

THE END OF OCCUPATION: IRAQ 2004

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I. INTRODUCTION

Can a military occupation—and all the responsibilities of an occupying power as laid down in the laws of war—end at a single moment in time, and without the actual departure of the foreign military forces involved? This is the core question posed by the planned twin events of 28 June 2004 in Iraq: (1) the assumption of full authority by the sovereign Interim Government of Iraq, and (2) the proclaimed end of the US-led occupation of Iraq that had begun during the war of March–April 2003.

Some other questions are linked to this core question. What does the law of war, and international practice since 1945, say about how occupations end? What does ‘sovereignty’ mean both in general, and with reference to the Interim Government of Iraq? Is the continuing presence of foreign forces compatible with Iraqi sovereignty? At the formal end of the occupation of Iraq, must prisoners of the coalition, if they have not been charged with offences, be released? After the formal end of occupation, what are the continuing international legal obligations that apply to armed forces in Iraq, and do the rules relating to military occupations still have any significance?

All of these questions relate to the laws of war, also referred to as international humanitarian law. More specifically, they relate to the parts of this body of international law that govern military occupations. Some of the questions also encompass applicable elements of human rights law.

This paper is confined to the questions outlined above. Its main focus is on what law is applicable to the changing situation in Iraq. It is not an assessment of whether the initial use of force against Iraq was justifiable—in legal, moral, or prudential terms. Nor is it an assessment of whether the coalition operating in Iraq has in fact observed the terms of the law on occupations: there have been massive problems in that regard, especially as regards the failures to prevent looting, the ill-treatment and torture of prisoners, and the changes to the law regarding foreign investment in Iraqi companies. Although these matters are briefly mentioned, the focus here is on the overall status of the occupation and of the situation resulting from its formal ending.

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Official statements and preparations regarding the status of Iraq in 2003–4 have not always been clear and far-sighted. Preparations by the coalition governments for the beginning of the occupation phase in Iraq were conspicuous by their absence. The US in particular, as the principal country involved, failed to exercise leadership on this matter. The writer, who was in Washington in April 2003, can testify personally to the lack of agreed and clear policies on such basic matters as how the US presence in Iraq was to be characterized, how order was to be maintained, and what types of troops would be needed for the work. The failure to control widespread looting in Iraq in late April and early May 2003 was symptomatic of the lack of preparation. As to the ending of the occupation, how well thought-out it will prove to have been remains to be seen. Some grounds for scepticism about a situation of great complexity and difficulty are indicated in this note.

II. LAW AND PAST INSTANCES OF THE ENDING OF OCCUPATIONS

Most legal writings indicate that an occupation ends when the foreign troops leave. As one classic work on international law put it, '[o]ccupation comes to an end when an occupant withdraws from a territory, or is driven out of it.'¹ In many cases such a statement poses no problems. However, the withdrawal of occupying forces is not the sole criterion of the ending of an occupation; and the occupant has not necessarily withdrawn at the end of all occupations.

The essential feature of the ending of an occupation is often, though not always, an act of self-determination involving the inhabitants of the occupied territory. This act of self-determination may well require, as pre-requisite or consequence, the withdrawal of foreign forces. Over the past four decades the international community has favoured self-determination in respect of at least five occupations—those of Namibia, the West Bank and Gaza, Cambodia, East Timor, and Western Sahara.² In all five cases the withdrawal of foreign forces has been seen as one key aspect of the ending of occupation. External armed forces remain in place only in those cases in which the occupation has not (or at least not completely) ended—ie the Israeli-occupied territories and Western Sahara.

Important as acts of self-determination are, they cannot be the sole decisive criterion for determining when an occupation ends. The case for self-

¹ L. Oppenheim *International Law: A Treatise* vol 2 *Disputes, War and Neutrality* (Lauterpacht (ed)) (7th edn Longmans Green London 1952) 436.

² UN General Assembly resolutions can be taken as one (albeit imperfect) measure of international opinion on the question of self-determination for occupied territories. On the five cases cited, see eg GA Res 2403 (XXIII) of 16 Dec 1968, and 43/26 of 17 Nov 1988 (both on Namibia); GA Res 2672C (XXV) of 8 Dec 1970 (the first of many calling for self-determination for the Israeli-occupied Palestinian territories); GA Res 36/5 of 21 Oct 1981, and 43/19 of 3 Nov 1988 (both on Cambodia); GA Res 36/50 of 24 Nov 1981 (on East Timor); GA Res 38/40 of 7 Dec 1983, and 43/33 of 22 Nov 1988 (both on Western Sahara).

determination has not been pressed where an occupied territory is widely accepted as being part of an existing State, from which it has been forcefully separated and to which it may be expected eventually to revert. A case in point is northern Cyprus: any act of self-determination there might well be seen as a threat to the sovereignty and territorial integrity of Cyprus, and as a victory for the Turkish invasion and occupation. There the key test of the ending of occupation is more likely to be the withdrawal of Turkish armed forces and personnel.

However, there are instances where an occupation is declared or widely presumed to have ended, but the occupant's forces remain in the country. This can happen, for example, if a treaty ending an occupation is accompanied by another one permitting the presence of foreign forces. Alternatively it may happen in a less formal way.

In Japan on 28 April 1952 a Peace Treaty ending the US military occupation of the country took effect, and simultaneously a Security Treaty came into force, providing for a continued US military presence.³

Likewise in West Germany on 5 May 1955 a number of agreements took effect simultaneously, including one which ended the last vestiges of the three-power occupation, one which provided for the continued presence of the same three countries' forces in West Germany, and others which provided for the entry of West Germany into the North Atlantic Treaty Organization and the Western European Union.⁴

As for East Germany, a Soviet Government statement of 25 March 1954 ended the Soviet 'supervision of the activities of the German Democratic Republic', and also specified that the Soviet Union would retain in East Germany its functions connected with guaranteeing security—which of course meant that Soviet troops remained.⁵ This formal ending of occupation, with external troops remaining in place, was not universally accepted. West German official publications continued for many years thereafter to refer to East Germany as the 'Soviet Occupation Zone'.

