summary of Opinion

2. For the reasons set out below, our opinion is that:
- (1) while the invasion and subsequent occupation of Iraq by the US and the UK were unlawful at international law, Resolution 1483 has, since its adoption, rendered the continuing occupation of Iraq by the US and the UK lawful;
 - (2) the conduct of that occupation is subject to the limits placed on it by international law;
 - (3) in particular, the legality of what the occupying powers are authorised to do and their responsibilities and obligations remain limited by the Hague Regulations and Geneva Convention IV; and
 - (4) on a proper interpretation of Resolution 1483 the *primary* responsibility for nation-building, judicial reform and economic reconstruction rests with the UN Special Representative appointed in accordance with paragraph 8 of that Resolution and *not* with the occupying powers.

Factual background

3. On 20 March 2003 the US and the UK commenced military action against Iraq. By 9 April 2003 US forces had reached Baghdad, toppling Saddam Hussein’s regime. The major figureheads of the regime went into hiding and the Iraqi administration crumbled. On 1 May 2003 George W. Bush, the President of the United States, announced what he described as the end of combat operations in Iraq.

4. Since at least that date the US and the UK have been in control of most of Iraq; UK forces are primarily in the south-east, where they control the city of Basra.

Resolution 1483

5. On 22 May 2003 the UN adopted Resolution 1483 relating to Iraq. The relevant parts of Resolution 1483 for the purposes of this opinion are set out below:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) promoting the protection of human rights;

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

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

9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority;

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

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

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

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

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

22. *Noting* the relevance of the establishment of an internationally recognized, representative government of Iraq and the desirability of prompt completion of the restructuring of Iraq's debt as referred to in paragraph 15 above, further *decides* that, until December 31, 2007,

unless the Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from legal proceedings against them and not be subject to any form of attachment, garnishment, or execution, and that all States shall take any steps that may be necessary under their respective domestic legal systems to assure this protection, and that proceeds and obligations arising from sales thereof, as well as the Development Fund for Iraq, shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations except that the above-mentioned privileges and immunities will not apply with respect to any legal proceeding in which recourse to such proceeds or obligations is necessary to satisfy liability for damages assessed in connection with an ecological accident, including an oil spill, that occurs after the date of adoption of this resolution;

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

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

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

6. The letter of 8 May 2003 to which the Preamble refers stated as follows:
“The United States of America, the United Kingdom of Great Britain and Northern Ireland and Coalition partners continue to act together to ensure the complete disarmament of Iraq of weapons of mass destruction and means of delivery in accordance with United Nations Security Council resolutions. The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. We will act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people.

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

The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall inter alia, provide for

security in and for the provisional administration of Iraq, including by: deterring hostilities; maintaining the territorial integrity of Iraq and securing Iraq's borders; securing, and removing, disabling, rendering harmless, eliminating or destroying (a) all of Iraq's weapons of mass destruction, ballistic missiles, unmanned aerial vehicles and all other chemical, biological and nuclear delivery systems and (b) all elements of Iraq's programme to research, develop, design, manufacture, produce, support, assemble and employ such weapons and delivery systems and subsystems and components thereof, including but not limited to stocks of chemical and biological agents, nuclear-weapon-usable material, and other related materials, technology, equipment, facilities and intellectual property that have been used in or can materially contribute to these programmes; in consultation with relevant international organizations, facilitating the orderly and voluntary return of refugees and displaced persons; maintaining civil law and order, including through encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; eliminating all terrorist infrastructure and resources within Iraq and working to ensure that terrorists and terrorist groups are denied safe haven; supporting and coordinating demining and related activities; promoting accountability for crimes and atrocities committed by the previous Iraqi regime; and assuming immediate control of Iraqi institutions responsible for military and security matters and providing, as appropriate, for the demilitarization, demobilization, control, command, reformation, disestablishment, or reorganization of those institutions so that they no longer pose a threat to the Iraqi people or international peace and security but will be capable of defending Iraq's sovereignty and territorial integrity.

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

administration to representative Iraqi authorities as early as possible.

