

## **International Law FORUM du droit international**

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*The opinions expressed herein are those of the authors and  
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## Editorial

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### Volume 5, No. 4

Les événements récents en Irak, en Israël ou encore au Libéria sont là pour nous rappeler que le droit international est de plus en plus impuissant à répondre aux crises. La paralysie actuelle du système de l'ONU pose pour la première fois depuis sa création en 1945 la question cruciale de sa raison d'être. Ce malaise, paradoxalement, est porteur d'espoir puisque enfin les consciences se réveillent. A la 58<sup>e</sup> Assemblée générale des Nations unies à New York, le Secrétaire général de l'ONU ainsi que de nombreux représentants des Etats membres ont appelé à une réforme profonde du système des Nations unies. Cette réforme devrait notamment passer par l'élargissement du Conseil de sécurité. C'est ainsi que Kofi Annan vient de mandater un comité de sages indépendants pour étudier le fonctionnement des organes principaux de l'institution et faire des propositions pour accroître leur efficacité.

Le malaise est tout aussi perceptible dans le domaine du commerce international où les revendications des pays du Sud ont été, une fois de plus, ignorées lors de la dernière conférence ministérielle de Cancun.

Nous avons choisi dans ce numéro de FORUM d'aborder le thème récurrent de la portée et des limites du droit international à travers le prisme de la situation en Irak. Ellen Hey et huit auteurs invités offrent une réflexion qui, par sa diversité et sa hauteur de vue saura, nous l'espérons, susciter un débat renouvelé parmi les lecteurs de FORUM.

Deux conférences ont retenu notre attention, l'une sur le règlement des différends en matière de patrimoine culturel, l'autre sur l'impact des acteurs non étatiques sur le système juridique international et européen.

Enfin nous espérons que vous partagerez notre enthousiasme pour la bibliothèque de Christopher Pinto, ancien président de la délégation du Sri Lanka à la Troisième Conférence des Nations unies sur le droit de la mer, dont l'érudition et l'humour oriental illuminent la morosité ambiante.

FORUM dédie ce numéro à Sergio Viera de Mello et à tous ceux qui, à ses côtés, voulaient faire triompher en Irak la force du droit international sur celle du terrorisme et de l'occupation militaire anglo-américaine.

## Recurring Themes / Thèmes récurrents

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### International Law in the Aftermath of the War on Iraq

#### Introduction

Deciding to embark on a recurring themes column dedicated to the aftermath of the war on Iraq was not a decision that the Board of Editors took lightly, especially after our condemnation of the war and of the legal arguments put forward to justify the war (see editorial, volume 5, No. 2, 2003, p. 94 *et seq.*). The assertion that international law had failed to prevent the use of force in the hegemonic exercise of power, was in many ways baffling. Yet, we also realized that as international lawyers we could not simply leave it at that – baffled or not.

While individuals, including United Nations (UN) personnel, continued to lose their lives and suffer other predicaments in Iraq, we asked several authors to reflect on the role of international law in the aftermath of the war, a question that might seem mundane to some in view of the ongoing chaos in the country. It, however, is a question that we believe international lawyers must face in view of that very same chaos. That is, we must consider the question as to how international law might address the present situation as well as the role that international law should play in addressing the root causes of situations such as those in Iraq. We found eight authors brave enough to share their thoughts with you. I say “brave” because, as I approached them, I realized that inevitably their task would involve recognizing that there is a lack of international law governing the aftermath of the war and that relevant rules were developing as they were writing. Moreover, relevant rules continue to develop as you are reading this issue of *FORUM*.

Jarna Petman focuses on the difficulty that international law encounters in trying to capture evil. She argues that international law cannot capture evil as long as we perceive of evil as the “radical Other”. Pointing to the fact that today’s liberation movement might be tomorrow’s terrorist group, she discusses the problem encountered in developing general rules that outlaw undesirable behavior. The indeterminacy of international law is the result. A point illustrated by subsequent contributions.

Terry Gill in his contribution asserts that the pre-Iraq rules on the use of force are still the law. Insufficient state practice and *opinio juris* justify the conclusion that it remains illegal for states to engage in preventive self-defense in case of potential and thus uncertain threats of an armed attack. However, he also points out that the United States, as the sole “great power” in existence at the moment, is willing and able to set those rules aside when it deems it to be in its interest to do

so. He suggests that the world “exhibits elements of both the Charter and a post-Charter era in terms of the *jus ad bellum*.”

Otti Korhonen addresses the question what stance the UN should take given the manner in which it and international law was sidestepped prior to the war. She asserts that the role that the UN takes on during the aftermath of the war will be crucial for the future of international law. The challenge that the UN faces in this respect is especially to “strike a deal with the US that does not compromise the humanitarian and developmental principles of the UN”. According to Korhonen, this challenge if it is to be met requires a renewal of international law: a reinterpretation of the Charter or adding to the doctrine on “peace-building” will not suffice. Instead, a renewal of the Western self is involved. This entails that the root causes of 9/11 and the related situations in Afghanistan and Iraq need to be addressed and a “credible internationally-led post conflict management model” developed.

Laurence Boisson de Chazournes in her contribution assesses the role of the UN in rebuilding Iraq. She traces the problematic relationship between the UN and Iraq back to the beginning of the period after the Kuwait war, during which UN Security Council Resolutions served to outcast the country from the international community. Boisson de Chazournes focuses on the problematic nature of the relationships between Iraq, the Special Advisor on Iraq of the Secretary-General, and the Authority, *i.e.* the US and the UK as occupying powers under unified command. Limited law is available to guide those relationships. She illustrates this point amongst others, with reference to the manner in which Iraq’s vast oil reserves are to be exploited.

Philippe Weckel concentrates on the manner in which Iraq’s suspected of committing serious crimes prior to the military attack might be brought to justice. Weckel discusses both the problems involved in establishing an international organ for this purpose as well as those involved in establishing a national organ. He concludes that the preferred option is probably a mixed tribunal that is integrated into the national judicial system and which is able to apply human rights standards. He also points out that before such a body can be established numerous uncertainties need to be resolved and that a degree of political reconstruction needs to be achieved in Iraq.

Geert van Calster focuses on the WTO rules on government procurement in view of the discussion regarding the allocation of contracts to rebuild Iraq mainly to US companies. He illustrates that those rules might be characterized as a set of bilateral inter-state exceptions rather than a system of generally applicable harmonized trade rules. His contribution also clarifies that while the accusing finger might be pointed at the US for a variety of reason when it comes to the situation in

Iraq, violation of the WTO rules on government procurement is not among those reasons.

John Crook points to another lacuna in the legal system: the future of the United Nations Compensation Commission (UNCC). While UN Security Council has determined that the revenues available to settle claims will be significantly reduced, much uncertainty remains. Crook regards claims settlement negotiations as the preferred manner of finally settling the remaining claims. He, however, also asserts that given the rigor with which, in his view, the UNCC has assessed claims, that process should continue so that its outcome can play a role in the claims settlement negotiations.

Finally, Michael Glennon advises the United States government to develop a more sophisticated view on a “new world order” and, in particular, on the role that international institutions are to play in that order. A discussion that, as Glennon also points out, has been initiated by the Secretary-General of the United Nations and, which has since been taken up by several states during the present 58th session of the United Nations General Assembly.<sup>1</sup> Glennon asserts that the present administration, as Wilson did in 1917, should establish a process whereby the government informs itself of “where the world is going and how the United States should fit into it.” Glennon describes the manner in which “The Inquiry”, as the 1917 think-tank process was known, operated and informed the United States government in the aftermath of World War I and in the process towards the establishment of the League of Nations.

Together these contributions illustrate that much is uncertain when it comes to the state of international law in times of the use of force and its aftermath. This conclusion, however, is not unique to the situation in Iraq: the situations in East Timor and Kosovo illustrate similar uncertainties. What does make the situation unique is the involvement of the so-called Authority. This statement of course brings us back to the manner in which the war on Iraq was started. Moreover, it also brings us back, as Outi Korhonen illustrates, to the manner in which the international community has dealt with issues of equity and equality and, as Laurence Boisson de Chazournes points out, to the manner in which Iraq was dealt with in the aftermath of the Kuwait war, also by the United Nations. As Jarna Petman asserts in her contribution perceiving of a state or other entity as the “radi-

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<sup>1</sup> See the so-called Greentree Report, entitled *From Promise to practice revitalizing the General Assembly for the new millennium*, submitted to the UN General Assembly by the Permanent representative of the Kingdom of the Netherlands to the UN, Doc A/57/836, 11 June 2003.

cal Other” is not an effective way of capturing evil in terms of law and may lay at the heart of the present situation in Iraq. I venture to add that this maybe the most important lesson that international law and international lawyers should draw from the Iraq dossier. Let us hope that the price that individuals and groups have to pay in the process will not continue to increase, both in terms of their lives and their social and economic conditions, but also in terms of restrictions on their civil and political rights.

Together the contributions present a lively and realistic debate on a daunting topic. The authors recognize the limits and limitations of the present international legal system as well as the need for rigorous analyses and demonstrate a willingness to engage with the system in order to seek ways of enhancing the rule of law and legitimacy in international affairs.

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## Evil and International Law

JARNA PETMAN\*

The American military campaign that followed the terrorist attacks of 11 September 2001 has pushed the fight against terrorism from the paradigm of crime control to that of just war. The bombing of Afghanistan was a start of an all-out, open-ended “war” against terrorism. The invasion of Iraq has been portrayed as a necessary step in the war, the liberating of the Iraqi people as an intricate part of a larger struggle against terrorists fearful of democracy and civilized values.

In this war, the enemies are regarded “as wrong as they are evil”<sup>1</sup>: “these terrorists kill not merely to end lives but to disrupt and end a way of life”.<sup>2</sup> Against them, “what is at stake is not just America’s freedom. This is the world’s fight. This is civilization’s fight”.<sup>3</sup> From the start, the rhetoric of the fight has veered toward a crusading moral triumphalism: “Either you are with us or you are with the terrorists”<sup>4</sup>. Such attitude has cast the enemy as someone with whom there can be no political community, no political antagonism. Instead, the struggle is existential. “[E]vil is real, and it must be opposed ... God is near”.<sup>5</sup> There is nothing to discuss, no compromise to make, no measure too excessive.

The existential language of the new rhetoric on terrorism hides the struggle that is waged on what notions such as “civilization” and “terrorism” mean: whose policy they will include and whose policy they will condemn. When President Bush claims that the US action in Iraq is for the good of the Iraqi people, and the world at large, he in fact claims that the particular and special instance of the United States can represent that which is universal and general. This is a hegemonic argument. It is an attempt to represent one’s particular interests as cosmopolitan ones, one’s values as universal, one’s reign as community.

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<sup>1</sup> George W. Bush, “State of the Union Address” (29 January 2002).

<sup>2</sup> George W. Bush, “Address to a Joint Session of Congress and the American People” (20 September 2001).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Bush, “State of the Union Address”, *supra* note 1.

But what to do with those who are of a different opinion? If the advocate of the universalist cause is, by definition, right, then those who disagree are, by definition, in error. To convince them through dialogue would be not only futile, but dangerous: to submit absolute truths to discussion would allow for their relativity. A dialogue would create uncertainty about the most fundamental questions. Thus the different world of the opponent is, must be, the radically “Other”. It fails to accept what the hegemon knows to be true for all humanity. Its unreasonable resistance blocks the spread of universal justice. Therefore, it is to be cast as the outlaw, outside the community.

The extraordinary danger of the new war against terrorism lies precisely in its implicit definition of the Other as the existential enemy, as not a member of humanity at all – the enemy becomes the “evil”. Under such circumstances, the outlaw either conforms and abrogates the right to think or feel differently from “humanity”, or confronts the righteousness and power of its representatives. This is the hegemonic struggle for which the word “terrorism” serves as a surface. Whose enemy may be cast as a terrorist, an adversary of everyone?