The complexity of the ending of occupations, illustrating the many gradations that can be involved, is illustrated by the case of Germany, and more particularly by the city of Berlin. For decades Berlin remained in the time-warp of the four-power occupation, although the powers of the Allies were minimal and residual.⁶ The occupation of Berlin, and the division of Germany,

³ For texts of these two treaties, both of which had been signed on 8 Sept 1951, see *United Nations Treaty Series* vol 136 at 46 and 216.

⁴ For details of the agreements on West Germany, see B Ruhm von Oppen *Documents on Germany under Occupation, 1945–1954* (OUP Oxford 1955) 600–48. Most of the occupant's powers of intervention in West German domestic affairs had already been abolished in the Convention on Relations between the Three Western Powers and the Federal Republic, signed on 26 May 1952. Text *ibid* 616–17.

⁵ *ibid* 597–8. In 1955 several further steps were taken, including the opening of diplomatic relations between the USSR and GDR on 20 Sept.

⁶ Berlin was the subject of the four-power agreement of 3 Sept 1971, but this mentions neither

were finally brought to a formal conclusion through the September 1990 Treaty signed by East Germany, West Germany, and the four occupying powers: but the four-power forces were permitted to remain in Berlin until the end of 1994.⁷ At midnight on 2–3 October 1990 East Germany ceased to exist, becoming part of the Federal Republic of Germany.⁸

In the cases of both Japan and Germany, a key reason for foreign forces remaining in the country after the formal ending of occupation was the need for defence against an external threat. In Japan and West Germany the continued presence of external forces does not appear to have undermined or threatened the resumption of sovereignty by these States or their independent decision-making capacity.

Iraq today is a very different case from Germany and Japan after the Second World War, for three principal reasons. First, it does not inherit a long tradition of sovereign and independent statehood; second, it suffers from deep internal divisions, principally those between Shiites, Sunni, and Kurds; and third, it is in the midst of an extensive and unusually brutal insurgency. In short, it is as much for internal as for external reasons that foreign forces are likely to remain in the country even after the formal ending of occupation. Thus the question of how completely the occupation has ended is bound to be more contentious in Iraq than it has been in certain other cases in which troops have remained after the formal end of occupation.

III. THE STATUS OF IRAQ TO 28 JUNE 2004

There is no dispute about the fact that between April 2003 and 28 June 2004 there was a foreign military occupation in Iraq, and that the principal person in charge from 6 May 2003 to 28 June 2004 was Paul Bremer, Administrator of the Coalition Provisional Authority.⁹ The basic framework was set out in

the word 'occupation' nor the word 'Berlin'. For one earlier assessment of the legal status of Berlin, see the chapter by JW Bishop in RJ Stanger (ed) *West Berlin: The Legal Context* (Ohio State University Press Columbus, Ohio 1966). A later and more comprehensive survey is ID Hendry and MC Wood *The Legal Status of Berlin* (Grotius Publications Cambridge 1987).

⁷ Treaty on the Final Settlement with Respect to Germany, signed in Moscow on 12 Sept 1990. *International Legal Materials* vol 29 at 1186. Art 4 specifies that the withdrawal of Soviet forces from 'the territory of the present German Democratic Republic and of Berlin . . . will be completed by the end of 1994 . . .'. Art 5 provides that, for the duration of the presence of these Soviet forces, French, UK and US forces 'will, upon German request, remain stationed in Berlin by agreement to this effect . . .'. Art 7 says that France, USSR, UK, and USA 'hereby terminate their rights and responsibilities relating to Berlin and to Germany as a whole'.

⁸ *Keesing's Record of World Events*, 37761. A four-power declaration signed on 1 Oct 1990 in New York by France, UK, USA, and USSR conferred full sovereignty on the new unified Germany pending formal ratification of the 12 Sept treaty by the legislatures of the parties.

⁹ Ambassador L Paul Bremer was named US Presidential Envoy to Iraq on 6 May 2003, and in this capacity was the Administrator of the Coalition Provisional Authority. Previously General Jay Garner was the US occupation administrator in Iraq, in his capacity (from 21 Apr–12 May 2003) as Director of the Office for Reconstruction and Humanitarian Assistance, which was in Baghdad.

the letter of 8 May 2003 addressed to the President of the UN Security Council from the Permanent Representatives of the UK and the US to the UN. In this letter, the word ‘occupation’ was not used, but its reality was evident. The letter’s two opening paragraphs laid down certain basic lines of policy:

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.¹⁰

A later paragraph in the same letter then went on to indicate the transformative objectives of the international military presence in Iraq, and the intention that it should be of a strictly provisional character:

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.

A similar approach, including the avoidance of the use of the actual word ‘occupation’ could be detected in the first order of the Coalition Provisional

¹⁰ Letter from the Permanent Representatives of the UK and the US (Jeremy Greenstock and John G Negroponte) addressed to the President of the Security Council, UN doc S/2003/538 of 8 May 2003. Available on the Global Policy Forum website at <<http://www.globalpolicy.org/security/issues/iraq/document/2003/0608usukletter.htm>>.

Authority (CPA) in Iraq, issued in May 2003, on the subject of de-Ba'athification.¹¹ This avoidance of use of the actual word 'occupation' was understandable, granted the negative connotations of the term, especially in the Middle East. Against that background, it is remarkable that the word was eventually accepted; and it is not surprising that there was a desire to drop it again as soon as possible, which turned out to be 28 June 2004.

The fact that there was an occupation in Iraq was formally affirmed in UN Security Council Resolution 1483 of 22 May 2003, which recognized 'the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority")'. This UN resolution did not create the occupation: it simply recognized that it already existed. It then called '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'. The temporary and transformative character of the occupation was reflected in several provisions, including one supporting the formation 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'. In the subsequent months, the Governing Council of Iraq was established under the wing of the CPA, holding its first meeting on 13 July 2003.

The basic framework of the occupation which had been outlined in May was reiterated in Security Council Resolution 1511 of 16 October 2003. This resolution additionally noted the decision of the Governing Council of Iraq to take the first steps towards the drafting of a constitution; it addressed the modalities of how the CPA was 'to return governing authorities and responsibilities to the people of Iraq as soon as practicable'; and it authorized 'a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq'.¹²

There were some uncertainties about the overall legal framework of the occupation of 2003–4, but they were not such as to cast doubt on whether the situation up to 28 June 2004 was properly characterized as an occupation. The main uncertainties concerned: (1) the status of certain States cooperating with the occupying powers in Iraq; (2) the effect of ongoing hostilities on the status of the occupation; (3) the Coalition Provisional Authority's status in US law;

¹¹ CPA Order No 1, De-Ba'athification of Iraqi Society, issued by L Paul Bremer, Administrator, CPA, Baghdad, 16 May 2003. Available on the CPA website <<http://www.cpa-iraq.org>>.