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

Legal Background

7. The international law on belligerent occupation is for the most part contained in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (**Geneva Convention IV**), in particular Articles 27-34 and 47-78, and the Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Regulations Respecting the Laws and Customs of War on Land (**the Hague Regulations**), Articles 42-56.

8. As Hans-Peter Gasser puts it in the Handbook of Humanitarian Law in Armed Conflicts¹ at 525:

“The first step towards an understanding of the international legal consequences of the occupation of foreign territory is to recognise the general ban on acquiring foreign territory by force, derived from the prohibition of the use of force in the UN Charter [see Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Resolution of the UN General Assembly No. 2625 (XXV) of 24 Oct. 1970.]. The annexation of conquered territory is prohibited by international law. This necessarily means that if one state achieves power over parts of another state’s territory by force or threat of force, the situation must be considered temporary by international law. The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or debellatio. International law does not permit annexation of territory of another state. It follows from this that all measures taken by the occupying authorities should affect only the administration of the territory, avoiding far-reaching changes to the existing order. In this sense, the occupying power assumes ‘responsibility for the occupied territory and its inhabitants.’”

The Hague Regulations

9. Article 42 of the Hague Regulations states:

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”
10. Article 43 of the Hague Regulations states:

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”
11. Article 43 is at the heart of the rules set out in Geneva Convention IV and the Hague Regulations. It encapsulates the responsibilities imposed upon occupying powers and the limits to the action they may take.
12. Article 46 of the Hague Regulations states:

“Family honour and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.”
13. Article 48 states:

“If, in the territory occupied, the occupant collects the taxes, dues and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.”
14. Article 55 states:

“The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”
15. Article 56 states:

“The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”

Geneva Convention IV

16. Article 54 of Geneva Convention IV states:

“The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.”

17. Article 55 states:

“To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.....”

18. Article 56 states:

“To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the co-operation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties... In adopting measures of health and hygiene and in their implementation, the Occupying Power shall take into account the moral and ethical susceptibilities of the population of the occupied territory.”

19. Article 58 states:

“The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities...”

20. Article 59 states:

“If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organisations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.....”

21. Article 63 states:

“Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power:

- (a) *recognised National Red Cross (Red Crescent, Red Lion and Sun Societies shall be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions;*
- (b) *the Occupying Power may not require any changes in the personnel or structure of these societies which would prejudice the aforesaid activities....”*

22. Article 64 provides:

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

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

Issues

- 23. We have in earlier Opinions² written before the start of military action against Iraq on 20 March 2003 set out our view that, in the absence of a UN Security Council Resolution clearly authorising the US and the UK to take military action against Iraq, such military action would be unlawful and in breach of international law. No such UN Security Council Resolution was ever adopted. In our view, therefore, the UK’s military action against Iraq was taken in breach of international law. We are aware that many international lawyers around the world, academic and practitioner, share that view.
- 24. The UK Government was advised, however, that there was a legal basis for its military action against Iraq in the combined effect of Resolutions 678, 687 and 1441³. The Government was also advised by the Attorney

General, Lord Goldsmith QC, in an opinion dated 26 March 2003 (and published in *The New Statesman*) that “*the lawfulness of any occupation after the conflict has ended is still governed by the legal basis for the use of force . . . any military action pursuant to the authorisation in resolution 678 (1990) must be limited to what is necessary to achieve the objectives of that resolution, namely Iraqi disarmament, and must be a proportionate response to that objective. The Government has concluded that the removal of the current Iraqi regime from power is necessary to secure disarmament, but the longer the occupation of Iraq continues, and the more tasks undertaken by an interim administration depart from the main objective, the more difficult it will be to justify the lawfulness of the occupation.*”

25. This raises a number of issues which we will address in this opinion:
- (1) Whether the occupation of Iraq by the US and the UK is lawful;
 - (2) whether Resolution 1483 renders the occupation of Iraq by the US and the UK lawful;
 - (3) the scope of the powers and responsibilities of the US and the UK under international law generally and under Resolution 1483 in particular.

Advice

Is the occupation of Iraq by the US and the UK lawful?