It is in order to avoid the problems in the *political* nature of definitions of terrorism that many have suggested the establishment of a definition that would check against the possibility of political misuse. If only there existed a *technical* notion of “terrorism” whose meaning was clear enough, it might then be possible to ascertain automatically – legally – whether some particular allegedly anti-terrorist measures were justified or not. Recent experience suggests, however, that attaining such a definition does not come easily: somehow proposed definitions elude general acceptance.

Diplomats and international lawyers have tried for decades to define “terrorism”, in vain. The multilateral treaties concerning terrorism concluded since 1963 and the numerous UN resolutions adopted since 1985 have merely resulted in various “operative” definitions, or definitions by implication. This is because States have, in the end, disagreed both on the basic criteria defining terrorist acts and on the characteristics distinguishing them from acts of national liberation. There emerges in every negotiation an apparently unbridgable gap between those who associate “terrorism” with any violent act by non-state groups against civilians, state functionaries, infrastructure or military installations, and those who believe that the use of force is legitimate when resistance against foreign occupation or against systematic oppression of ethnic or religious groups within a State is concerned.

The perverse logic at the heart of attempts to define terrorism is well-known: everyone tries to include one’s adversaries in the definition while keeping one’s allies and one’s own (actual or potential) activities outside it. This is no easy task

given the many contradicting categories of organizations and movements. Just think of the Palestine Liberation Organization: a liberation movement for Arabs and Muslims but a terrorist group for Israel. Or think of the Kashmiri resistance groups: liberation fighters in the perception of Pakistan but terrorists in that of India. During the Cold War, the Afghani Mujahedeen, later to become the Taliban movement, were terrorists for the Soviet Union but a group of freedom fighters for the West, supported by the West – think of the situation now.

The problem with defining terrorism is this: on the one hand, any such definition would have to encompass any serious enemy that one might have in the future. But the future remains unknown and the experience of the past is insufficient to grasp it. What if one's Mujahedeen friend turns into tomorrow's Taliban adversary? Or if one's former Kosovo Liberation Army ally is transformed into a saboteur of one's future governance plans? So the definition would have to be open-ended enough so as to govern *future perceptions* of enemy. On the other hand, it should not be such as to enable the definition of one's own action, or those of one's ally, as "terrorism". But again, it is impossible to know what kinds of action may be needed in order to protect important values in the future. What if one's country is invaded by a foreign occupier and one needs to set up a clandestine organization of military resistance? Surely any definition should not cover such actions.

In other words, any definition should be binding so as to bite hard on the acts of one's adversaries, but open-ended so as to be adjustable as needed in changing circumstances.

No wonder, then, that even the most recent attempt to define terrorism has come to a halt. Since year 2000, an Ad Hoc Committee has been working on a comprehensive international treaty on terrorism under the auspices of the UN. At the end of last year's session, the Chairman of the Committee had to report that article 2 of the draft convention which sets down a definition of terrorism could not be agreed upon because consensus could not be reached on an article 18 covering who would be entitled to exclusion from the convention's scope.<sup>6</sup> The Committee had not been able to get rid of the delicate question of an eventual exemption for national liberation movements.

Apparently anticipating the deadlock the Secretary-General addressed the General Assembly in October 2001, emphasizing that while he understood and accepted "the need for legal precision" there was also "a need for moral clarity" that needed to be taken account of. By moral clarity he meant that:

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<sup>6</sup> See United Nations press release, Ad Hoc Committee on Assembly Resolution 51/210, Sixth Session, 26th Meeting (AM), UN Doc. L/2993 (1 February 2002).

There can be no acceptance of those who would seek to justify the deliberate taking of innocent civilian life, *regardless of cause* or grievance. If there is one universal principle that all peoples can agree on, surely it is this.<sup>7</sup>

But surely the one thing that peoples do *not* agree on when it comes to defining terrorism is the cause that underlies a particular taking of innocent civilian life? The *cause* is the very thing that separates a freedom fighter from a terrorist. Would not a definition of terrorism that ignores motivations be unjust? Might not the fight against oppression or alien domination sometimes require unorthodox measures? But would not a definition of terrorism that does take motivations into account provide a dangerous license – exactly what do we mean by “oppression” or “alien domination” anyway?

This, then, is the problem of evil for international law: on the one hand, there is the biting insistence of the experience of the “evil”, the overwhelming and non-rational impetus to not to let the evil go unpunished, to act on behalf of the oppressed in the name of humanity – unilaterally, if one determines this to be right. On the other hand, there is the grave concern that any such impulsive resort to force on intangible moral feelings can be abused. This is why so many insist on following the correct procedure, on applying the formal rule, and, above all, on achieving a legal definition.

But, and here lies the tragedy, the legitimate attempt to get away from the irrational passions fails. Evil such as terrorism resists definition: a definition becomes either too bureaucratic to be credible, or then it merely refers back to the moral impulse that we hoped to bind with it. So does this mean that we are condemned to forever remain poised between the irrational feeling about the presence of radical evil on the one hand, and legalistic nihilism on the other? Perhaps not. Perhaps what is needed is to include the “grey zone” in which the radical Other is encountered within a universe of political antagonism instead of seeking its complete exclusion. Before anything, this requires that the Other is no longer regarded an enemy to be destroyed, not an “evil”, but an “adversary”: someone whom we may not agree with but whose otherness would have a claim to existence as valid as our own.

In a sense, this means a return to international law from the realm of moral certainty. The current fight against “terrorism” is advanced by a theory that presumes both the ability and the moral necessity to discriminate between the guilt of

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<sup>7</sup> UN Doc. SG/SM/7977, GA/9920 (1 October 2001) (emphasis added). See also UN Doc. SG/SM/8021, SC/7209 (12 November 2001).

unjust causes and the innocence of the just ones. The moral assurance has resulted in a legal criminalization of the enemy as the absolute evil that ultimately allows all measures taken by the “just” side of the conflict. This has elicited a pathological dialectic, opponents unreflectively demonizing each other as epitomizing absolute evil. In this, human and civil rights have been thrown into the winds and the slow work of addressing the causes of social injustice has been replaced by troop movements and casualty scenarios.

Only something like a shared structure of rules and institutions is receptive to the multiplicity of voices that a pluralist society encompasses and to the need to allow them forms of expression instead of striving towards a morally based global harmony or unity. Such an approach requires accepting that rules and institutions embody a political dimension. It requires accepting that there is no pre-politically given “Evil” and that if some violent action should be condemned as “terrorism” because of the exceptional danger to the community that it entails, then it is the task of the community – instead of some hegemonic actor within it – to take action to oppose it. That such action would be governed by law, and not by moral or theological impulse, would affirm its contingent nature and its amenability to control and critique within the community. For, in the end, a perception of Evil is no different from any other political judgment.

## The War in Iraq and the Contemporary *Jus ad Bellum*

TERRY D. GILL\*

### 1. Introduction

The topic of this essay is the influence of the recent war against Iraq upon the international law relating to the use of armed force, in particular the law relating to the use of force in self-defense.

In this context, a number of separate, but related questions will receive attention. Firstly, some description of the state of the law prior to the outbreak of the conflict is unavoidable. Clearly, one can only determine whether the law has changed in relation to a starting point for the purposes of comparison, and this would seem to be the logical place to begin. Secondly, we will examine whether the events which occurred and the attitudes which were expressed in the lead-up to the outbreak of the conflict demonstrate a shift in opinion in the direction of a new set of legal rules and principles relating to the use of force. Finally, we will assess the influence of the course of the conflict and its immediate aftermath upon the question whether we are in a process of change with respect to the legal regulation of the use of armed force.

In view of the fact that the primary justification put forward for the use of force against Iraq, at least prior to and during the course of the conflict, was the right of self-defense, specifically in relation to suspected terrorist threats and repressive and hostile regimes allegedly in possession of weapons of mass destruction, this aspect of the topic will correspondingly receive the most attention. However, other relevant points will receive some degree of attention, to the extent necessary to help answer the central question. In the concluding paragraph, the answers to our main question will be summarized while taking into account the present state of international relations – in particular the virtually unprecedented position which the United States presently holds within the international system.

### 2. The State of the Law Prior to the Iraq War

#### 2.1 *General Description and Assessment of the Law Regulating the Use of Force*

The international legal regulation of the use of armed force contained in the UN Charter and in customary law has always been subject to a significant degree of controversy on a number of points. This is often seen as a weakness of this particular branch of international law, if not of international law in general. The points of

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controversy have generally related to the scope of the prohibition of the use of armed force and the scope of the right of self-defense respectively.

The controversy relating to the scope of the prohibition has centered upon the question whether all uses of force except those specifically excepted in the UN Charter, were covered by the prohibition. In particular, two possible additional exceptions have been put forward in both State practice and the relevant doctrine. These are, of course, humanitarian intervention and certain types of national liberation struggles, both of which have had their supporters and detractors over the years. In recent years, humanitarian intervention seems to have gained a growing degree of acceptance, while the relevance of national liberation struggles has diminished as a result of the end of the Cold War and the virtual disappearance of colonial (type) rule.

The controversy relating to the scope of the right of self-defense has, to a considerable extent, revolved around the question as to what kind of prior armed attack or threat of attack triggers the right to use force in self-defense. There has been controversy on other points, but the question of what constitutes an armed attack and when an armed attack can be countered by action in self-defense, has been and undoubtedly still is the aspect of the law relating to self-defense which has caused the most disagreement.

Notwithstanding these controversies, there always has been a considerable degree of agreement on the fundamental aspects of the *jus ad bellum*. The prohibition of the use of armed force was generally considered to cover all forms of the use of force between States, not covered by specific Charter exceptions, with possible additional exceptions in extreme cases relating to either humanitarian intervention or national liberation struggles in the view of the respective supporters for these types of action.

With regard to the recognized exceptions to the prohibition there was likewise a large degree of consensus on the main points. These were the primacy of the UN Security Council in the maintenance of peace and security, including, in particular, the authorization of military enforcement action in cases where the Council was able to reach consensus. With regard to the law relating to self-defense, State practice and legal opinion were in broad agreement that the use of force in self-defense was contingent upon the occurrence of some form of prior armed attack, or at least a clear and immediate threat of an attack, and was subject to the conditions of necessity and proportionality, as well as to the ultimate authority of the UN Security Council to either endorse, condone or reject a claim of self-defense.

The terrorist assault of 11 September 2001 and the US and international reaction to it did not fundamentally change this understanding of the law. The US immediately approached the Security Council, which accepted, in principle, the

US invocation of the right of self-defense and proceeded to take a series of measures aimed at increasing international cooperation against terrorism. By and large, most States accepted the US reliance on self-defense in its military campaign against Al Qaeda in Afghanistan in view of the significant presence of Al Qaeda in Afghanistan and the demonstrably close relationship between Al Qaeda and its Taliban hosts.

*2.2 The Debate Leading Up to the Iraq War and its Impact upon the Law Regulating the Use of Force*

The process of gradual dissipation of the broad support for the US campaign to root-out and destroy the terrorist network which had struck American territory with such devastation began with President Bush's "State of the Union" address of January 2002, in which a number of States without any clear and demonstrable links to the events of 11 September were characterized as forming an "Axis of Evil". Although no concrete policy statements were formulated in the context of this speech, there was a clear implication that the US Government viewed these States as forming a potential threat to US and international security and as potential adversaries in the context of the "War on Terrorism" due to their alleged possession or pursuit of weapons of mass destruction and alleged (potential) links with international terrorism. With the virtual close of the military campaign in Afghanistan in the Spring of 2002, US attention shifted to Iraq; which had been under UN quarantine since the close of the Gulf War, and was generally considered to be in violation of UN Security Council resolutions relating to verifiable disarmament and widely perceived as continuing to be in possession of prohibited weapons of mass destruction, although opinions differed markedly on the extent of such weapons development and deployment and the degree of threat that they posed in themselves, or through potential Iraqi links to international terrorism.