¹² In this article the terms 'coalition forces' and 'multinational force' are used more or less interchangeably to refer to armed forces of the USA and various partner States operating in Iraq under US leadership. The terms have slightly different baggage and connotations. The term 'coalition forces' can refer to the forces involved in the invasion and occupation from March to April 2003 onwards; while the term 'multinational force under unified command' was only introduced in Security Council Res 1511 of 16 Oct 2003, and is used mainly with reference to the various forces that remained or arrived in Iraq from that time onwards..

and (4) the possible clash between the transformative purposes of the occupation and the provisions of the law on occupations. Here these four problems will simply be identified, not explored in depth.

A. The status of certain states cooperating with the occupying powers

As noted, Security Council Resolution 1483 had referred to the US and UK as ‘occupying powers under unified command’. Where did this leave other States with armed forces in Iraq, including for example Poland and Spain, and subsequently Japan? The resolution included the mysterious clause: ‘Noting further that other States that are not occupying powers are working now or in the future may work under the Authority.’ This wording can be taken as connected with an appeal in a following paragraph to UN Member States ‘to contribute to conditions of stability and security in Iraq’, and probably represents an attempt to indicate that States contributing forces to Iraq would not thereby necessarily incur all the responsibilities and perhaps odium that come with being labelled an occupier. Since any such contributors and their armed forces are still clearly urged to comply with the relevant Hague and Geneva rules, it is hard to see what practical problems might arise from the curious status of participating in an occupation but not being an occupying power. On the other hand, partly for domestic political reasons it was important for certain countries supplying forces to Iraq that they should not actually carry the unpopular label of ‘occupying power’. A case in point is Japan, which early in 2004 supplied forces deployed in southern Iraq whose mission was strictly humanitarian in character. Similarly, it was important for Japan and other States to be part of a UN-authorized force. From 1 July 2004 what was essentially a legal fiction—that there could be States with forces in Iraq that were not occupying powers—moves closer to becoming a fact.

B. The effect of hostilities on the status of the occupation

From the start of the occupation in April 2004, there was extensive violent opposition to it, assuming mainly the forms of attacks, not only on the occupying armed forces but also on international personnel (including UN and ICRC) and on Iraqi citizens cooperating with the CPA or the Iraqi Governing Council. The existence of this opposition raised two possible questions regarding the status of Iraq as occupied:

1. Did the acts of violence constitute either an international armed conflict, or a non-international armed conflict? If they were considered to do so, that might call into question the designation of all of Iraq as under the control of an occupying power. It is hard to see how the ongoing conflict during the occupation could be considered to fit easily within the well-established criteria for either an international or a non-international armed

conflict, as established in the 1949 Geneva Conventions.¹³ However, the acts of violence were extremely serious, and had strong international as well as internal ramifications. This confirms that the nature of some modern conflicts, and of the armed groups and organizations that take part in them, is complex and varied; and that the distinction between war and peace (and the parallel distinction between war zones and occupied territory) is not always as clear in practice as it is in theory.

2. Did the existence of active violent opposition call into question the very status of occupation? In theory, the concept of 'occupation' refers to an aspect or phase of a conflict in which a belligerent has established control in a given area. Clearly the CPA did not, throughout the duration of its existence, have full control of the whole of Iraq. However, in practice the status of occupation has not been viewed as being negated by the existence of violent opposition, especially when that opposition has not had full control of a portion of the state's territory. Moreover, in the particular case of Iraq no State individually, nor the UN Security Council, has suggested that the hostilities in any way undermined the status of the occupation.

Numerous acts of the opposition forces have involved violations of fundamental rules of international law, including the laws of war: for example, attackers appearing as civilians, attacks on civilians and civilian objects, attacks on ICRC and UN personnel, and the taking and killing of hostages. It is undoubtedly true that such attacks form a pattern of conflict significantly different from what is envisaged in the laws of war.¹⁴ However, the fact that there has been a pattern of such violations does not mean that the law can be ignored by coalition and Iraqi government personnel, for example in such matters as treatment of prisoners. The law remains applicable to such personnel. There are solid reasons, in addition to formal legal obligation, for observing it. These include the need to maintain internal discipline within coalition and Iraqi forces; the need for them to retain legitimacy and political support in Iraq and internationally; and the fact that violations of the law, especially in the emotionally sensitive matter of treatment of detainees, have frequently had the effect of fuelling and giving legitimacy to armed opposition and terrorism.

A particular effect of the ongoing hostilities is to raise a question about the ending of occupation on 28 June. When the occupation ends, and assuming

¹³ See the four 1949 Geneva Conventions, common Art 2 (on the application of the conventions to international armed conflict and to occupations); and common Art 3 (on the application of the conventions to non-international armed conflict). The 1977 Geneva Additional Protocol II, on non-international armed conflict, contains a clear definition of non-international armed conflict as taking place 'in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

¹⁴ For a general discussion see A Roberts 'The Laws of War in the War on Terror' in P Wilson (ed) *International Law and the War on Terrorism* US Naval War College International Law Studies vol 79 (Naval War College Newport, Rhode Island forthcoming).

that the violent opposition continues, will the Geneva Conventions and other rules of war still apply to the actions of coalition and Iraqi personnel? This question is discussed in the final section, on continued application of the laws of war.