26. Article 42 defines the state of occupation as “*territory.. actually placed under the authority of the hostile army.*” The occupation extends only to the territory where such authority has been established and can be exercised.
27. As stated above, in our view the military action taken by the US and the UK was in breach of international law. It follows therefore that the ensuing occupation of Iraq as the invasion unfolded was also unlawful. The fact, however, that the occupation was unlawful does not mean that the US and the UK were not bound by the provisions of the Hague Regulations and Geneva Convention IV, nor does the UK’s compliance with these treaties mean that the occupation is lawful. The principles of international humanitarian law apply to unlawful occupying powers in the same way as they apply to lawful occupying powers.⁴
28. The question of whether the UK is conducting its occupation of Iraq in a lawful way is therefore distinct at international law from the question of whether the occupation itself was lawful, the latter question being inextricably linked to the justification for taking the military action which led to the occupation.

29. In relation to the former question, as the Attorney-General pointed out in his opinion of 26 March 2003, the powers and actions of the occupying powers are limited by the Hague Regulations and Geneva Convention IV. In particular Article 43 of the Hague Regulations limits the ability of the occupier to make permanent changes to the constitution of the occupied territory. As Professor Christopher Greenwood QC stated in *The Administration of Occupied Territory in International Law and the Administration of Occupied Territories* (Clarendon, 1992),

“the fact that a belligerent occupant does not acquire sovereignty and has a duty under Article 43 of the Hague Regulations to respect the laws in force in the occupied territory makes any change introduced by the occupant in the constitution or institutions of the occupied territory of doubtful legality.....an attempt by an occupying power to effect permanent changes in the constitution of occupied territory may, in itself, involve a violation of the Hague Regulations. Article 43, it has been suggested, “protects the separate existence of the State, its institutions and its laws.”⁵ An occupant is entitled to suspend the operation of certain constitutional guarantees and the functioning of the political organs of the constitution (at least at the level of central government) for the duration of the occupation. Permanent changes in the constitution of the occupied territory, on the other hand, are probably lawful only if they are necessary to enable the full implementation of the Hague Regulations and the Fourth Geneva Convention or other rules of international law.”⁶

30. Equally Article 43 of the Hague Regulations combined with Article 64 of Geneva Convention IV shows *“that international law does not recognise a general legislative competence in the belligerent occupant. Changes in the law of the territory will be contrary to international law unless they are required for the legitimate needs of the occupation.”⁷*
31. The desire of the US and the UK to oversee, if not themselves make, far-reaching changes to the structures of government of Iraq and in particular to institute a representative democracy would therefore almost certainly have been in breach of Article 43 of the Hague Regulations. Under the Hague Regulations and the Geneva Convention, the occupying powers have a duty to “take all the measures in his power to restore, and to ensure, as far as possible, public order and safety.” They may not, however, by virtue of Article 43 of the Hague Regulations and Article 64 of Geneva Convention IV replace the administration and

judicial organisation of the occupied territory with their own administration. If there is a power vacuum because, for example authorities, public officials and judges have left the occupied territory, or are unwilling to perform their duties then, as a matter of urgency, the occupying powers may set up their own civilian administration. *“According to the principle of subsidiarity, they may intervene and take their own decisions only to the extent that this is absolutely necessary in the interests of the population of the occupied territory. National administrative bodies or courts which are still functioning may not be altered.”*⁸

32. The Hague Regulations and Geneva Convention IV also contain important limitations on the occupying power’s ability to control the economy. The basic principle is that the occupying power must not exercise its authority in order to further its own interests or to meet the needs of its own population. Antonio Cassese states:⁹ *“In no case can it exploit the inhabitants, the resources or other assets of the territory under its control for the benefit of its own territory or population.... In my view it follows from the provisions of the Hague Regulations referred to above [Articles 46, 52, 53, 55 and 56] that the occupant can interfere in the economic activity of the territory under its control (by requisitioning private property, seizing public movables, or using state-owned immovables) only for the following purposes: (a) to meet its own military or security needs (i.e. the exigencies posed by the conduct of its military operations in the occupied territory); (b) to defray the expenses involved in the belligerent occupation; (c) to protect the interests and the well-being of the inhabitants.”*
33. Perhaps the most important restriction on the occupying powers derives from the assumption that the occupation will be temporary. Article 6 of Geneva Convention IV expressly provides, for instance, that save for certain core provisions the Convention will cease to apply one year after the close of military operations, although this is a provision which has been much criticised.¹⁰
34. As a result of these restrictions, the US and the UK sought authorisation for their administration of Iraq from the UN Security Council in the form of Resolution 1483. In this advice we will address two questions which arise from Resolution 1483: first whether it legitimises the US and the UK’s occupation of Iraq; second, to what extent it extends the US and the UK’s powers and responsibilities as occupying powers under international law.