The impact of this upon the law relating to the use of force came in the form of a two-pronged challenge to the existing system, which was put forth in President Bush's address to the UN General Assembly in September 2002 and the publication of the "National Security Strategy of the United States", in September 2002. Together these two initiatives laid down the following challenges to the existing legal system regulating the use of force:

1. The US Government challenged the other members of the UN Security Council to back up the Council's binding resolutions with the resolve to employ or authorize (military) enforcement measures to ensure compliance, or risk slipping into irrelevance.
2. The national security of the US in the post-11 September situation demanded that the US deal proactively and if necessary preemptively with

international terrorism and with the threat posed by regressive regimes in possession of weapons of mass destruction, or pursuing their possession, and the threat posed by potential proliferation of such weapons to international terrorist movements, by any means necessary – including the use of armed force.

This policy statement by the most powerful member of the Security Council was a challenge to the existing legal system regulating the use of force for two reasons. Firstly, it was a clear and somewhat stridently worded “wake-up call” by the US to the other members of the Security Council and the international community at large, that existing and future Council decisions must be enforced by any means necessary, with the clear implication that if the Council failed to do so, the US would take the measures it considered necessary to enforce Council decisions where the US deemed its security to be at stake. Secondly, the US definition of self-defense went beyond traditional limits to anticipatory action to include not only unequivocal and imminent threats of attack, but also *potential* threats of attack at an unspecified and unknown point in the future. This was besides being a reversal of US policy on this issue (the US has consistently supported anticipatory self-defense within strict limitations of immediacy and necessity, but hitherto rejected the idea of preemptive strikes against mere potential threats), the clearest challenge to the contemporary legal regulation of force by a major State in many years, since it was open-ended and backed-up by both intent and capability.

The reaction of the international community was mixed. On the one hand, the Security Council responded to the US insistence upon backing up its earlier decisions on Iraq with real efforts to ensure compliance by unanimously adopting a new resolution re-implementing the arms inspection regime and threatening “serious consequences” if Iraq failed to comply. On the other hand, most States, either guardedly or more openly, distanced themselves from the new US doctrine of preemptive self-defense. The resulting situation is well known. When the inspection regime failed to turn up conclusive evidence of weapons of mass destruction, neither proving nor disproving their existence, the US insisted upon receiving authorization for the enforcement of Council decisions, while maintaining that such authorization was not legally strictly necessary, but simply desirable from a political standpoint. When the majority of the Council refused to grant such an authorization without further evidence, the US, supported by the UK and a handful of other States, sidestepped the Council and ultimately opened hostilities in the absence of a specific Council mandate. The result was the worst split in the Council since the end of the Cold War, and at least the temporary marginalization of the Charter Collective Security System and the relative isolation of the United States in the conduct of the war and initial stages of the occupation.

### **3. The Aftermath of the Conflict and Conclusions**

At this point, some three months after the close of hostilities what can one say about the effect of the split in the Security Council and the US-UK use of force against Iraq? It is, of course, too early to make detailed predictions about how these and subsequent events will influence the legal regulation of force. Nevertheless, some comment is called for and possible, while taking into account that it is still early for definite statements on specific legal issues.

Firstly, from a strictly legal perspective with reference to the traditional criteria for the formation or modification of a new rule of customary law, there is little evidence of a change in the pre-conflict legal framework regulating the use of force described above. There has been neither sufficient practice, nor evidence of a widespread and representative shift in legal opinion which would support acquiescence in, much less acceptance of, a right of preemptive self-defense or a right of a minority of Security Council members to auto-interpret the Charter and earlier decisions as providing a basis for using armed force, without a specific mandate from the Council to do so.

However, this is only part of the overall picture. The fact of the matter is that any international legal system purporting to regulate force must reflect the underlying political, military and economic realities and capabilities of its members, as well as their attitudes and willingness to “play within the system”. When this ceases to be the case, the system either accommodates itself to the new realities, or temporarily ceases to be a factor of importance until a new system emerges.

At present, the reality is that the United States is only partly willing to play within the system and is, moreover, capable of either persuading or pressuring the other members of the system to acquiesce in or support its actions in the security realm, or ignoring them when they refuse to do so and when it sees its security and “vital interests” at stake. This is in itself, of course, not a new phenomenon. Great powers have always done that; it is what essentially makes them “great powers”. This is as true of the Charter era as it is for earlier periods before the Charter based legal regulation of force existed. One need only think of the numerous interventions by both superpowers during the Cold War to maintain their respective spheres of influence. What makes the present situation different is that there is only one “great power” in the political and military sense, and that it is at the present time uniquely capable and willing to exert its influence and use force when it sees its security at stake.

The present rift in the Security Council will gradually diminish, since neither the US, nor the other (permanent) members can in the long run do without each other. There is, however, little likelihood that other States will follow the US example in accepting a doctrine of preemptive self-defense, since there is little support

for the doctrine outside the US, and no other State is in a position to carry out such a policy in the face of the opposition of the other members of the international community, including the United States itself.

In short, the present legal system will continue to exist and function, alongside the reality that for the foreseeable future, the most powerful member of the system will be in a position to ignore the system to the extent it sees its security at stake and it remains capable of doing so. Of course, international power relationships are subject to change and it may well be that in 20, 50 or 100 years, a wholly different distribution of power will emerge. However, for the time being we live in a “unipolar” world which exhibits elements of both the Charter and a post-Charter era in terms of the *jus ad bellum*.

## To Sanction Aggression or to Reconstruct? – The UN After the Attack on Iraq

OUTI KORHONEN\*

To put it bluntly, the attack on Iraq by the US-led coalition was simultaneously an attack on the UN Charter by some of its most notable founding members. Therefore, it is no wonder that the question on the future role and status of the world organization perplexes many of us after the second Gulf War. From the point of view of international law the situation of the UN is not enviable. It seems logical that in order to buttress the bindingness of the international rule of law, the organization should seek to enforce the key norms and to sanction their violations. The skeptics have doubted the existence of any proper law in the international sphere precisely because there is a lack of enforceability and sanction against sovereign states even if they tread on the core norms of the system.<sup>1</sup> Therefore, the current situation seems yet another time of reckoning for the organization.

Yet, the UN seems to have no choice but to join the reconstruction of Iraq with the best deal it can forge with the occupiers, *i.e.* mainly with the US. This is because it would be an even harsher abandonment of the core principles of the UN Charter and of international law itself if the organization failed to alleviate the administrative, economic and other developmental needs of one of its member states in order to punish and sanction the acts of another. And to join the reconstruction and the development assistance of Iraq in this post-conflict situation cannot be restricted to humanitarian assistance only if the UN is to honor its own Charter. It has to go far beyond food and medicine. Thus, the world organization finds itself in a bind that is no easier than the one before the conflict. In fact, I claim, that whichever stance the UN and all of its supporters take in the aftermath – in the post-phase – of the conflict is indeed much more decisive for the future of international law and world affairs than what was done before.<sup>2</sup>

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<sup>1</sup> See *e.g.* L. Henkin, R.C. Pugh, O. Schacter and H. Smit, *International Law, Cases and Materials* (St. Paul 1993, 3d ed.), 1-14.

<sup>2</sup> I have written previously on the same theme, see O. Korhonen, “Post’ As Justification”, 4 *German L. J.* No. 07, at 709-723 (2003); O. Korhonen and J. Gras, *International Governance in Post-Conflict Situations* (Helsinki 2001); and O. Korhonen, “International Governance in Post-Conflict Situations”, 13 *Leiden J. Int’l L.* 495-529 (2001).

**To Insist on the Violation**

I have argued that to insist on the violation of the Charter in the post-phase of the conflict may be quite accurate but likely to turn into a tedious “Jammer” in the ears of those eager to win contracts and other forms of influence in the future of the Iraqi economy and society.<sup>3</sup> The abrupt question “So what?” should be taken seriously. Quite true, the Charter was violated; there was an act termed “pre-emptive self-defence” by the US-led coalition against Iraq without any proven imminent threat and without the Security Council ever finding that a breach of the peace was so near that only the military option was left.<sup>4</sup> Quite true, the US-led coalition is seeking to govern a member state of the UN (Iraq) without any democratic or international authorization in the post-phase. And, quite true, the Bush Administration may arrogantly be expecting the division of labour in the unipolar world to be: “the US fights, the UN feeds, and the Europeans fund”.<sup>5</sup> After all the defense budget of the US has remained above 3% when the Europeans have cashed in on the “peace dividend” and counted on the US to maintain “a global fighting ability”, as Kagan claims.<sup>6</sup>

However, the fighting-feeding-funding –formula is far from adequate in a situation where social structures and the social moral needs to be rebuilt in a haste in order to avoid more chaos, terror, starvation and other suffering emerging from various forms of violence that have been inflicted on the people of Iraq by the infamous dictator and by the three wars (one with Iran and the two Gulf wars) that have, in turn, bred yet further violence.<sup>7</sup> It is a dangerous trend if the ordinary “Iraqis cannot care less for democracy for the time being” when all they want is to

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<sup>3</sup> See, Korhonen, “‘Post’ As Justification” (*supra*); similarly, Habermas (*infra*), at 702.

<sup>4</sup> See, UN Charter arts. 39, 42, 51; the UN Charter allows a military attack only with the authorization of the Security Council or in self-defense when there is an imminent threat. Other instances not applicable here.

<sup>5</sup> Quoting Dominique Moïsi; D. Malone, “A Dysfunctional Multilateral System?”, *World View* (Center on International Cooperation), Issue 3 (July 2002), at 2, 3.

<sup>6</sup> In a highly provocative article, Kagan argues that the “Americans are from Mars and Europeans from Venus” thus banalizing the difference in security policy between the US and the European countries as one of power v. weakness. See, R. Kagan, “Power and Weakness”, *Policy Rev.* no. 113 (18 July 2003); available at [http://www.policyreview.org/JUN02/kagan\\_print.html](http://www.policyreview.org/JUN02/kagan_print.html).

<sup>7</sup> On the vicious circle of violence and, especially, the terrorist tendencies now emerging in the post-conflict chaos of Iraq, see J. Stern, “Iraq Chaos Breeds Terrorism”, *International Herald Tribune* (August 21, 2003).

be able to go to the grocery store without fearing rape or abduction. They yearn for some electricity, water and a means of communication as soon as possible.<sup>8</sup> The attitude is understandable, yet dangerous if the goal is a truly democratic Iraq.<sup>9</sup> Democracy, after all, cannot be if the citizens do not care. Therefore, something beyond the (attempted) stabilization by the occupying forces and even beyond the basic three Fs needs to be done quickly.

I have elsewhere suggested an eight-prong program<sup>10</sup> for addressing situations in need of international post-conflict governance.<sup>11</sup> Addressing issues from administrative democracy to oversight and ombudsperson, from the creation of opportunities to basic education and training, from the registration of claims to the preparation of ballots, the UN alone or with the assistance of other international organizations (the EU, the IFIs etc) should design a structured policy – not only an *ad hoc* bargain with the US on the governance of Iraq – and be quick to implement it if further damage, both moral and concrete, is to be avoided.

#### **How to Get Onboard the Reconstruction?**

The difficulties of the UN become evident in Habermas's conclusion on the situation. He says,

“(...) the UN has so far not suffered truly significant damage. Insofar as the ‘small’ member states (...) refused to buckle under the pressure from the larger states, it has even gained in regard and influence. (Its) reputation (...) can suffer only self-inflicted damage: if it were to try, through compromises, to ‘heal’ what cannot be healed.”<sup>12</sup>

To get onboard the reconstruction, *i.e.* to honor the humanitarian and developmental principles of its own Charter, the UN must come to acceptable terms with

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<sup>8</sup> *Id.*

<sup>9</sup> On the danger of creating superficial, makeshift democracy at best, see fn. 2 and S. Marks, *The Riddle of All Constitutions* (Cambridge 2000).

<sup>10</sup> The eight points to be responded in formulating such a structured policy for international post-conflict administration are: 1) Blueprint model, 2) Legitimacy questions, 3) Mandate, 4) Preparation & Reserves, 5) Local Opportunities Program, 6) Settling Past Wrongs & Preparing for Democratic Processes, 7) Avoiding Terror and Discrimination, 8) Exit of the Internationals.

<sup>11</sup> See fn. 2 (*supra*).