C. The Coalition Provisional Authority's constitutional status in US law

Some concern has been expressed in the USA about the status of the Coalition Provisional Authority (CPA). For example, a report issued by the Congressional Research Service in April 2004 stated:

It is unclear whether CPA is a federal agency. Competing, though not necessarily mutually exclusive, explanations for how it was established contribute to the uncertainty about its status. The lack of an authoritative and unambiguous statement about how this organization was established, by whom, and under what authority leaves open many questions, particularly in the areas of oversight and accountability. Some executive branch documents support the notion that it was created by the President, possibly as the result of a National Security Presidential Directive (NSPD). (This document, if it exists, has not been made available to the public.) The other possibility is that the authority was created by, or pursuant to, United Nations Security Council Resolution 1483 (2003).¹⁵

As the report noted, there is abundant evidence that the CPA was closely aligned with the US Department of Defense (DOD). Yet it was not an exclusively US organization. The US Army Legal Services Agency was unequivocal in its argument that CPA was not a federal agency:

The CPA is not a Federal agency. Rather, as the HCA [CPA's Head of Contracting Activity] explains: The Coalition Provisional Authority (CPA) is a multi-national coalition that exercises powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration.¹⁶

The evidence all points to the fact that the CPA was under the authority of the US and UK governments, with the Pentagon and the UK Ministry of Defence as the principal government agencies responsible for it. The Pentagon obviously took the lead role because the USA was the coalition leader and had supplied the majority of human and physical resources sent to Iraq.

¹⁵ LE Halchin *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities* Congressional Research Service, Washington DC, 29 Apr 2004, summary page. As the report indicates elsewhere, the CPA had already been mentioned as an existing entity in the Greenstock and Negroponte letter of 8 May 2003. Therefore the suggestion that it was created pursuant to Security Council Res 1483 of 22 May 2003 does not make sense.

¹⁶ *ibid* CRS-8.

D. The transformative purpose of the occupation of Iraq

There is an assumption in the laws of war that occupying powers should respect the existing laws and economic arrangements within the occupied territory, and should generally make as few changes as possible. In particular cases, including Iraq, this assumption may be considered to be in conflict (a) with certain applicable provisions of human rights law; and (b) with the policy goals not just of certain occupying powers, but of the international community more generally.

UN Security Council Resolution 1483 proclaimed certain transformative objectives for the occupation. These are mainly to be found in paragraph 8 of the Resolution, which is about the role of the UN Special Representative for Iraq. Here is one example of what he was supposed to achieve in coordination with the Coalition Provisional Authority in Iraq:

8 (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;

Taken as a whole, the purposes of the occupation as outlined in Resolution 1483 go well beyond the confines of Hague and Geneva law. Yet the Resolution did not explain the relation between the transformative purposes and the existing body of law on occupations. These two matters are set out separately. The same is broadly true of subsequent UN Security Council resolutions, including Resolution 1511 of 16 October 2003.¹⁷

It is not the purpose of this paper to evaluate the actual performance of the Coalition Provisional Authority or of the coalition forces in Iraq in relation to the law on occupations. However, it is evident that some legal pronouncements of the CPA go far beyond what is envisaged in the law of The Hague and Geneva. One such example is CPA Order No 39 on Foreign Investment, issued on 19 September 2003 with immediate effect.

A particular problem of occupations with a transformative purpose is that changing the fundamental principles and procedures by which a society governs itself is necessarily a long process. To develop a constitutional system in Iraq based on competent administration, the rule of law, and the acceptance of peaceful and consensual political procedures, would take years, perhaps even decades. Therefore, even without the ongoing insurgency, the formal ending of the occupation of Iraq, long before the transformation is completed, would necessarily result in a situation of huge uncertainty.

¹⁷ For a useful discussion of this problem, see D Scheffer 'Beyond Occupation Law' (2003) 97 AJIL 842–60.

IV. PLANS FOR THE STATUS OF IRAQ AFTER JUNE 2004

On 15 November 2003 the Coalition Provisional Authority (CPA) and the Iraqi Governing Council agreed to a timetable for the establishment of a sovereign Iraqi government. Of the five key dates identified in the timetable, two were of particular importance as regards the ending of the occupation:

By 28 February 2004, the Governing Council was to approve a Transitional Administrative Law, to serve as an interim constitution, guaranteeing basic rights, defining the structure of a transitional government and setting out procedures to select delegates to a constitutional convention.

By 30 June 2004, the Transitional Government was to assume full sovereignty over Iraq. At that point the Governing Council and the CPA were to be dissolved. 'This will end the responsibilities of the Coalition as an occupying power as specified in the United Nations resolutions.'¹⁸

Subsequent stages in the timetable allowed for elections in March 2005 for a constitutional convention, and in December 2005 for the election of an Iraqi government on the basis of the new constitution. The date for the planned national elections has subsequently been brought forward. It is now intended that they be held by 31 December 2004 if possible, and in no case later than 31 January 2005; and that they are elections to a Transitional National Assembly.¹⁹

With some variations, these two key elements in the timetable as identified above were largely followed. (1) On 8 March 2004 the Transitional Administrative Law was passed. (2) On 1 June 2004 the Iraqi Interim Government was formed. This followed the Iraqi Governing Council's election of two of its members to key posts: Dr Ayad Allawi to be Prime Minister of the Interim Government, and IGC President Sheikh Ghazi al-Yawar to be President of Iraq. On the same day Prime Minister Allawi also named the ministers who will comprise the cabinet of the Iraqi Interim Government. In addition, the Iraq Governing Council dissolved. On 28 June 2004, two days in advance of the planned and much-advertised deadline of 30 June, and in the midst of huge insecurity in Iraq, the CPA formally handed over authority to the Iraqi Interim Government, and the occupation was declared to be at an end.

The process by which the Iraqi Interim Government was formed was controversial. A larger role than originally anticipated was played by the coalition-appointed Iraq Governing Council. Lakhdar Brahimi, the Special Adviser to the UN Secretary-General, who had earlier been envisaged as having a key role in the process, was effectively sidelined. In addition, the fact that Prime

¹⁸ Coalition Provisional Authority and Iraqi Governing Council 'The November 15 Agreement: Timeline to a Sovereign, Democratic and Secure Iraq' text available at the CPA website <<http://www.cpa-iraq.org>>.

¹⁹ On provisions for the Transitional National Assembly, see UN Security Council Res 1546 of 8 June 2004, operative para 4(c), the provisions of which are briefly mentioned below.