Does Resolution 1483 render the US and the UK occupation of Iraq lawful?

35. As is clear from the extracts from Resolution 1483 set out above, nowhere in that Resolution does the Security Council state that the

military action against Iraq was lawful or justified. Although the third recital of the Preamble reaffirms the importance of the disarmament of Iraqi weapons of mass destruction and of eventual confirmation of the disarmament of Iraq, and the 13th recital recognises that the UK and the US are occupying powers, both fall short of endorsing the military action.¹¹ As explained above, the US and the UK's status as occupying powers and the powers and responsibilities which go with that status, are not dependent on the lawfulness of the military action which led to the occupation.

36. In any event, in our view it would be difficult to see how such retrospective endorsement would be compatible with the UN Charter, unless the Security Council were to conclude that the US and the UK had acted properly under Article 51, the self-defence provision of the Charter, which permits force to be used by Member States in self-defence as long as the matter is promptly referred to the Security Council. Either the US and the UK were authorised to take military action by the Security Council under Chapter VII of the UN Charter or they were not. If they were not then that action was unlawful, and in our view *no ex post facto* resolution can authorise that action. Furthermore, although the Security Council has a quasi-judicial function insofar as it is called upon to judge whether there has been a violation of international law in order to enforce the provisions of the Charter, in our view the scope of that function is limited to what is necessary in order for it to enforce the law. As Bruno Simma's Commentary on the Charter of the UN¹² states:

“..the tendency of the S[ecurity] C[ouncil] to assume quasi-judicial authority, though certainly conducive to the maintenance of peace, is difficult to reconcile with the legal order of the UN Charter which, as has been shown above, limits Chapter VII powers, in principle, to preliminary measures while excluding the imposition of specific terms of settlement by the SC. Moreover, the final determination of rights and obligations of States (and of individuals) partly establishes a compulsory jurisdiction, whereas the Charter has opted for a system of voluntary submission of States to third-party settlement. Therefore in cases of doubt a legal determination by the SC should be interpreted as possessing only preliminary and not final character, thus allowing for challenges when the conflict is over and when a reconsideration of the legal question does not add to the threat to the peace any more...In any event, quasi-judicial determinations should remain exceptional and should be confined to cases where they are indispensable for the exercise

of the police function of the SC. In consequence, their effects should be limited to the particular situation. In addition, they should conform to the general standards for judicial findings, and thus meet the respective procedural requirements and respect the substantive law in place.”

37. In our view, therefore, for the reasons set out above the lawfulness of the military action against Iraq by the US and the UK is still very much an open question.
38. The question remains, however, to what extent Resolution 1483 legitimises the continuing occupation of Iraq by the US and the UK. As stated above, the 13th recital of the Preamble recognises that the US and the UK are occupying powers and recognises the specific authorities, responsibilities and obligations under applicable international law which follow from this status. Although this is far from a condemnation of the US and the UK's presence in Iraq,¹³ equally it does not in our view amount to an endorsement of their presence because the relevant obligations apply to those powers whose occupation is unlawful as well as those whose occupation is lawful.
39. Operative paragraph 4, however, calls upon the Authority (the US and the UK) to promote the welfare of the Iraqi people through the effective administration of the territory including 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. Operative paragraph 8 meanwhile sets out responsibilities for the UN Special Representative in coordination with the Authority, thereby anticipating the involvement of the Authority in the carrying out of those responsibilities, and operative paragraph 9 supports the formation by the people of Iraq with the help of the Authority and working with the Special Representative, of an interim administration as a transitional administration run by Iraqis until a recognised representative government is established by the people of Iraq and assumes the responsibilities of the Authority.
40. The Security Council has called upon the US and the UK to remain as administrator and to promote the welfare of the Iraqi people in the ways described in operative paragraph 4; has envisaged by operative paragraph 8 that the US and the UK will be involved in carrying out specific functions over and above those provided for in the Hague Regulations and Geneva Convention IV; and by operative paragraph 9 has anticipated that the US and the UK will remain until an internationally recognised representative government is established by the people of Iraq which assumes the responsibilities of the Authority. By those means, in our view, Resolution 1483 renders lawful the