<sup>12</sup> J. Habermas, “Interpreting the Fall of a Monument” (transl. by M. Pensky), 4 *German L. J.* No. 07, at 701, 708 (2003).

the occupiers of Iraq. As we have seen, this is easier said than done. Already in Afghanistan, the US has opposed the UN, the Afghans and the other countries when they have demanded the expansion of the mandate of the international troops there.<sup>13</sup> In Iraq, the other countries have not gained diplomatic privileges yet and the security situation has been completely monopolized by the US (and the coalition). The UN has so far only been asked to approve resolutions legitimizing the administrative initiatives of the US governor and “to assist”. The question thus is: How to strike a deal with the US that does not compromise the humanitarian and developmental principles of the UN, that does not amount to the de facto legitimization of the right of the US to depart from the Charter obligations, and, in stead, by setting conditions on the role of the US in the post-conflict Iraq to “sanction” the breach of the Charter? Of course, this seems all very difficult. From a cynical point of view, the latter goal is outright utopian. A further twist is that while the bargaining between the UN and the US on the conditions is taking place, the people of Iraq are suffering and the chaos and the deprivation breeds everything from crime to death to international terrorism.

#### **The Bargain over International Legitimacy and Influence**

To take the UN onboard the reconstruction efforts in Iraq would lend some international legitimacy to the US. According to those that believe that even a country as powerful as the US needs “soft power” in addition to “hard” (military and economic might), the US must seek such legitimization. To obtain true riddance of terrorism, international crime and trade problems “the US cannot go it alone”.<sup>14</sup> The UN, on the other hand, needs to get onboard the reconstruction in order not to betray its own principles and to prove its effectiveness in helping where needed globally. It is, however, far from certain that offering merely the rationales and the virtues of multilateralism and the re-legitimization, the UN will be able to push the US into an agreement that puts the UN (or an international body) in charge of the administration of the key sectors of the reconstruction of Iraq. The cynics fear that “until more boys are sent home in body bags” the Jacksonians and the unilateralist of the Bush Administration will not buckle under the pressure of the Wilsonians and the international community and the US will insist on the un-

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<sup>13</sup> See Malone (*supra*), at 2.

<sup>14</sup> See the very persuasive writings to this effect by Joseph Nye. J. Nye, “American Power and Strategy”, 82 *Foreign Affairs* No. 4 (July/August 2003), at 60-73, 65-67. And, J. Nye, *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* (Oxford 2002).

questionable lead of the post-war Iraq policies.<sup>15</sup> This cynical point puts the UN and the internationalists in the uncomfortable boat of those that benefit from the acts of the suicide bombers and other violent extremists.

### **Renewal of International Law, the UN and the Western Self after Iraq**

I agree with Habermas and others in so far as to say that the UN will either win or lose only in the post-phase of the Iraq conflict. Along with the UN, the losers or the winners will be the ideas of multilateralism, international democracy, sovereign equality and anti-hegemony. The “win” or “loss” will be measured in the conditions on which the world organisation agrees to participate in the reconstruction and the entire post-conflict governance of Iraq (and Afghanistan, for that matter). In order to forge the proper conditions that assure international legitimacy by accountability, transparency, equality, and adequate checks and balances – in short, the standards of good governance – the UN needs to form a structured policy and a set of norms applicable to post-conflict governance situations.

It has become increasingly evident in the wake of the emergence of an unipolar world, where force is used more frequently with an assumed right than during the functioning of the bipolar deterrence policies, that the rule of law emanating from the UN and the body of international law cannot stop at the event of war (or even at humanitarian law). The legitimacy questions are even more burning *ex post facto* of the use of arms. Governments and private actors (including the NGOs) do not get any further guidance from the norms condemning the use of force in the post-phase when they rush to get their share of the reconstruction contracts. They want to know under which conditions they can enter the post-conflict site (*e.g.* Iraq), who will guarantee their safety, who will grant them license to operate, with whom will they negotiate the setting up of their representations, to whom to appeal of wrongs ... As sinister as it is that such needs spring out of the event of international violence and the destruction of the social institutions of a country, international law and the UN should not be paralyzed by the tragedy; the after-war time needs normative enlightenment more than makeshift, non-transparent and non-predictable *ad hoc* arrangements or outright tutelage by an occupying force.

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<sup>15</sup> Many, however, wish that “the war in Iraq (...) be rescued from the impulse to make it part of a grander imperial project” with a *co-operative* process of reconstruction: “reconstruction of Iraq, reconstruction of the international system, and reconstruction of the image and prestige of the United States...” See, D. Remnick, “After the Battle”, *The New Yorker* (Issue 2003-03-31), at 2; available at [http://www.newyorker.com/printable/?talk/030331ta\\_talk\\_remnick](http://www.newyorker.com/printable/?talk/030331ta_talk_remnick).

To me the task of renewal here is not merely a reinterpretation of the Charter or the filling in of the gaps of international law through adding a doctrine on “peace-making” or, for instance, the resuscitation of the dead chapter XIII on the Trusteeship Council. It is ultimately another reminder of the call of renewal of the Western self – the one seeing others as targets of war or of peace-making. One needs to ponder the causes of the war on Iraq, to go back on the causes and effects of the war on terror, the causes and effects of 9/11 (2001) and beyond. Immediately one will see that what needs to be addressed in the post-conflict phase of Iraq – the devastation of the social moral and the general deprivation and lack of positive freedom and security – is what should have been addressed already long before 9/11. Many have pointed to the background causes of terrorism and dictatorship, such as mass starvation, increasing global inequality and the resulting discontent – causes that were and still are present (and possibly gaining ground) in the everyday of post-conflict Iraq.

The inability of our international system to prevent the global wrong (*i.e.* 24,000 hunger-related deaths per day on average<sup>16</sup>) will make equally impossible to prevent extremist acts in future. Richard Rorty has predicted that modern Western cities will remain easy targets and to prevent new terror attacks would be as if to attempt to prevent a hurricane.<sup>17</sup> The real issue is how to preserve the democratic progress made and the civilization gained world-wide even if terrorist acts and international conflict reoccur ever so often. This is the question for the world-governance-oriented Western self as well as, on the organizational level, for the UN; how not to paralyze in the face of violence but to strive at what Derrida calls “the impossible” or the “politics of friendship”.<sup>18</sup> For impossible it may seem when thousands starve to death every day, on occasion added with the victims of a “hurricane”.

It is, nevertheless, a poor politician who sees her options of influence reduced to war. Similarly poor are those individuals who see terrorism or other forms of “active nihilism”<sup>19</sup> as their only options. In the face of such moral poverty and nihilism, the UN needs to come forward with a renewed policy. It needs to take another

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<sup>16</sup> This point is driven by Honderich when analyzing the effects of 9/11. See T. Honderich, *After the Terror* (Edinburgh 2002).

<sup>17</sup> See R. Rorty, “Fighting Terrorism With Democracy”, available at <http://www.thenation.com/doc.mhtml?i=020021021&s=rorty> (21 Jan 2002).

<sup>18</sup> See J. Derrida, interview in *Süddeutsche Zeitung*, available at <http://www.sueddeutsche.de/index.php?url=/kultur/dossier/252664/>. *Politics of Friendship* is also title of a book by Derrida. See, *id.*, *Politiques de l’Amitié* (Paris 1994).

<sup>19</sup> See S. Zizek, *The Ticklish Subject: The Absent Centre of Political Ideology* (London, New York 1999).

shot at the deep causes of the conflicts and, as an easier task, set out a plan of normative guidance out of the ruins – a credible internationally-led post-conflict management model as an alternative to the rule by occupiers and violence breeding more violence. Those who support the organization and believe in its civilizing effect in the international system oppose both “passive” and “active nihilism”<sup>20</sup>, *i.e.* the deferral to sheer power or the belief in an inevitable and alienating bureaucratization of any of its alternatives.

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<sup>20</sup> *Id.*

## The United Nations on Shifting Sands: About the Rebuilding of Iraq

LAURENCE BOISSON DE CHAZOURNES\*

There are various ways of assessing the importance of Resolution 1483 (2003), adopted on 22 May 2003 in the aftermath of very troubling times for the international community. The US, the United Kingdom and a group of other states had conducted a war in Iraq the end-result of which was the falling apart of the regime led by Saddam Hussein. The United Nations system had been put aside during that period because of strong discord among member states with respect to the necessity and the legality of resorting to force. It is not the purpose of this contribution to enter into the debate on legality versus illegality of the resort to force in this conflict, or on the relationship between legality and legitimacy, where the latter concept is used to justify the use of force because of the “unacceptable” consequences of not doing so.

The war has put the well-being of the international system itself and its governance regime for collective security issues under severe strain and this effect is not going to disappear overnight. The founders of the UN system had put in place a regime for maintaining international peace and security. One of its main axes was the prevention to resort to force, except in very specific circumstances. The Security Council (SC) was to be at the heart of this regime and was equipped with decision-making and enforcement powers. Practice had already eroded some of the contours of this regime. However the great divide among the SC member states during the Iraqi crisis and the fact that a coalition of states went ahead, supposedly on legal grounds, shook it to its foundations. The result was the irrelevance of the UN in the conduct of the hostilities as well as its marginalization in the rebuilding of Iraq in the aftermath of the conflict.

### A Relationship of 13 Years Plus ...

The UN had already lost quite a bit of its “innocence” in its relationship with Iraq (not that it had not lost some of it over other collective security issues ...). For twelve years since the Kuwait war, because of its behavior, as condemned in the numerous resolutions adopted during this period, Iraq (with the exception of its Northern provinces which benefited from a semi-autonomous regime since 1991), had been the subject of very heavy institutional and regulatory machinery. This

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was supposed to bring it back to a pacific attitude in compliance with the conditions set by the SC. However, because of the scope and nature of the means resorted to by the international community through the SC, the Iraqi population was kept prisoner of a situation in which the accused regime did not willingly comply with the rulings of the SC. On the contrary, the Iraqi government was benefiting from them. More and more it appeared to the Iraqi population that the international community, and its imposition of collective sanctions, was also to blame. They prevented it from interaction with the outside world: intellectual, cultural and economic relationships were almost impossible. The population was increasingly driven towards upholding its dignity and assuring its physical and psychological survival. Thus it was caught between the hammer of a comprehensive international regime of sanctions managed by the UN and the anvil of a despotic political regime. As already pointed out, the regime was benefiting from this situation. Its participation with the UN in the delivery of humanitarian supplies through the oil-for-food program was a useful means to this end. Nor was there any lessening of its lack of respect for fundamental human and minority rights. In addition, the international community gradually came to turn a blind eye to the “grey” oil market which was developing and enriching Saddam Hussein’s regime.

This is not to say that, in spite of the government’s reluctance to cooperate, the international community did not achieve certain results with respect to Iraqi disarmament – the major bone of contention between Iraq and the UN. But these achievements were never considered sufficient for lifting the sanctions, thus creating the impression that they were to remain in place for an indefinite period. New devices for controlling disarmament – sometimes backed by force – were put in place one after the other without giving the last one time to produce any results. The alleged lack of disarmament was to be the reason for resorting to force, undermining the last-effort multilateral approach intended to induce Saddam Hussein to demonstrate his obedience to the SC conditions, an approach which had been framed through a painful negotiating process culminating in the adoption of Resolution 1441 in November 2002.

#### **The UN in the Aftermath of the Hostilities: a Mere Auxiliary?**

Having been shunted aside during the conduct of hostilities, the UN slowly came back into the picture after the falling apart of the Iraqi government. The “re-building” of Iraq was at stake. But once more the UN was restricted to a limited role, as the US-led coalition considered that it had to be in charge and control of the political and economic re-building of Iraq. This allocation of responsibilities was certified by the SC when it acknowledged the US and the UK as occupying powers under unified command and referred to them as the “Authority”. An “Iraqi in-

terim administration” was foreseen as a means for involving the Iraqis in the running of the country, albeit not empowered with sovereign prerogatives. The views of the US-led coalition were predominant in all discussions. The winners of the hostilities on the ground ending with the ousting of the Saddam regime, were setting out their conditions to the Iraqi population, as well as to the rest of the world. To those who wanted to see the UN involved in the re-building of Iraq, the only compromise was that of forging a multilateral-type approach allowing for UN intervention in some areas.