Minister Allawi had a long record of US connections raised questions as to the extent to which this government would be truly independent.²⁰ Not surprisingly, some commented adversely that ‘the Interim Government represents in large part a reshuffling of the hand-picked Governing Council of last year, which never gained sufficient legitimacy in Iraq’.²¹

On 20 May 2004, nearly two weeks before the Interim Government was formed, the theory of how the planned 30 June transition should take place had been outlined by US Secretary of State Colin Powell in a speech in Washington DC:

We intend for this interim government, on the 1st of July, to be sovereign. That interim government will replace the Coalition Provisional Authority. Ambassador Bremer, having completed his work, will step down. The elements of the Coalition Provisional Authority that still have a role to play in supporting this government will be integrated into our embassy operation. Ambassador Negroponte will, of course, be the leader of that embassy operation. But it is the interim government that is replacing Ambassador Bremer and the Coalition Provisional Authority, not Ambassador Negroponte.²²

Colin Powell went on to point out that the transfer had been happening gradually: already as at 20 May 13 Iraqi ministries were operating more or less independently of the US authorities.

On 8 June, one week after the formation of the Interim Government of Iraq, the UN Security Council approved its long-planned and much-revised resolution on the political transition in Iraq. Resolution 1546 began by:

Welcoming the beginning of a new phase in Iraq’s transition to a democratically elected government, and *looking forward* to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004.²³

The Resolution reaffirms ‘the right of the Iraqi people freely to determine their own political future and control their own natural resources’. It lays down a detailed road map for Iraq’s future political development, including the holding, before 31 January 2005 at latest, of democratic elections to a Transitional National Assembly. It welcomes the fact that Iraqi security forces are ‘responsible to appropriate Iraqi ministers’, and that there is to be ‘full partnership between Iraqi security forces and the multinational force’. It contains extensive provisions on the roles of the multinational force and of the Iraqi govern-

²⁰ On Ayad Allawi, see eg J Brinkley ‘Ex-CIA Aides Say Iraq Leader Helped Agency in 90’s Attacks’ *New York Times* 9 June 2004. Available at <<http://www.nytimes.com>>.

²¹ CM Lynch ‘The Security Council and Iraq: The UN Risks Losing its Clout’ *Newsday* 19 June 2004. Available at <<http://www.newsday.com/news/printedition>>.

²² Secretary of State Colin L. Powell ‘Remarks to International Political Directors on the Way Forward in Iraq’ Washington DC 20 May 2004. Available at <<http://www.state.gov>>.

²³ UN Security Council Res 1546 of 8 June 2004, passed unanimously. This was a substantially revised version of earlier drafts, the first of which had been presented at the UN on 24 May 2004. The text of the resolution as passed is available at <<http://www.un.org/documents>>.

ment, both of which are envisaged as taking a wide range of security measures. It also contains a preambular clause recognizing the continued application of international humanitarian law:

Noting the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to cooperate with relevant international organizations.²⁴

On the face of it the change that took place on 28 June is major. It has been approved by key parties—the US, UK, the Iraqi Interim Government, and the UN Security Council. When all of these proclaim a major change in the governance of Iraq, it is not credible that there will not be a significant change of some kind.

However, after 28 June outside involvement in the administration of the country, and in military operations, will not have ceased entirely. The huge remaining numbers of foreign troops and advisers will inevitably have considerable influence. So a closer examination is needed of certain key issues relating to Iraq's resumption of sovereignty.

V. WHAT DOES 'SOVEREIGN' MEAN IN THE CASE OF IRAQ?

Security Council Resolution 1546 contains eight references to the words 'sovereign' and 'sovereignty'—probably a record for a UN Security Council resolution, and a reflection of the general truth that the more sovereignty is in question, the more it needs to be asserted. What exactly does 'sovereignty' mean, is it proper to speak of a 'transfer of sovereignty' to Iraq, and is there a prospect of the Iraqi Interim Government being genuinely independent and sovereign?

A. Meanings of 'sovereignty'

There is no unambiguously clear agreed definition of sovereignty. Like all political abstract terms, its meaning is the subject of contestation and change. At its heart is the idea of a situation in which there is a centre of decision-making power over a specific territory, not subject to a higher sovereign. A pleasingly clear traditional view of sovereignty is well expressed in the judgment given in a 1928 arbitral award: 'Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.'²⁵

²⁴ There was no equivalent clause in the draft of this resolution presented at the UN by the US and UK on 24 May 2004; the revised draft presented on 1 June included the clause in a shorter version than the final one; only the final text, which was first circulated on 7 June, contained the phrase 'including obligations under international humanitarian law'.

²⁵ Judge Huber in the *Island of Palmas* arbitral award, 1928. The text of the award was published in (1928) 22 AJIL 867–912. This quotation is at 875.

The UN Charter is notably cautious on the subject of sovereignty, which it does not define. It does use the enigmatic phrase ‘sovereign equality’ of States: this appears in Article 2(1). An authoritative examination of this article ascribes two types of meaning to sovereignty:

According to a widely shared view, sovereignty has two complementary and mutually dependent dimensions: within a State, a sovereign power makes law with the assertion that this law is supreme and ultimate, i.e. that its validity does not depend on the will of any other, or ‘higher’, authority. Externally, a sovereign power obeys no other authority.²⁶

Absolute interpretations of sovereignty as complete freedom from all higher authority have always been open to criticism as not reflecting the general conditions of international life. In the contemporary world, the particular problem with such interpretations is that they appear to take little account of the specific obligations under international legal agreements and international organizations. As Professor Christian Tomuschat has put it: ‘Sovereignty is in a process of progressive erosion, inasmuch as the international community places ever more constraints on the freedom of action of States.’ He added that we witness ‘a development of greater community discipline . . . driven by a global change in the perception of how the right balance between individual State interests and interests of mankind as a whole should be established.’²⁷

There is scope for disagreement about whether the idea of sovereignty was ever as absolute as some formal definitions have implied; and also whether it is eroding to quite the extent suggested by Professor Tomuschat. No ruler has ever been in a position to take totally independent decisions free from all external constraint. What always was, and today remains, important in the idea of sovereignty is the proposition that, within a given area of the globe, a particular constitutional and governmental structure has the prime responsibility for reaching and implementing decisions, including in response to internal and external pressures. This proposition continues to exert a powerful attraction—witness the number of new sovereign States that have emerged in the post-1945 period. In that modest sense the idea of sovereignty is not dead. The question remains how convincing an example of sovereignty Iraq can be.