continuing occupation of Iraq by the US and the UK, in order to carry out the responsibilities described in the Resolution. Operative paragraph 4 in particular, as a measure under Chapter VII which “calls upon” the US and the UK to take a particular action, is binding on the US and the UK. ¹⁴ Article 48 of the UN Charter provides that “*the action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine*”.

41. In our view therefore, although we remain of the view that the military action taken against Iraq by the US and the UK was taken in breach of international law, and although the Security Council in Resolution 1483 does not make any finding that this military action was lawful, by calling upon the US and the UK to carry out the role of administering Iraq in order to promote the welfare of the Iraqi people, and by expressly contemplating that the US and the UK will remain in Iraq until their responsibilities are assumed by an Iraqi representative government, the Security Council has authorised the continuing occupation of Iraq by the US and the UK for the purposes set out in Resolution 1483.

What is the scope of the UK’s responsibilities and authority under international law and Resolution 1483?

42. Resolution 1483 expressly calls at operative paragraph 5 upon ‘all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907’ and in the 13th recital of the Preamble recognises the specific authorities, responsibilities and obligations which the US and the UK have as occupying powers under international law. There is no question therefore that the UK must continue to comply with the Hague Regulations and Geneva Convention IV, not to mention Geneva Convention III which concerns prisoners of war.
43. As indicated above, however, Resolution 1483 also appears to anticipate a role for the US and the UK which goes beyond that permitted of an occupying power under the Hague Regulations and Geneva Convention IV (see below). It is significant that operative paragraph 4 which confers a direct responsibility on the UK and the US does not in fact endow them with more power to change the *status quo* than permitted by the Hague Regulations or Geneva Convention IV, but expressly states that they should act consistently with relevant international law and calls upon them to promote the welfare of the Iraqi people in particular by *inter alia* creating the conditions in which the Iraqi people can freely determine their own political future. Although the words ‘creation of

conditions' is open to interpretation, in the context of the paragraph as a whole, which requires compliance with relevant international law and specifies the restoration of conditions of security and stability as a means of promoting the welfare of the Iraqi people (entirely in keeping with Article 43 of the Hague Regulations which requires the occupier to restore public order and safety), in our view, this would limit the US and the UK to the powers set out in the Hague Regulations and Geneva Convention IV. It is only operative paragraphs 8 and 9 which appear to expand the role of the UK and the US as occupying powers.

44. Operative paragraph 8 is addressed to the Secretary-General of the UN and requests him to appoint a special representative with the responsibilities set out in that paragraph and paragraph 9. These responsibilities are in fact less far-reaching than those set out in UN Security Council Resolution 1244, which provided for the establishment of an international civil presence in Kosovo, which had widespread administrative powers, and UN Security Council Resolution 1272, which provided for the establishment of an international transitional administration in East Timor whose overall responsibility included all legislative and executive authority and the administration of justice. As indicated above, because paragraphs 8 and 9 require the Special Representative to work in co-ordination with the Authority in carrying out these responsibilities it appears that they are therefore implicitly also conferred on the US and the UK (see below).
45. Operative paragraph 8 (c) provides that the Special Representative should work intensively with the Authority and the people of Iraq to advance efforts to restore and establish national and local institutions for representative governance, and work together to facilitate a process leading to an internationally recognised, representative government of Iraq; 8 (e) provides that he should in co-ordination with the Authority promote economic reconstruction and conditions for sustainable development; 8 (i) provides that he should in co-ordination with the Authority encourage international efforts to promote legal and judicial reform; and operative paragraph 9 supports the establishment with the help of the Authority and the Special Representative of a transitional administration run by Iraqis.
46. It is immediately clear from the above that Resolution 1483 gives the Special Representative and the Authority a considerable amount of influence over the process of creating a new government and constitution in Iraq, over the creation of a temporary civil administration, over economic reconstruction and over legal and judicial reform. In our view this influence is far greater than would be lawful for an occupying power under the Hague Regulations and Geneva