The US and UK paid lip service to the idea that the organization’s role was to be crucial. The compromise made in Resolution 1483 (2003), after several drafts had been circulated among the SC member states mostly to negotiate the UN’s role, was that this “vital” role would only be played out in specific areas related to “humanitarian relief, reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance”.<sup>1</sup> The UN was thus made the handmaiden, charged with specific tasks, whilst the main activities involved in nation-building would rest on the shoulders of two foreign states acting as occupying powers.

In exchange, the US-led coalition agreed that for its actions in Iraq, it would be bound by the norms of international law dealing with occupation (including the 1949 Geneva Conventions and the 1907 Hague Regulations).<sup>2</sup> This was regarded by those who wanted to see the UN more involved, as a legal tool for internationalizing the situation as well as a means to make the US-led coalition legally accountable. The UN Secretary-General stressed this point very firmly in his first report to the SC, reminding the Authority of its responsibilities with respect to security and public order issues in Iraq.<sup>3</sup> The tragic events since then have served to underscore the crucial need for effective respect by the Authority of its duties.

Reducing the situation to one of occupation and attempting in that way to introduce a minimum of accountability does not, however, obviate the need for thinking about the Iraqi situation in terms of legitimacy. Experience has shown that the legitimacy of international action in the aftermath of a conflict has to be grounded on restoration of sovereignty (both in its internal and external dimensions), with the support of the UN system as a sign of the willingness of the inter-

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<sup>1</sup> See para. 7 of the Preamble of Resolution 1483 (2003).

<sup>2</sup> See para. 5 of Resolution 1483 (2003).

<sup>3</sup> See Report of the Secretary-General to the SC, S/2003/715 (17 July 2003), para. 51.

national community to co-operate in this endeavor. The imposition of a nation-building model principally by the occupying powers, with only a limited say given to the population and to the international community, is highly questionable, both on legal and political grounds.

The question had been raised whether the UN should be part of the process of rebuilding Iraq at all. However, the great majority of members of the international community wanted to be present in Iraq through the UN. This led to a collective endorsement of UN intervention with “terms of reference” set out in Resolution 1483 (2003). They are narrow and not consistent with the UN practice developed, together with other international organizations (such as the IMF and the World Bank), since the end of the Cold War in post-conflict situations and nation-building activities, such as Cambodia, Bosnia, Kosovo or Timor. For those who wanted to see the UN involved in Iraq, even though the door was only slightly open for the organization’s intervention, what counted was their belief that it was necessary for the organization to be there. It was also tied in with its *raison d’être*. Pragmatism was also involved. It led to the view that working with the occupying powers would lead in the end to greater confidence between the Authority and the other members of the organization and gradually to a stronger role for the international community.

It took and would have taken many of the diplomatic skills of the Special Adviser on Iraq of the Secretary-General, the late Sergio Viera di Mello, as well as his team, to help the UN to reinforce the UN’s role. A key issue is the return of sovereignty to the Iraqi people. The UN, through its Secretary-General, has made strong calls in this direction since the beginning, as did some SC members. However it might be that it was too quick to welcome the steps taken by the Authority in this direction with the establishment of the Governing Council of Iraq.<sup>4</sup> Self-determination is a complex and endogenous process which is antithetic to occupation.

An open question remains the law governing UN activities in Iraq. Although the organization can build on its experience in previous post-conflict and nation-building activities, the situation in Iraq is quite different as its intervention is not based on an agreement negotiated with a government in place or resulting from a

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<sup>4</sup> In its Resolution 1500 (2003) of the SC adopted on 14 August 2003, the SC stated that it “Welcomes the establishment of the broadly representative Governing Council of Iraq on 13 July 2003, as an important step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq”.

peace-agreement framework. Should the applicable law be the same for the Authority, *i.e.* the Geneva Conventions and 1907 Hague Regulations? If this were to be the case, the question arises as to the degree to which the UN's activities are compatible with international humanitarian law. The latter puts limits on the power to change the institutions of the occupied territory. However, the UN intervention as framed by Resolution 1483 (2003) and 1502 (2003) rests among other things, on "efforts to restore and establish national and local institutions for representative governance", "promoting the protection of human rights" and "encouraging international efforts to promote legal and judicial reform".<sup>5</sup> These tasks seem to go beyond the limits imposed by international humanitarian law.

This situation raises the question whether the aforementioned resolutions contribute to the development of a custom investing the UN (and its sister organizations) with the power to promote the local and national change of institutions should the international community give its endorsement to do so through SC resolutions.

#### **The Framing of a Natural Resources Management and Economic Reconstruction Process: International Scrutiny at Stake**

Another matter of interest in the nation building process in Iraq is the importance given to the economy. The management of natural resources is a key element of the regime. Never had similar emphasis been put on the economic assets of a country in shaping the regime to be built as in Resolution 1483. The situation of Iraq as potentially one of the richest oil-exporting countries explains this approach.

The Authority has been granted jurisdiction over "all export sales of petroleum, petroleum products, and natural gas from Iraq".<sup>6</sup> These prerogatives are to be exercised under certain conditions which leave room for the involvement of various actors and a degree of international scrutiny. It is, however, as yet difficult to see how this involvement of other actors and the means for international scrutiny will be put into practice.

The international community – through various international organizations – has been given a role to play, mainly as an auditor of the decisions taken by the Authority. A Development fund is to be established and held by the Central Bank of Iraq. It will be funded, *inter alia*, by resources remaining from the oil-for-food program, resources from assets frozen because of the imposition of sanctions in the early 1990s, and more especially by the proceeds from all export sales of petroleum

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<sup>5</sup> Para. 8 c), g) and i) of Resolution 1483 (2003).

<sup>6</sup> See para. 20 of Resolution 1483 (2003).

products and natural gas. The Authority decides how the funds will be disbursed. It is supposed to do this in consultation with the Iraqi interim administration. It is thus in a powerful position to decide about the allocation of funds, on the condition that they are “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”.<sup>7</sup> These broadly-crafted objectives leave ample room for the Authority to take decisions in an area which is at the heart of a state’s sovereignty.

In this context, an additional point to be made is that the law of armed conflict is rather laconic in its prescriptions when dealing with natural resources management and economic activities in times of occupation. Thus, the legal test for the Authority’s accountability rests on notions and principles that are rather elusive. In addition, practice is scarce in this area. A number of questions remain subject to interpretation, as for example the extent of the scope of the notion of “expenses of occupation” in relation to the use of the proceeds deriving from Iraqi oil and gas fields.

A right to be informed more than a real “droit de regard” is granted to the international community through a complex nexus of procedures of auditing, transparency and reporting. It is a multi – layer process. An international body, *i.e.* the International Advisory and Monitoring Board, composed of representatives of the UN Secretary General, the IMF Managing Director, the President of the World Bank and the Director-General of the Arab Fund for Social and Economic Development,<sup>8</sup> will approve the nomination of independent public accountants. The latter shall conduct audits of the way best market practices have been followed by the Authority with respect to export sales of petroleum, petroleum products and natural gas from Iraq. They shall also conduct audits with respect to the management of the Development Fund’s resources. They will then report to the International Advisory and Monitoring Board.

It is difficult to foresee how the International Advisory and Monitoring Board will be able to discuss and be involved in the running of oil and gas exports. With respect to the disbursement of funds – to be made by the Development Fund under the guidance of the Authority – the extent of the accountability of the Authority is also at issue. The interpretation of the meaning to be given to the audit function has so far not been agreed upon between the Authority and the interna-

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<sup>7</sup> Para. 14 of Res. 1483 (2003).

<sup>8</sup> See para. 12 of Resolution 1483 (2003).

tional organizations concerned.<sup>9</sup> The identification of the borderline between, on the one hand, oversight of good practices to be followed and on the other hand, control of the allocation and use of the funds is a difficult one. Undoubtedly, all parties will want to explore it further, some seeking to restrict it to mere procedural steps and others pushing it more in a substantive direction.

A further layer of information for the international community is provided through the reports of the Secretary-General to the SC. In addition to the work of his Special Representative, he will report on the work of the International Advisory and Monitoring Board. In this respect, it will be interesting to see how far the UN and the international community can go in their dialogue with the Authority. A lot will depend on the selection of the independent public accountants as well as on the auditing procedures. What will also be of great importance is the content of the information which is made available to the International Advisory and Monitoring Board as well as to the international community more generally. All these elements will help in assessing the extent of international participation in the economic decision-making process in Iraq.

Separately from the special regime for oil and gas exports, additional economic assistance is seen as being indispensable for the rebuilding of Iraq. The UN, together with the international financial institutions, has been entrusted with the task of “promoting economic reconstruction and the conditions for sustainable development” as well as “facilitating the reconstruction of key infrastructure”.<sup>10</sup> Cooperation and coordination among organizations is at stake here. No hierarchical relationship exists between the Representative of the Secretary-General and the Bretton-Woods institutions.<sup>11</sup> Experience in Bosnia, Kosovo and Timor where these organizations worked and still work together, should be reassuring in this context.

A conference of donors which will be held in Spain in October 2003 should secure the funds required for allowing the organizations to be fully involved in Iraq. The governance scheme with regard to the funds to be collected is however still a point to be resolved. International donors have made clear that international assistance should not be managed through the Development Fund run by the Authority. But the US has warned against earmarking of contributions by donors so as to avoid any appearance of funding the Authority’s activities. It seems that the road which will be followed is the creation of an international trust fund with reconstruction priorities agreed at a broad-based level.

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<sup>9</sup> See *Le Monde*, 5 September 2003, p.5.

<sup>10</sup> See para. 8 (d) and (e) of Resolution 1483 (2003) as well as its para. 15.

<sup>11</sup> See Report of the Secretary-General to the SC, S/2003/715 (17 July 2003), para. 93.

However, a question arises with respect to the management of this new fund. Who will be involved in the decision-making process? Will the Governing Council of Iraq and the newly established government be in a position to decide in a “sovereign manner” on these issues? It would seem likely that the contributors to this fund will push in this direction and would not be content to leave the field open to the Authority. This, however, exposes the donors to the risk of taking a stand in the internal Iraqi political situation by implicitly recognizing the “Governing Council of Iraq”, which after all is a mere creation of the occupying powers.

#### **An Increased Leverage for the International Community?**

There are many tests, not to say obstacles, for the international community’s involvement in a country where two countries decided up front that they had the right to determine most of the political, security and economic aspects of its rebuilding. The negotiation of Resolution 1483 (2003) gave some leverage for scrutiny and involvement by the international community through the UN and other international organizations. As for security and political matters, this leverage might get stronger as the Authority painfully realizes that it needs the assistance of others. The UN appears to be the only legitimate vehicle for allowing this collaboration, especially for the constitution of a multilateral force for ensuring security in Iraq.

The Resolution 1510 (2003) adopted on 15 October 2003 goes somewhat in this direction with respect to security issues, although great uncertainties remain with respect to the relationship to be established between the Authority and the multinational force authorized by the resolution. As to the political situation in Iraq, the Authority received an almost complete blessing for its own way of “managing” the constitutional situation in the country. The UN once more were left at the stage door with a minor role to play.

With respect to economic issues, the leverage might be weaker because of the economic regime framed under Resolution 1483 (2003). However, the Authority will have to make some compromises on issues of accountability as well as of decision-making in areas where the international community has been granted a say. This might also lead by the same token to more involvement of the political authorities of Iraq in the economic re-building of Iraq.

## Le rôle du droit international dans le jugement des responsables irakiens pour les crimes commis avant la guerre

PHILIPPE WECKEL\*

“The day of Iraq’s liberation will also be a day of justice” – Président George W. Bush

Plusieurs mois après la chute du régime baasiste, la question de la poursuite des anciens responsables du pays paraît encore hypothétique. La détermination des Etats-Unis<sup>1</sup> à faire juger ces personnes semble en effet moins assurée et, dans le scénario que les autorités américaines écrivent en ce moment, le droit international pourrait jouer un rôle de simple figuration (I). Toutefois, la question n’est pas définitivement tranchée parce que la concrétisation d’un projet de juridiction irakienne n’est guère concevable dans le contexte actuel (II).