B. The so-called ‘transfer of sovereignty’ to Iraq

In the run-up to the announced 30 June 2004 deadline, the main parties involved in the Iraq occupation chose to describe the imminent change using such language as ‘transfer of sovereignty’. On 11 May Colin Powell referred

²⁶ B Fassbender in B Simma (ed) *The Charter of the United Nations: A Commentary* (OUP Oxford 2002) 70. Dr Fassbender goes on (at 73) to recognize that since 1945, within the context of the United Nations, sovereignty has been modified to take into account ‘the notion of solidarity of all member States of the international community’.

²⁷ Christian Tomuschat, Lecture at Hague Academy of International Law, 1993.

the plan ‘to return full sovereignty to the Iraqi people by the end of June’.²⁸ On 19 May President Bush spoke of ‘our plan and our strategy to transfer full sovereignty to the Iraqi people’.²⁹ On 25 May UK Prime Minister Tony Blair said at a press conference:

After June 30 there will be the full transfer of sovereignty to the Iraqi government, therefore the people who will decide whether the troops stay or not will be the Iraqi government, they will be the people then, the Iraqis themselves with the full sovereign right of political control.³⁰

The Coalition Provisional Authority website had a banner proclaiming ‘x days to Iraqi sovereignty’.³¹

The language of ‘transfer of sovereignty’ was much less used in June than it had been in May. This may reflect the fact that the whole proposition that what was involved was a ‘transfer of sovereignty’ was questionable and indeed questioned. Those claiming to transfer sovereignty did not themselves possess it. Under the well-established body of law relating to occupations, Iraqi sovereignty was always vested in Iraq—and not in the US and its coalition, which as the occupying power merely exercised a temporary administrative role. Indeed, Iraq’s continuing sovereignty was explicitly confirmed in the principal UN Security Council resolutions dealing with the occupation—1483 of 22 May 2003, 1511 of 16 October, and 1546 of 8 June 2004. The change that took place on 28 June 2004 might be better, albeit less dramatically, described as a transfer, not of sovereignty, but of administrative authority; or, alternatively, as a resumption of Iraqi sovereignty.

C. Is the new government sovereign?

Is the new Interim Government really sovereign? Hardly, if sovereignty means absolute independence both internally and externally. However, States emerge and re-emerge in many forms. In an era marked by a growing body of international law and institutions, few if any States are absolutely independent: they all have to observe international standards and accept some outside controls.

Harsh critics may view the situation of the Interim Government as comparable to that of a ‘puppet government’. The clearest summation of the role of such a government can be found in George Kennan’s May 1939 report to the US State Department on the situation of the theoretically independent government of Slovakia under Axis domination before the Second World War:

²⁸ Colin L Powell ‘Remarks with German Foreign Minister Joschka Fischer after their meeting’ Washington DC 11 May 2004. Available at <<http://www.state.gov/secretary/rm/32369.htm>>.

²⁹ President George W Bush ‘Remarks after Cabinet Meeting’ Washington DC 19 May 2004. Available at <<http://www.whitehouse.gov/news/releases/2004/05/20040519-4.html>>.

³⁰ Tony Blair, Press Conference at 10 Downing Street, 25 May 2004. Available at <<http://www.pm.gov.uk/output/page5860.asp>>.

³¹ Coalition Political authority website accessed on 24 May 2004, when its banner proclaimed ‘37 days to Iraqi sovereignty’. Was accessed at <<http://www.cpa-iraq.org>>.

In internal matters, it has exactly the same independence as a dog on a leash. As long as the dog trots quietly and cheerfully at his master's side – and in the same direction – he is quite free; if he starts out on any tangents of his own, he feels the pull at once.³²

Any such comparison may be seen as invidious: in Iraq the stated purpose of establishing the Interim Government has been to assist the development of self-determination and democracy, not to suppress it. However, the progression towards democracy is plainly incomplete: at present there is no major institution, such as an elected parliament, of the kind that is seen in many States as an essential embodiment and guarantor of sovereignty.

It is entirely possible that the Iraqi Interim Government will exercise a degree of independence, not least in relation to those who assisted its creation. There have been many historical cases of governments and political systems which, although they owed their existence to an outside power, subsequently demonstrated sturdy independence of that power. French Gaullism since 1945 has exemplified that tendency. Whatever long-term possibilities there may be of Gaullism Iraqi-style, the fact remains that after the formal end of the occupation of Iraq there will still be a powerful foreign military, economic and political presence; and the Iraqi Interim Government will depend on it as one important source of support.

The freedom of action of the Interim Government may be constrained not only by the coalition presence, but also by an unusual limitation that is reflected in its UN mandate. The first operative paragraph of Security Council Resolution 1546 states that the Security Council:

1. *Endorses* the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office as envisaged in paragraph four below . . .

The constraint on 'taking any action affecting Iraq's destiny' beyond the interim period was reportedly the result of pressure from a number of Iraqi groups, anxious that the position of Kurds, Shiites, or others might be undermined irrevocably by actions taken by the 'sovereign' Interim Government. This constraint means that the Interim Government is, paradoxically, in a position analogous to that of an occupying power. As mentioned below, the CPA interpreted this constraint as limiting the Interim Government's power to conclude treaties. The constraint has obvious similarities to the obligations on occupying powers to refrain from making fundamental changes to the legal system of the occupied territory, and to behave generally in a trustee-like manner. The fact that the term 'caretaker government' is often used with reference to the Interim Government confirms this.

³² George F Kennan 'Report to the State Department on about 1 May 1939'. Text published in Kennan *From Prague After Munich* (Princeton University Press Princeton, NJ 1968) 135.

VI. THE CONTINUED PRESENCE OF COALITION FORCES

Is the continued presence of coalition forces in Iraq (officially termed ‘the multinational force’) compatible with Iraqi sovereignty? In principle there is a problem. If an armed force invades and occupies a country, establishing a friendly regime in the process, is it acceptable in international law for the newly established regime to legitimize the presence of the forces that helped to create that regime in the first place? In this respect, the situation might appear comparable to such cases as that in Hungary after the Soviet invasion of October and November 1956: in the following year the newly-installed Hungarian government concluded a troop-stationing treaty with the Soviet Union.³³ In the case of Iraq, the fact that the coalition forces invaded Iraq in March 2003 without consent and without UN Security Council authorization reinforces questions about their legal status.