Convention IV, and in particular exceeds the remit set out in Article 43 of the Hague Regulations. Although as indicated above, there are circumstances where an occupying power might be entitled to create a new temporary civil administration compatibly with the Hague Regulations, economic reconstruction, judicial reform and permanent changes to the system of government are flatly contradictory to the basic principle underlying the Hague Regulations, namely that the occupation is ‘a temporary state of affairs and any change in the status of the territory has to wait until the conclusion of a treaty of peace or the complete subjugation of the State which had formerly exercised sovereignty in the territory’.¹⁵

47. As Christopher Greenwood states:¹⁶

“Existing administrative and legislative structures and the political process may be suspended for the duration of the occupation but an occupant will exceed its powers if it attempts, for example, to create a new State, to change a monarchy into a republic or a federal into a unitary government. An occupant may, therefore, suspend or bypass the existing administrative structure where there is a legitimate necessity of the kind discussed in the preceding paragraph but any attempt at effecting permanent reform or change in that structure will be unlawful.”

48. There is no doubt that nation-building has increasingly become part of the practice of the Security Council.¹⁷ As Frederic Megret and Florian Hoffmann put it:¹⁸

“Whereas old-style mandates and trusteeships under the League of Nations were administered by states with the League merely exercising supervisory power, the United Nations is henceforth engaged in an unprecedented experience of massive direct rule with broader competence over a territory than ever before bestowed upon an international body.

That this ‘international civil presence’ to use the prevalent euphemism, is meant to be temporary, does not change the fact that it is effective, often exclusive and, in most cases, likely to last a number of years. Concretely this means that in a context of renewed commitment to ‘nation-building’ the United Nations is asked to build state structures from scratch in a process that has variously been described as post-conflict ‘reconstruction’, ‘management’ or, perhaps even more adequately, ‘international social engineering’.”

49. It is generally accepted,¹⁹ that although these functions are newly exercised by the Security Council, they do fall within the wide and non-exhaustive range of measures envisaged by Article 41 of the UN Charter.²⁰ Furthermore the United Nations does not naturally fit the definition of an occupying power and it is a matter of debate whether the Geneva Conventions of 1949 and the Hague Regulations apply to it.²¹
50. The responsibilities endowed upon the Special Representative by operative paragraphs 8 and 9 are therefore in keeping with the role increasingly taken by the United Nations. The important question therefore arises, whether the Security Council has by Resolution 1483 shared or delegated those responsibilities to a Member State which is also an occupying power.
51. The powers of the Security Council under Chapter VII of the UN Charter are broad. There is a view that when acting under Chapter VII with the arguable exception of *ius cogens* (i.e. peremptory norms of international law which permit of no derogation) the Security Council is not bound to respect international law apart from the Charter itself,²² although it must be guided by the purposes and principles of the UN Charter set out in Articles 1 and 2 and by the principle of proportionality.²³ This view is, however, rejected by Judge Mohammed Bedjaoui in the New World Order and the Security Council, Testing the Legality of Its Acts²⁴ at 34-5. The Security Council has nonetheless a very wide margin of appreciation in making determinations under Article 39 that there is a threat to the peace or breach of the peace, limited by the purposes and principles of the UN Charter and the obligation to act in good faith.²⁵ The Security Council also has a wide discretion to select measures under Articles 41 and 42, though it would also be bound by the purposes and principles of the UN Charter.²⁶ Schweigman states:²⁷

“As seen above this inter alia implies a duty to act in good faith, meaning that one should determine “whether the responsive measure selected by the Security Council was commensurate with the threat to the peace it had identified. In this context Brownlie observes that the concepts of “purpose and necessity” are relevant to the Council’s choice of measures under Articles 41 and 42 particularly because it “cannot be ex hypothesi necessary to select a method of implementation which is incompatible with general international law.” And Shaw also takes note of the “extensive” discretion afforded the Security Council under the Charter scheme “as regards actions taken consequent upon the determination in order to maintain or restore international peace and security”. At the same time he maintains that:

the more subsidiary such measures are and the further away from the initial action taken in the exercise of the primary responsibility to restore international peace and security, the stronger grows the case for the application of international legal principles.”