### I. Abandon du projet de tribunal international

**Politique de l’Administration Clinton.** En mars 1998 le sénat des Etats-Unis a adopté à l’unanimité une résolution non-normative demandant la constitution d’un tribunal *ad hoc* de l’ONU pour juger le dictateur. Le but de cette initiative, selon ses promoteurs, était de fournir, à travers la stigmatisation du régime irakien, la justification morale d’une action des Etats-Unis contre le régime criminel<sup>2</sup>. L’Administration du Président Clinton envisageait cette mesure pour affaiblir le gouvernement irakien. M. David Scheffer, ambassadeur extraordinaire pour les

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<sup>1</sup> L’orientation retenue par le Gouvernement des Etats-Unis occupe nécessairement le centre de la réflexion. En effet, il a pris l’initiative d’investir militairement le territoire de l’Irak et de provoquer ainsi la destruction de l’appareil d’Etat. En agissant en dehors du consensus international il a fait porter à la nation américaine la charge principale du règlement de la crise. Notre note sur la guerre en Irak, “L’usage déraisonnable de la force”, *Revue Générale de Droit International Public*, 2003, 2, 377-400.

<sup>2</sup> “If he is indicted, if he is tried, even in absentia, there would be a very firm brand on Saddam Hussein as a war criminal” ; “if he is branded as a war criminal it gives us the high moral ground to take action against Saddam Hussein”, Sénateur Arlen Specter qui avait fait cette proposition dès 1991, *CNN*.

crimes de guerre, présentait même l'institution d'un tribunal de l'ONU comme un objectif majeur des Etats-Unis<sup>3</sup>. La mise en accusation de M. Milosevic a renforcé la conviction des partisans d'un procès international pour l'Irak. L'inculpation du chef de l'Etat yougoslave a, en effet, facilité la transition démocratique dans ce pays. Enfin on note que les Etats-Unis ont apporté leur aide aux organisations qui ont rassemblé un matériel de preuve considérable sur les crimes irakiens<sup>4</sup>.

**Politique de l'Administration Bush.** La guerre a modifié les finalités de la poursuite des responsables irakiens, remettant en question le projet de constituer un tribunal international spécial<sup>5</sup>. M. Saddam Hussein n'appartient pas encore à la justice ; pour l'heure il est encore un combattant ennemi traité comme un objectif militaire. Le gouvernement des Etats-Unis ne considère donc pas le procès des dirigeants irakiens comme une priorité du moment. Ainsi, les forces américaines qui opèrent en Irak n'ont pas reçu officiellement des instructions en vue de permettre la livraison des anciens dirigeants à la justice<sup>6</sup>. D'ailleurs, des offres d'immunité ont été adressées aux responsables irakiens<sup>7</sup>.

Les circonstances de guerre relèguent donc au second plan les exigences de justice. En effet, la mise en place d'un tribunal international était envisagée initialement dans le but d'émettre des mandats d'arrêts internationaux dont la mise en œuvre

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<sup>3</sup> "The Continuing Criminality of Saddam Hussein's Regime", conférence devant le Congrès national irakien le 29 octobre 1999.

<sup>4</sup> En particulier l'association *Indict*.

<sup>5</sup> Ari Fleischer, porte parole du Président Bush envisageait encore le 14 octobre 2002 la création d'un tribunal international.

<sup>6</sup> Le Secrétaire d'Etat adjoint américain Richard Armitage a déclaré à CNN le 29 juillet 2003 que "si Saddam Hussein pouvait être capturé en toute sécurité sans présenter un quelconque danger pour le personnel américain, cela serait parfait" ; "mais si sa capture présentait un danger, alors il faudrait le tuer". Le général Norton Schwartz a d'ailleurs estimé que la décision de prendre l'ancien chef d'Etat mort ou vif serait prise par l'officier qui dirigera les opérations sur le terrain.

<sup>7</sup> Dès le 19 janvier 2003 M. Colin Powell avait déclaré : «pour éviter la guerre, je recommanderais personnellement des mesures afin que les dirigeants et leurs familles bénéficient d'un exil ». M. Donald Rumsfeld a renouvelé de telles offres pour les personnes qui accepteraient de fournir des informations permettant de localiser M. Saddam Hussein ou des armes de destruction massive. Voir la lettre publique adressée par *Human Rights Watch* le 19 juin 2003 au Président Bush et au Premier ministre Blair : <http://hrw.org/press/2003/06/iraq-bush062703-ltr.htm>, <http://hrw.org/press/2003/06/iraq062703-ltr.htm>.

obligerait tous les Etats. De cette manière les dirigeants de l'Irak auraient été traités comme des parias réfugiés dans leur propre pays. L'affaiblissement du régime ayant cessé de constituer un objectif, les autorités américaines semblent abandonner l'idée d'un tribunal de l'ONU et privilégient pour des raisons de doctrine politique une formule "nationale", juridiction américaine ou juridiction irakienne, en fonction de la nationalité des victimes.

M. Pierre-Richard Prosper, actuel Ambassadeur extraordinaire pour les crimes de guerre, estimait en décembre 2001 devant une commission sénatoriale que "the international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible... International tribunals are not and should not be the courts of first redress, but of last resort." Il a confirmé cette doctrine de la préférence nationale le 10 avril 2003 : "it is our policy to encourage and help states to pursue credible justice rather than abdicating their responsibility or having it taken away. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability for war crimes while respecting the rule of law by a sovereign state must be encouraged at all times"<sup>8</sup>. La question du rôle dévolu au droit international dans la poursuite des responsables irakiens fait ainsi l'objet d'un débat politique aux Etats-Unis<sup>9</sup>. L'équipe dirigeante estime qu'une restriction à la souveraineté judiciaire d'un pays démocratique respectueux de l'Etat de droit ne serait pas justifiée. Il applique ce raisonnement à l'Irak en transition démocratique en écartant *a priori* toutes les formes d'internationalisation de l'organe judiciaire qui serait chargé de juger les responsables irakiens. On regrette cette prévention à l'égard du droit international qui n'impose en la matière qu'une exigence générale d'effectivité de la répression. Ce droit ne privilégie pas la justice pénale internationale et le système judiciaire interne conserve pleinement son rôle dans la mise en œuvre des obligations qui pèsent sur les Etats. Simple question d'ingénierie juridique, le choix des mécanismes de justice pour l'Irak devrait être examiné sans dogmatisme.

## II. Obstacles à l'institution d'une juridiction irakienne

**Exclusion de la Cour pénale internationale.** La Cour pénale internationale peut être écartée du débat. C'est la seule certitude actuellement. Ni l'Irak, ni les Etats-Unis ne sont parties au statut de cette Cour. En outre la juridiction de la CPI ne recouvre pas les faits antérieurs à l'entrée en vigueur du statut. En théorie on pourrait

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<sup>8</sup> Déclaration devant le *Committee on Governmental Affairs* du Sénat, le 10 avril 2003.

<sup>9</sup> D. Sheffer, «Justice In the Aftermath», *Washington Post*, 26.03.03.

affirmer qu'une extension de la compétence de la nouvelle juridiction ne serait pas incompatible avec son statut et qu'une résolution du Conseil de sécurité procédant à cette extension serait envisageable. En fait les membres de cet organe ne pourraient pas se mettre d'accord sur une telle solution.

**Faiblesses du projet de cour spéciale irakienne.** La déclaration faite à la presse le 8 mai 2003 par le conseiller américain auprès du ministère irakien de la justice, M. Clint Williamson, exprime la préférence accordée à une formule purement nationale. Il estime qu'il y a "un large consensus selon lequel les crimes contre le peuple irakien doivent être pris en main par la justice irakienne. La chose doit être clarifiée et les détails doivent être mis au point, mais cela se fera probablement dans le cadre du système de la justice irakienne, au sens large"<sup>10</sup>. Il justifie la création d'une cour spéciale irakienne<sup>11</sup> en ces termes : "les poursuites concernant les crimes commis sur une large échelle vont mobiliser le système pendant des années. Il est donc nécessaire de mettre en place certaines structures spéciales pour traiter du problème". "la loi irakienne s'applique à tout Irakien, quel que soit son statut" et, par conséquent, les anciens dirigeants n'échapperaient pas à la justice.

En réalité le droit pénal irakien évoqué par le conseiller américain ne peut pas être celui que les anciens tribunaux baasistes appliquaient au moment où les faits ont été commis. M. Williamson explique d'ailleurs que "la loi (le code pénal irakien de 1969) était bonne, mais la manière dont elle était appliquée était erronée". Or cette application aménagée du droit pénal irakien serait-elle conforme au principe de non-rétroactivité de la loi pénale<sup>12</sup> ?

En outre, les poursuites qui seraient engagées sur la base du droit pénal ordinaire ne résoudraient pas la question de l'impunité des crimes de droit des gens. Ainsi les campagnes de l'Anfal menées en 1988 par les militaires irakiens contre la popula-

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<sup>10</sup> *Le Nouvel Observateur*.

<sup>11</sup> D'après M. Williamson : "in all probability we will see some sort of special chamber set up within the Iraqi system composed of Iraqi judges using Iraqi prosecutors who will handle this" *CNN*.

<sup>12</sup> L'Irak ayant ratifié le Pacte international des droits civils et politiques le 25 janvier 1971 le précédent de l'affaire des gardes frontières est-allemands pourrait être utilement invoqué pour surmonter cette grande difficulté : voir l'affaire *Krentz* devant la Cour européenne des droits de l'Homme, Arrêts du 22.03.01, *Streletz, Kessler et Krentz c. Allemagne, K.-H. W c. Allemagne*, Chron. de juris. int., *R.G.D.I.P.*, 2001, 3, 774-788. En réalité le droit interne rétroactivement aménagé est nécessairement influencé par le droit international.

tion kurde ont vraisemblablement constitué un génocide<sup>13</sup>. Il n'est pas concevable que de tels crimes puissent être simplement qualifiés de meurtres. Des observations similaires sur l'inadéquation des poursuites menées sur la base du droit commun peuvent évidemment être faites au sujet des crimes de guerre et des crimes contre l'humanité imputables aux agents du régime irakien. Or on doute fort qu'une juridiction irakienne composée de juges irakiens, après vingt-cinq ans de dictature, ait la compétence technique nécessaire pour appliquer correctement le droit international humanitaire dans une affaire d'une telle ampleur et d'une telle complexité<sup>14</sup>.

La création même d'une cour spéciale irakienne pendant la période de la transition se heurte à un obstacle juridique majeur. Comme le notait Charles Rousseau l'effet de l'occupation de guerre n'est pas de conférer à l'Etat occupant l'autorité étatique<sup>15</sup> et il est clair qu'en matière juridictionnelle sa compétence est restreinte. Les tribunaux de l'Etat occupant peuvent juger les délits commis contre les forces de cet Etat, sous réserve bien entendu de la situation des prisonniers de guerre qui ne sauraient être poursuivis à raison d'actes légitimes de belligérance<sup>16</sup>. En outre l'article 43 du Règlement de La Haye annexé à la Convention IV de 1907 oblige l'occupant à rétablir l'ordre et la vie publics dans le respect de la loi locale. Toutefois, on ne voit guère comment rattacher à ce texte la création d'une cour spéciale irakienne exerçant sa juridiction à l'égard de crimes commis *avant l'occupation*. Or l'occupant expose sa responsabilité lorsqu'il excède ses compétences<sup>17</sup> et les actes ainsi accomplis par des juridictions créées par l'occupant sont, en principe, nuls<sup>18</sup>. Ni la nationalité des juges, ni leur indépendance fonctionnelle ne sont d'ailleurs de nature à couvrir le vice résultant de la violation du droit de la guerre. Le conseil provisoire de gouvernement s'est saisi le 13 juillet 2003 de la question des poursuites

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<sup>13</sup> Voir pour s'en convaincre les documents officiels irakiens joints au rapport de M. van der Stoep, Rapporteur de la Commission des droits de l'Homme, sur la situation en Irak, 25.02.94, E/CN.4/1994/58.