In 2004 there is an obvious argument for the continued presence of foreign forces—that the Interim Government of Iraq, whose own armed forces are still undergoing radical restructuring, may need foreign military help in order to survive against an actual ongoing insurgency. However, that fact does not in itself distinguish Iraq from certain cases of foreign forces being based in client States.

Three features of the foreign troop presence in Iraq suggest that it is different from such cases as that of Hungary in 1956–7. (1) The presence of the multinational force in Iraq has been specifically approved in UN Security Council resolutions, including Resolution 1546, which lays down key provisions for the post-occupation phase. (2) The prime stated purposes of the coalition forces include assisting the process of establishing a constitutional order in the country and assisting the Iraqi people to exercise their right of self-determination. (3) Not only has the Interim Government invited the coalition forces to remain, but also the coalition States have agreed that their forces are there by invitation and would leave if requested to do so.

An important issue, helping to establish the genuineness or otherwise of Iraq’s sovereignty after 28 June, is Iraq’s right to ask the coalition forces to leave the country. On 14 May 2004 Paul Bremer, the US Administrator of Iraq, said that the United States would leave Iraq if requested to do so by the new Iraqi government—adding that he thought such a move was unlikely. On the same day Colin Powell reaffirmed that if the Iraqi government asked its US protector to leave, the US would comply.³⁴ UN Security Council Resolution 1546 notes ‘that the presence of the multinational force in Iraq is at the request

³³ Agreement Concerning the Legal Status of Soviet Forces Temporarily Stationed in the Territory of the Hungarian People’s Republic, signed in Budapest 27 May 1957, Art 1. *United Nations Treaty Series* vol 407 at 170.

³⁴ ‘Bremer says US will Leave Iraq if new Government Asks: Rulers not Likely to Seek Quick Exit, Administrator Says’ Associated Press Report from Baghdad, 14 May 2004, available at <<http://www.msnbc.msn.com/id/4978361>>.

of the incoming Interim Government of Iraq and therefore *reaffirms* the authorization for the multinational force . . .'. The Resolution also states that

the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution . . . and *declares* that it will terminate this mandate earlier if requested by the Government of Iraq.³⁵

By thus linking the authorization of the multinational force to Iraq's request for it, this Resolution establishes that Iraq has a continuing right to demand withdrawal of the coalition forces at some point.

The conditions governing the presence of foreign forces in a sovereign country are normally determined by a status-of-forces agreement (SOFA).³⁶ During the CPA occupation in Iraq, the status of foreign forces was determined by a CPA Order of June 2003, but this was set to expire on 30 June 2004.³⁷ On 22 April 2004 a 'senior official' of the CPA in Baghdad indicated that the CPA was working on an 'arrangement' that would provide for 'the privileges and immunities for the Multinational Force Iraq and the contractors and civilians who directly support it'. The planned decree, to be issued before the end of June, would finalize the legal privileges enjoyed by international forces and contractors. The official indicated that the CPA would issue it after negotiations with the Iraqi side, although technically the coalition could authorize the document with or without Iraqi approval. Difficult issues in the negotiations included the question of immunities for foreign civilians and for private security personnel. This new and temporary status-of-forces arrangement would expire after January 2005 when an elected Iraqi government should be in place and able to negotiate a binding status-of-forces agreement. The CPA official said that under the law, the caretaker government—installed by the coalition on 1 June—lacked sovereign power to make security agreements with other countries.³⁸ On 26 June 2004, in one of his last acts as Administrator, Paul Bremer signed an edict that gave US and other Western civilian contractors immunity from Iraqi law while performing their jobs in Iraq. All this confirms that, at the most, 28 June 2004 marks the beginning of a move towards complete Iraqi sovereignty rather than a sudden realization of it.

³⁵ UN Security Council Res 1546 of 8 June 2004, operative paras 9 and 12. See also the text of letters (both dated 5 June 2004) from the Prime Minister of the Interim Government of Iraq and the US Secretary of State to the President of the Security Council. These letters are annexed to the resolution.

³⁶ For a useful survey of status-of-forces agreements see D Fleck (ed) *The Handbook of the Law of Visiting Forces* (OUP Oxford 2001).

³⁷ CPA Order No 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors, issued by L Paul Bremer, Administrator, CPA, Baghdad, 27 June 2003. Section 2 specified that such forces and personnel were immune from Iraqi legal process. Section 4 specified that this agreement would expire at the end of the period of CPA authority. Available on the CPA website <<http://www.cpa-iraq.org>>.

³⁸ 'US Overseer to Define Status of Foreigners in Iraq this Week', Agence France Presse report from Baghdad, 22 June 2004. Published the same day on <<http://www.channelnewsasia.com>>.

VII. SHOULD PRISONERS HELD BY THE COALITION BE RELEASED?

Must prisoners of the coalition, if they have not been charged with offences, be released? This issue attracted attention following a statement by an ICRC spokeswoman on 13 June: 'The United States defines Saddam Hussein as a prisoner of war. At the end of an occupation POWs have to be released provided they have no penal charges against them.' She argued that prisoners had to be released because, in essence, the war was over:

If we consider the occupation ends on June 30, that would mean it's the end of the international armed conflict. This is the legal situation. When the conflict ends the prisoners of war should be released according to the Geneva Conventions.³⁹

These remarks attracted particular attention because Saddam Hussein and other senior officials of the old regime have been given prisoner-of-war status. The ICRC spokeswoman also indicated concern over the thousands of other detainees in US custody, many of whom have an unclear legal status.⁴⁰

It is undoubtedly true that the laws of war provide that prisoners of war and interned persons shall be released without delay after the cessation of active hostilities. This clear rule is laid down in Article 118 of the 1949 Geneva Convention III, on prisoners of war; and of Articles 132–4 of the 1949 Geneva Convention IV, on civilians: the key rule is in Article 133: 'Internment shall cease as soon as possible after the close of hostilities.'

There is of course provision for particular individuals—whether prisoners of war or civilian detainees—to be charged and tried for particular offences during armed conflicts and military occupations.⁴¹ Thus there is no doubt that coalition forces have had a right to put certain persons on trial. It is a question of whether that right continues after the announced end of the occupation.