52. As explained above, in our view, the military action taken by the US and the UK against Iraq was taken in breach of international law. The Security Council adopted Resolution 1483 without making a determination one way or the other about the lawfulness of the US and UK action against Iraq and ensuing occupation. Can the Security Council be said to be acting in accordance with the purposes and principles of the UN Charter by calling upon an unlawful aggressor to administer the territory of the country it has unlawfully invaded? To the extent that the Security Council is doing no more than calling upon the US and the UK to comply with the obligations which those states have in any event under the Hague Regulations and Geneva Convention IV, in our view this does not exceed the limits of the Security Council's powers. As highlighted above the Security Council has a broad discretion in deciding whether there is a threat to the peace, breach of the peace or act of aggression under Article 39, and a broad discretion in deciding what actions to take in order to eliminate it under Articles 41 and 42. In our view the Security Council cannot be said to be obliged to call upon the US and the UK to withdraw from Iraq, nor can it be said to be acting in bad faith or otherwise in contravention of the purposes and principles of the UN Charter for deciding that it was in the interests of peace and security for the US and the UK to remain in Iraq as administering powers in accordance with international law.
53. The position is, in our view, more complex in relation to any argument that Resolution 1483 implicitly authorises the US and the UK to play a role in the nation-building and economic reconstruction of Iraq. Neither are rights or powers which the US and the UK can claim at international law for the reasons set out above. These are powers reserved exclusively to the Security Council under Article 41 of the Charter. Furthermore Resolution 1483 expressly confirms the UK and the US's status as occupying powers and calls upon them (operative paragraph 5) to act in accordance with their obligations under Geneva Convention IV and the Hague Regulations.
54. Danesh Sarooshi argues that, since the Security Council is exercising powers delegated to it by Member States under Article 24 of the UN Charter, powers which it must exercise in compliance with the Purposes and Principles of the United Nations, it cannot delegate certain of its functions under Chapter VII to a Member State, and must retain

effective authority and control over those functions which it does delegate (Danesh Sarooshi, The United Nations and the Development of Collective Security, (Oxford, 1999), at pp154-5). Sarooshi also argues that the limitations on delegation mean that the terms of a resolution which delegates Chapter VII powers are to be interpreted narrowly (The United Nations and the Development of Collective Security, above, at p 44). The argument that Chapter VII resolutions should be narrowly interpreted is echoed in the Charter of the United Nations, A Commentary:²⁸

“..Chapter VII resolutions should, in general, be interpreted narrowly. If their wording is ambiguous, this most often reflects a compromise and therefore indicates that no agreement has been reached on a certain measure. Such agreement of nine members and the absence of objection by the permanent members, however, constitute the sole authority upon which this measure rests. In their absence, the basis of such a far-reaching encroachment upon the rights of a member State as caused by enforcement action is doubtful. For SC resolutions under Chapter VII, it seems therefore warranted to have recourse to the old rule of interpretation according to which limitations of sovereignty may not be lightly assumed.”

55. The US and the UK’s joint letter of 8 May 2003, which envisages the UN’s Special Representative playing a minor role, notwithstanding, there is no point in Resolution 1483 where the Security Council expressly delegates its powers under Article 41 to the Authority. It follows, in our view, that operative paragraphs 8 and 9, when they refer to ‘*in coordination with the Authority*’ or ‘*with the help of the authority*’ or ‘*working intensively with the Authority*’ should be construed narrowly. When construed narrowly, with the UK and the US’s obligations under international law, which have been carefully emphasised in the earlier parts of the Resolution, in mind, it becomes clear that the responsibilities for nation-building set out in those paragraphs rest primarily with the Special Representative and the people of Iraq, with the US and the UK as the occupying powers playing merely a facilitating and not a decisive role.
56. If therefore the UK seeks to play more than a facilitating role in the carrying out of the functions described at operative paragraphs 8 and 9, it would be acting in breach of its obligations under international law, and exceeding its mandate under Resolution 1483.