<sup>14</sup> Cf. Human Rights Watch, "Iraq: Justice needs international role", *Human Rights News*, 15 juillet 2003.

<sup>15</sup> Ch. Rousseau, *Le droit des conflits armés*, Pédone, Paris, 1983, p. 141.

<sup>16</sup> J. Paust, "The US as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War", *ASIL Insights*, Avril 2003.

<sup>17</sup> T.A.M. germano-belge, 19 oct. 1925, *Ville d'Anvers c. Etat allemand*, *Rec. T.A.M.*, V, 712.

<sup>18</sup> Sur la nullité des jugements prononcés par les tribunaux allemands institués en Belgique en 1918, C. Cass., 4.12.1919, *Cambier c. Lebrun, Pasicrisie belge*, 1920.I.1.

contre les responsables de l'ancien régime, mais il demeure sous le contrôle des autorités d'occupation.

Il faut s'attendre à ce que la livraison au tribunal irakien des suspects détenus par l'armée américaine soit difficile. Cette dernière refusera vraisemblablement de remettre ceux qu'elle considère comme des combattants ennemis et les commissions militaires auront à connaître des crimes de guerre commis à l'encontre des forces américaines. Si aux Etats-Unis l'action contre les "combattants ennemis" tient la justice en échec<sup>19</sup>, une telle situation pourrait se reproduire en Irak en raison de la persistance d'une activité armée hostile à la coalition. Sans la conclusion d'un accord international entre l'Irak et l'autorité d'occupation portant sur les prisonniers de guerre et les internés on ne voit pas bien comment la justice irakienne pourrait fonctionner de manière indépendante et effective.

Enfin, on relève que l'approbation d'une procédure judiciaire par l'ONU et les principaux partenaires des Etats-Unis est envisageable seulement si la peine de mort n'est pas applicable et si les plus hauts standards de justice, notamment le droit de recours de la personne condamnée, sont respectés. Aussi la préférence accordée aux mécanismes purement nationaux, les commissions militaires américaines qui sont souvent considérées comme une parodie de justice et une cour spéciale irakienne qui ne serait qu'un tribunal d'exception<sup>20</sup>, affecterait la légitimité internationale des jugements<sup>21</sup>. Les Etats-Unis pourraient envisager une participation de juges venant de pays arabes afin de conférer à l'instance irakienne une certaine coloration internationale. Bien que considérés souvent comme étant moins regardants en ce qui concerne le respect des droits de l'Homme, les Etats arabes ne seraient sans doute pas enthousiastes à l'idée de collaborer à cette instance sous influence américaine.

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<sup>19</sup> Notre note, "Le statut incertain des détenus sur la base américaine de Guantanamo", *R.G.D.I.P.*, 2002, 2, 357-369.

<sup>20</sup> Joe Stork (*Human Rights Watch*) relève à juste titre que "it would be difficult today to find Iraqi jurists who have not been compromised by participating in a court system that was part of the Baath apparatus of repression; or, conversely, who were not linked with opponents of the previous regime, and who hail from communities that suffered under it. Second, trials conducted by judges appointed directly or indirectly by the US civil administration would be widely viewed in Iraq as serving American interests, if not operating under US control", *DailyStar*, 8.07.03.

<sup>21</sup> Voir la déclaration publique d'*Amnesty International*, "any court to try past crimes must be fair and seen to be fair", 15 juillet 2003.

**Intérêt d'une juridiction mixte.** La répression des violations du droit international humanitaire ne répondrait pas totalement au besoin de justice ressenti par les victimes. En effet de nombreuses violations des droits de l'Homme, meurtres, torture, viols notamment, n'ont pas un rapport suffisamment étroit avec un conflit armé, une attaque contre un groupe de population civile ou une entreprise de génocide et elles échappent par conséquent aux qualifications de crimes de guerre, crimes contre l'humanité et crimes de génocide. L'application du droit interne irakien qui assure l'effet horizontal des droits de l'Homme est donc inévitable.

Le modèle d'une juridiction mixte intégrée au système judiciaire national, mais comportant aussi un certain nombre de caractères internationaux, dont la présence en son sein de juges nommés par l'ONU, semble ainsi particulièrement adapté à la situation de l'Irak. En effet, cette formule retenue au Sierra Leone permettrait d'étendre la compétence de l'organe en question aux crimes "contre les droits de l'Homme", c'est-à-dire aux atteintes aux droits les plus élémentaires de la personne qui ne peuvent pas être qualifiées de violations graves du droit international humanitaire. Une juridiction mixte peut, en raison de sa nature, juger des faits qui ne sont pas directement incriminés par le droit international. La situation irakienne est très différente de celles qui ont donné lieu dans un passé récent à la création de juridictions internationales *ad hoc*. On envisage en effet de faire *le procès d'un régime politique* criminel plutôt que d'un conflit armé. De ce point de vue le cas irakien évoque le précédent du Cambodge de Pol Pot. Dès lors il est souhaitable que la juridiction puisse aborder la pratique du régime dans son ensemble sans être limitée au domaine d'application du droit humanitaire. Cette démarche présente également l'avantage appréciable de justifier la compétence personnelle et temporelle de cette instance. En effet, il serait difficile d'expliquer autrement l'exclusion des faits qui se sont produits au cours de la récente guerre et dans l'après-guerre, ou bien encore la limitation aux seuls crimes irakiens<sup>22</sup>. Un tribunal mixte permettrait aussi d'impliquer au mieux les Irakiens dans le travail de mémoire et de réparation tout en bénéficiant de l'assistance technique et financière de la Communauté internationale.

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<sup>22</sup> Le premier procès irakien contre les Etats-Unis a été engagé le 13 juin par Aboud Sarhane, un berger de 71 ans qui affirme qu'un avion américain a tiré un missile sur sa tente dans le désert, le 4 avril, tuant 17 membres de sa famille et 200 moutons. Le procès s'est ouvert le 20 juillet 2003 à Ramadi près de Bagdad ; le président du barreau d'Athènes, Dimitris Paxinos, a porté plainte auprès de la Cour pénale internationale contre les dirigeants britanniques pour "crimes contre l'humanité" perpétrés lors de la guerre en Irak. La plainte vise le Premier ministre britannique Tony Blair, trois de ses ministres et plusieurs responsables militaires britanniques.

Néanmoins l'institution d'une telle juridiction ne paraît pas envisageable dans le cadre juridique établi par la Résolution 1483. Le tribunal mixte devrait en effet être mis en place sur la base d'un accord conclu par l'ONU avec *l'Etat territorialement compétent*. Or un Etat occupant ne dispose pas de la compétence législative nécessaire pour participer à un tel accord et le conseil provisoire de gouvernement n'exerce pas l'autorité étatique pour le compte de l'Irak<sup>23</sup>. Ces observations ne sont pas décourageantes. Malgré la dégradation de la situation matérielle, les progrès dans la reconstruction politique sont sensibles et la question du jugement des responsables irakiens ne semble pas d'une urgence absolue. Il serait donc prudent d'attendre que les incertitudes actuelles soient levées avant de trancher définitivement cette question.

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<sup>23</sup> Ahmed Maher, ministre égyptien des affaires étrangères, a déclaré le 11 août 2003 que "ce conseil ne représente pas l'autorité légale ou la souveraineté irakienne. Tout le monde sait, y compris ceux qui ont créé ce conseil et l'ont appuyé, qu'il n'est qu'un pas qui doit être suivi d'autres sur le chemin de l'exercice par le peuple irakien de sa souveraineté", ce que confirme la Résolution 1500 adoptée le 14 août par le Conseil de Sécurité.

## WTO Law and Contracts for Rebuilding Iraq

GEERT VAN CALSTER\*

In the fog of war, various accusations were levelled at the United States. Among those of a legal nature, this contribution looks at the suggestion that the contracts to rebuild Iraq, handed out by the United States Government and various US Agencies, violated the rules of the World Trade Organisation (“WTO”), in particular its Agreement on Government Procurement (“AGP”).

### A. Introduction to the AGP

The Agreement on Government Procurement<sup>1</sup> is, in contrast with other WTO Agreements, not a multilateral agreement to which all WTO Members have to accede by default. It is a plurilateral agreement, committing only those members who chose to adhere to it. Currently, most Parties to the Agreement are developed nations (including the EC on behalf of all of its Member States). There are few developing nations that are a party to the Agreement, for reasons which fall outside the scope of this contribution. It is also noteworthy that as a consequence of the Agreement’s plurilateral character, it is characterised by strict reciprocity. Thus, Parties only have to extend the duties laid upon them as a result of their adherence to the Agreement to those members who are also a Party to the Agreement.

The reciprocity of the Agreement is further complicated by the myriad of obligations that may apply between any given Parties as a result of Appendix I to the Agreement. For one to be aware of the obligations of a given Party in a given circumstance, one needs to consult the specific provisions of Appendix I. Appendix I is made up of five separate Annexes and a section of general notes. The Annexes and the general notes are country-specific – so the US’s Annex 1 is different to the EC’s Annex 1, and so on. Annex 1 lists central government entities that are governed by the AGP. Annex 2 lists sub-central government entities. Annex 3 lists all other entities included (for instance state-owned enterprises, etc., depending on the specific regulatory set-up of the Party concerned). Annexes 4 and 5 list the services and construction works covered.

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<sup>1</sup> Like all WTO texts, it may be consulted at [www.wto.org](http://www.wto.org)

Once the AGP becomes applicable (which, other than the potentially complex assessment of the various Annexes, also requires certain thresholds to be exceeded), the following *core principles* apply.

*1. National Treatment and Non-Discrimination*

Article III AGP provides as follows:

“1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:

- (a) that accorded to domestic products, services and suppliers; and
- (b) that accorded to products, services and suppliers of any other Party.

2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:

- (a) that its entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership;

and

- (b) that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV.

3. The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement.”

*2. Technical Specifications*

Article VI AGP regulates the technical specifications which may be employed in government procurement. It provides in this respect that

“1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

2. Technical specifications prescribed by procuring entities shall, where appropriate:
  - (a) be in terms of performance rather than design or descriptive characteristics; and
  - (b) be based on international standards, where such exist; otherwise, on national technical regulations, recognized national standards, or building codes.
3. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as 'or equivalent' are included in the tender documentation.
4. Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.”

### *3. General Exceptions to the Agreement*

Article XXIII.2 of the AGP comes into play should the provisions of the Agreement not be met. As in the GATT Agreement, the AGP consequently offers a general escape clause for otherwise illegal national practices and/or regulations. Article XXIII.2 reads

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.”

### **B. Implications *vis-à-vis* the Iraq Situation**

In the general US-bashing which took place during and shortly after the War in Iraq, the issue of the contracts concluded with US companies, seemed a particularly attractive one. Indeed here was one accusation which – so the argument went – did not rely on personal views or interpretation of international law, but on arguably the toughest set of international economic laws: the World Trade Organi-

sation's rules.<sup>2</sup> However, what at first sight seemed to be an attractive option of drawing in the WTO, eventually led to quiet retraction of the accusations. The European Commission, for one, warned against too high expectations. It announced, at a mid-April press briefing,<sup>3</sup> that it would look into the contracts on a case-by-case basis, but already prior to that investigation conceded that the AGP allows many an exception, and that the US contracts may well be covered by these. By mid-May, it announced through that same forum that the Commission had – as yet – failed to find any flaws in the system.<sup>4</sup> Thus the Commission is so far left with having to resort to personal views and policy considerations, such as the view by its Commissioner for External Relations, Chris Patten, who reportedly called the US bias in awarding the contracts to US companies, “exceptionally maladroit”.<sup>5</sup>

So why did the WTO, through the AGP, not deliver? Various justifications for the US approach may indeed be found in the AGP:

*The US Annexes Qualify Adherence to AGP Principles*

Like all members which are party to the AGP, the US has only committed itself to the AGP to the extent specified in the Annexes. In the case of the Iraq allegations, two specific entries are worth recalling:

- Point 10 of Annex 1 [“Central Government entities which procure in accordance with the provisions of this Agreement”] lists the United States Agency for International Development (commonly known as “US AID”), but with the specific proviso “*not including procurement for the direct purpose of providing foreign assistance*”. This provision in other words directly links US AID procurement decisions to US foreign policy. Whether the reconstruction of Iraq *directly* provides foreign assistance, may be debatable. However, no WTO Panel nor the Appellate Body can conceivably be expected to rule one way or another (see also below on the task of the dispute settlement institutions).