The coalition powers can advance the following arguments to buttress the case that they are still entitled to hold prisoners after the end of the occupation. (1) In whatever way the insurgency in Iraq is characterized, there is undoubtedly an armed conflict of sorts continuing in the territory of Iraq: the coalition forces are entitled to maintain security measures against that insurgency and to support the Interim Government in its measures against the insurgents. (2) Some of those held, including Saddam Hussein, are not simply foot soldiers or potential suspects being held until the end of a conflict. They are liable to be charged with particularly serious offences, including against the law of war

³⁹ Nada Doumani, a spokeswoman for the ICRC, quoted in report from J Steele in Baghdad 'US Told: Charge Saddam or Free Him' *Guardian* 14 June 2004 at 1.

⁴⁰ On 16 June 2004, the ICRC issued a clarification stressing that it 'had never called for all Iraqi prisoners of war to be released', and indicating that the Geneva Conventions allow for both rearresting and prosecuting POWs as well as civilian internees for crimes they committed. See <<http://www.icrc.org>>.

⁴¹ See 1949 Geneva Convention III, Arts 82–108; and Convention IV, Arts 65–77.

and human rights law, committed over a long period of time: it would make little sense to release them just because the complex matter of charging them, finding witnesses willing to testify against them, and setting up an appropriate court, is incomplete at the moment when the CPA occupation ends.

There are two obvious qualifications to be made regarding the continued holding of detainees. First, they can only be held by the coalition powers if the Interim Government consents. Secondly, whether the Interim Government or the coalition holds them, they must be held in full conformity with international legal standards, including those laid down in the laws of war.

VIII. CONCLUSION: CONTINUED APPLICATION OF LAWS OF WAR

Iraq is clearly not a case of an occupation coming to an end when an occupying power withdraws from a territory, or is driven out of it. From 28 June 2004 the formal occupation of the whole of Iraq has ended, but the factual situation has not changed completely overnight. Features of post 28 June Iraq, noted in the foregoing analysis, and implicitly or explicitly reflected in Security Council Resolution 1546, are likely to include the following:

- There is a continued presence of foreign forces in the form of the multinational force, possibly with the addition of some new contingents.
- There are ongoing hostilities and threats to order, of sufficient gravity as to make it implausible to suggest that the situation of armed conflict is definitively over.
- The situation does not conform exactly to recognized definitions of either international or civil war, or of military occupation.
- The laws of war, otherwise called international humanitarian law, are held to be applicable to the actions of armed forces in Iraq.
- The Interim Government, while exercising a wide range of governmental decision-making powers, is constrained in key respects by its essentially caretaker character, the formal restrictions as regards 'taking any decisions affecting Iraq's destiny', the limitations on its treaty-making powers, and its weaknesses in certain areas when compared to the position of external powers in Iraq.

None of this means that the end of the occupation is a sham. What it does mean is that important aspects of the factual situation will not change overnight. Nor will key aspects of the legal framework, at least as regards the application of the laws of war. In short, 28 June 2004 marks an important stage on the road to full resumption of Iraqi sovereignty, not arrival at that destination.

There is a worrying question about this new stage in Iraq. When the occupation ends, will it be replaced not only by the sovereign Interim Government of Iraq, but also by a state of war? The widespread character of the attacks in the occupation period opened up the nightmare prospect that unofficial and

uncontrolled violence might be becoming endemic in Iraqi society. Once violence is endemic, it is very difficult to bring it under control; and international institutions do not have a strong record in ending violence in societies where it has become habitual.

If armed incidents continue in Iraq, what international legal framework will apply to them? It might have been possible to claim that as from 1 July 2004 any continuing hostilities in Iraq are internal in character. However, that claim would be weakened both by the involvement in terrorist activities of non-Iraqi groups, and by the obviously non-Iraqi character of the multinational force. If the questionable supposition that the conflict was purely internal was accepted, the body of rules contained in common Article 3 of the Conventions (which deals with non-international armed conflict) could be applicable, including the complete prohibition of cruel treatment and torture.

However, the wording of Security Council Resolution 1546 suggests a more robust approach. The resolution indicates that, regardless of how the situation is characterized, international humanitarian law will apply to it. There are no let-out clauses to the effect that normal rules cannot apply in the new kind of war—ie against terrorists. Hence, if Iraqi or coalition armed forces are used against insurgents, and if they take prisoners, they will be continue to be bound by the terms of the Geneva Conventions, including the provisions that relate to such matters as the holding of detainees.

Will the specific rules relating to occupation also apply as from 28 June 2004? In the case of occupations, as in that of armed conflicts, the test for when the four 1949 Geneva Conventions apply is essentially a factual one. Under their common Article 2, the conventions apply to all international armed conflicts, and to all cases of partial or total occupation of a country. The question of whether or not there is a formal proclamation of occupation is of limited importance: it is the reality, not the label, that counts. By the same token, the formal proclamation of the ending of occupation could also be of limited importance. There could be numerous circumstances after 28 June that constitute either a general exercise of authority in Iraq similar to that of an occupant, or else an occupation of at least a part of Iraqi territory. In such circumstances the law on occupations would again be applicable.

During the period of the occupation by the Coalition Provisional Authority, immense damage was done to the coalition cause by certain actions, particularly the abuse and torture of many detainees. Those now responsible for Iraq following the demise of the CPA must take active steps to avoid continuation of the earlier errors, and to make clear that the new arrangements in Iraq really are different from the old. As far as coalition troops are concerned, the need for a clear and effective line of responsibility for prevention and punishment of crimes (a line of responsibility, that is, under international law and under the domestic law of their own States) is all the more pressing because, even after 28 June, coalition troops continue to have immunity from prosecution under Iraqi law.

After 28 June 2004 the rules laid down in international humanitarian law, and most particularly in the 1949 Geneva Conventions, continue to be applicable to Iraqi government forces and to all those who serve in the multinational force in Iraq. The UN Security Council has been clear on this general proposition. These rules will need to be implemented thoroughly and professionally: this will require action by the governments concerned as well as their armed forces. The transfer of authority must not become an excuse for an abandonment of responsibility. Indeed, the transfer of authority provides an opportunity for the Iraqi government, and the governments supplying troops for the multinational force, to take a clearer, more principled, and more determined stand on the application of the rules of international humanitarian law than was evident in the period, now over, of the CPA occupation of Iraq.