Conclusion

57. In our view while the invasion and subsequent occupation of Iraq by the US and the UK was unlawful at international law, Resolution 1483 has rendered the continuing occupation of Iraq by the US and the UK lawful, subject to the limits on the conduct of that occupation contained in international law. In our view, the responsibilities and obligations of the US and the UK remain limited by the Hague Regulations and Geneva Convention IV, and on a proper construction of Resolution 1483 the primary responsibility for nation-building, judicial reform and economic reconstruction rests with the Special Representative appointed in accordance with operative paragraph 8. While Resolution 1483 envisages that the US and the UK will be involved in those processes, in our view such involvement must remain administrative and logistical in order for it to comply with the US and the UK's obligations under international law, which are reaffirmed by Resolution 1483.

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23 July 2003

**IN THE MATTER OF THE LEGALITY OF THE OCCUPATION OF
IRAQ BY UK ARMED FORCES**

OPINION

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Matrix Chambers
Public Interest Lawyers

FOOTNOTES

¹Edited by Dieter Fleck, OUP, 1995, 1999

²Opinion dated 15 November 2002 on whether the United Kingdom (UK) could rely on United Nations Security Council Resolution 1441 (**Resolution 1441**) (**OP1441**); Opinion dated 23 January 2003 on whether the UK could rely on Resolutions 678 and 687 (**OP678**) to use force against Iraq

³See the Statement of the Attorney General given to the House of Lords on 17 March 2003.

⁴See Adam Roberts, *What is a Military Occupation?*, 55 *British Yearbook of International Law*, 249 at 294, and Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in *International Law and the Administration of Occupied Territories*, Clarendon, 1992 at 243.

⁵Geneva Convention IV, Commentary, Pictet, Geneva, 1958 at 273

⁶Page 245

⁷Greenwood, op cit at 247

⁸Gasser, Op cit at p. 256.

⁹See also Christopher Greenwood op cit at p 256: “Where there is no functioning administrative structure or that structure is not capable of providing an adequate government in the unusual circumstances of belligerent occupation, the occupant is entitled to create such new administrative bodies as are necessary. Where, however the occupant finds a functioning administrative structure already in place, there is a presumption that that structure will be retained even if some or all of the officials are removed from their posts. Departures from the existing structure will be justified only where they are necessary to enable the occupant to meet the needs of its armed forces or to discharge its governmental duties under the Hague Regulations and the Fourth Geneva Convention.”

¹⁰*Powers and Duties of an Occupant in Relation to Land and Natural Resources*, in *International Law and the Administration of Occupied Territories*, Clarendon, 1992 at 422-423

¹¹See for example Gasser, op cit at p 251-2

¹²See *ASIL Insights* Security Council Resolution 1483 on the Rebuilding of Iraq by [Frederic L. Kirgis](http://www.asil.org/insights/insigh107.htm), May 2003, <http://www.asil.org/insights/insigh107.htm>

¹³Second Edition, 2002 at p 708

¹⁴See by contrast UN Security Council Resolutions 384 and 389 in which the Security Council called upon Indonesia to immediately withdraw its forces from East Timor

¹⁵See Bruno Simma, op cit at p 739

¹⁶Christopher Greenwood, op cit at 244-5

¹⁷Op cit at p 257

¹⁸The UN as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities, *Human Rights Quarterly*, 25, 2003 314, at 327- 330

¹⁹Ibid at 329

²⁰See Bruno Simma ed, op cit at 743-4; *The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis*, Carsten Stahn, Max Planck UNYB (2001) 105 at 139

²¹The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations

²²See Frederic Megret and Florian Hoffman op cit at 330-333

²³Bruno Simma ed at 711

²⁴See Simma at 711; and *The Authority of the Security Council under Chapter VII of the UN Charter, Legal Limits and the Role of the ICJ*, David Schweigman, Kluwer, 2001 at 165-182

²⁵1994, Kluwer

²⁶Schwiegman ibid at 185-189

²⁷Schweigman ibid at page 189-192

²⁸Ibid at page 190– 91

²⁹Op cit at 713