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<sup>2</sup> It should be pointed out, no doubt superfluously, that the WTO has no calling in the internal dispute in the US as to whether it is appropriate to contract with companies that would seem to have strong links with the current administration.

<sup>3</sup> The only reliable paper trail which the author found of this briefing which otherwise came to his attention through the Brussels grapevine, may be consulted via <http://www.crienglish.com/144/2003-4-10/20@9128.htm>

<sup>4</sup> <http://news.bbc.co.uk/1/hi/business/3035097.stm>.

<sup>5</sup> *The Guardian*, 14 April 2003, <http://www.guardian.co.uk/comment/story/0,3604,936158,00.html>

- Point 3 of Annex 4 [“Services – Of the Universal List of services, (...) the following services are excluded”] excludes “(a)ll services purchased in support of military forces located overseas” from application of the AGP principles. Again, which services qualify as “support”, may be open to debate, but would not seem judiciable under the responsibility of the WTO.

*The General Exceptions Contained in the Agreement Provide for Leeway, Where Required*

As quoted above, the AGP contains a GATT Article XX-type exception, which includes, *inter alia*, any infringements of the AGP’s obligations, with a view to protecting public order and safety. This is the heading referred to by some US officials who quoted “national security” reasons for bypassing procurement procedures. These exceptions are accompanied by a safety valve,<sup>6</sup> which is reminiscent of the Headnote *ad* GATT Article XX, and includes a least trade restrictiveness test. Even assuming – which is far from certain – that the US practice would not get the green light on the basis of the above specifications in the US Annexes, one could see merit in the US position *vis-à-vis* the general exceptions. Indeed the US have argued that, in view of the need for a “timely” planning of its post-war policy in Iraq, the bulk of post-war reconstruction had to be planned even prior to hostilities starting. Candidates for the contracts in particular were given access to confidential information. This meant that US companies could be given exclusive access, in view of their – assumed – allegiance, as well as in view of the security clearance which the companies involved had already acquired through prior work for the US Government. Moreover, the US argues that the least trade restrictiveness test is met. Indeed US AID, for instance, did indeed procure the main contracts on the basis of limited access, but refers to those contractors sub-contracting on a non-exclusive basis, as a proof of the openness of the market in practice.

**C. “Marginal Assessment” by the WTO Dispute Settlement Institutions**

Just like the “nine old men” of the US Supreme Court at the time of the New Deal litigation, the members of the WTO Dispute Settlement institutions are all too aware of the precariousness of their judgments. There are plenty of occasions in which they may be called upon to pass judgment on very sensitive issues and concepts. With respect to US/EU tensions over environmental and public health protection, for instance, the precautionary principle provokes near-passionate arguments

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<sup>6</sup> “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.”

*pro* and *contra*. Likewise, whether a procurement process may be by-passed on perceived national security concerns,<sup>7</sup> is not an easy matter for a court to adjudicate. Hence in the WTO, as in many national proceedings concerning judicial review of decisions taken by public authorities, dispute settlement institutions may be tempted to make recourse to what in German (and other Western European) legal practice is known as “marginal assessment”: authorities will only be held to have infringed vague or unclear concepts,<sup>8</sup> where the infringement is manifest, in particular where the State is found to have taken no account at all of the concept concerned. In the case at issue, only if the national security invocation were to be plainly bogus would the US be held not to qualify for the exemption.

#### **D. Wider Implications for the WTO and Conclusion**

The tension over the awarding of contracts in Iraq illustrates the quintessentially intergovernmental nature of the organisation. Indeed much of the depth and speed of the liberalisation of international trade, remains a prerogative of national governments. Schedules of commitment in particular serve as both the engine and the brakes of the liberalisation agenda. This author submits that there are many arguments to be found to support the US stance that it did not violate the AGP when awarding contracts for the reconstruction of Iraq. This episode may serve as an encouragement for further harmonisation of these rules, through the WTO or other fora.

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<sup>7</sup> To name but one of the more or less vague concepts referred to above.

<sup>8</sup> Which effectively give them a high degree of discretion.

## The UN Compensation Commission: What Now?

JOHN R. CROOK\*

Over a decade ago, as the UN Compensation Commission was getting slowly underway and it was not known when or if there would ever be funds to pay approved claims against Iraq, I wrote that even if funding was not available:

[T]he Commission's collection and verification of claims should continue ... [I]t will be useful to governments to have claims of concern to them assessed and evaluated by an international body. This process will provide a sound foundation for the future bilateral settlement of any claims not fully compensated through the UN mechanism.<sup>1</sup>

I believe that this statement holds equally true today, as prospects for substantial funding to pay approved claims again seem uncertain. This comment argues that completing the UNCC's orderly assessment of the relatively few remaining claims can make a useful contribution to independent post-occupation Iraq's smooth re-incorporation into the international community.<sup>2</sup>

Much has happened in the twelve years since the Security Council created the UNCC.<sup>3</sup> The Commission has developed into an important international legal institution, making major – although perhaps not yet fully understood – contributions to the substance and procedures of international claims law.<sup>4</sup> On a more

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<sup>1</sup> John R. Crook, "The United Nations Compensation Commission – a New Structure to Enforce State Responsibility", 87 *AJIL* 144, 157 (1993).

<sup>2</sup> Some disagree. A study by an influential Washington "think tank" called for the UNCC to stop work on its remaining unsettled claims and to halt or discount payments of claims already approved. Frederick D. Barton and Bathsheba N. Crocker, "A Wiser Peace: An Action Strategy for a Post-Conflict Iraq", January 2003, Center for Strategic and International Studies, available at <<http://www.csis.org>> (hereinafter Barton and Crocker) (visited 28 July 2003).

<sup>3</sup> Including creation of a substantial body of literature on the Commission, most listed in a good bibliography on the UNCC's excellent website, <<http://www.unog.ch/uncc/publicat.htm>> (visited 25 July 2003).

<sup>4</sup> The Commission has vigorous detractors as well, who argue that its creation exceeded the Security Council's power, and that its procedures are fundamentally flawed by the

practical level, it has channeled significant compensation to parties with demonstrated damages from Iraq's 1990 invasion of Kuwait and ensuing events, including paying over 2.5 million approved claims of injured individuals or families, overwhelmingly persons of modest means from developing countries.

But what of the future? Casey Stengel (a baseball figure celebrated for creative abuse of English) is generally credited with observing that it is hard to predict the future because you don't know what's going to happen.<sup>5</sup> However, with the American-led invasion and occupation of Iraq, the end of Saddam Hussein's regime, and Iraq's launch into a new and uncertain future, the Commission inevitably faces reassessment. Given factors such as the international community's keen desire for Iraq's early re-integration, the uncertain health and welfare of Iraq's people, and the sad state of Iraq's infrastructure (aggravated by post-war looting and sabotage) it seems to this writer unlikely that the Security Council will continue to direct substantial amounts of Iraq's oil revenue to paying claims from 1990-1991. This is reinforced by the UNCC's own success – as claims are resolved, the Commission's global constituency shrinks correspondingly<sup>6</sup> – and perhaps by perceptions, fair or not, that the UNCC now mainly benefits Kuwait or other Gulf countries, or a few rich multinational corporations.

A crucial shift may have already occurred in May 2003. Paragraph 21 of Security Council Resolution 1483(2003)<sup>7</sup> reduced the percentage of Iraqi oil revenues available for paying claims from 25% under the "Oil-for-Food" program to 5% of the uncertain value of future Iraqi exports. Paragraph 21 "walls off" this 5% share for some time to come; it remains effective until either the Security Council re-

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limited (albeit progressively expanded) opportunities for Iraq's participation in the claims process. See, e.g., Bernard Graefrath, "Iraqi Reparations and the Security Council", 55 *Heidelberg J. Int'l Law* 1 (1995); Alain Gresh, "A Debt of Dishonour", *Le Monde Diplomatique*, October 2000, <<http://mondediplo.com/2000/10/02iraq>> (visited 6 Aug. 2003). *Contra*, see, e.g., Andrea Gattini, "The UN Compensation Commission: Old Rules, New Procedures on War Reparations", 13 *EJIL* 161 (2002); John R. Crook, "The UNCC and its Critics. Is Iraq Entitled to Judicial Due Process?", in *The UN Compensation Commission* 77 (Richard Lillich ed., 1995).

<sup>5</sup> This insight also has been attributed to, *inter alia*, Niels Bohr, Winston Churchill, Albert Einstein, Samuel Goldwyn, Groucho Marks and Mark Twain. <<http://www.larry.deneenberg.com/predictions.html>> (visited July 29, 2003).

<sup>6</sup> Although the Commission has extended its deadlines for receiving claims of Palestinians, and has received requests to file additional claims from several countries, including Iran, Pakistan and Sri Lanka.

<sup>7</sup> Adopted 22 May 2003.

peals or suspends it (requiring nine affirmative votes and no vetoes), or a future Iraqi Government and the UNCC's Governing Council agree on a change, also under procedures subject to the veto.

However, the effect of Paragraph 21 together with slow resumption of oil exports is to slash funding for paying claims. Before the 2003 invasion, US officials reportedly projected Iraqi oil revenues of \$15 to \$20 billion a year (meaning \$750 million – \$1 billion a year for the UNCC under Paragraph 21), but these estimates now appear far too high, at least for a long time to come.<sup>8</sup> Whatever funding is available for claims in future months will be far less than before, and may be quite small in relation to the potential total of approved claims.

So, as Lenin asked, “what is to be done?”<sup>9</sup> The answer requires consideration of the Commission's two great tasks. The Security Council Resolutions creating the UNCC and subsequent UNCC Governing Council decisions have always distinguished between collecting and assessing claims, and the separate challenge of paying approved claims.<sup>10</sup> The first task is largely completed. The UNCC has received and processed an enormous mass of claims for damages directly caused by Iraq's 1990 invasion of Kuwait and ensuing events. It received over 2.6 million timely filed claims, seeking over \$300 billion. Ninety-six countries filed claims, as did thirteen offices of three international organizations acting for Palestinians or others unable to claim through a state.<sup>11</sup>

In 1998, the UNCC Executive Secretary reportedly called for the Commission to complete its assessment of all remaining claims within five years. This has largely been accomplished. Approximately 99% of all claims have been resolved, resulting in approved awards of \$46.3 billion out of \$251.1 billion claimed (18%).<sup>12</sup> Work is completed on all claims of individuals for departure (“A Claims” in Commission parlance), for death and serious personal injury (“B claims”) and for losses up to \$100,000 (“C Claims”), except for some filed by the Palestinian Authority.<sup>13</sup>

<sup>8</sup> Neela Banerjee, “Sluggish Iraqi oil flow complicates US plans”, *International Herald Tribune*, July 18, 2003, at 15.

<sup>9</sup> V.I. Lenin, “What is to Be Done?”, *V Collected Works* 375-76, 451-53, 464-67.

<sup>10</sup> David D. Caron and Brian Morris, “The UN Compensation Commission: Practical Justice, not Retribution”, 13 *EJIL* 183, 187 (2002).

<sup>11</sup> “The Claims”, on UNCC website (visited 18 Aug. 2003).

<sup>12</sup> “Status of Claims Processing”, on UNCC website (visited August 18, 2003).

<sup>13</sup> UNCC Press Release PR 2003/6 (20 June 2003), on UNCC website.

Throughout, the Commission emphasized early resolution of these claims from the vast number of individuals and families injured by the events of 1990-1991, overwhelmingly people of limited means from developing countries. The early completion of virtually all of them fulfilled a fundamental goal of many who worked to create the UNCC in the early 1990s. About 2.5 million such claims received approximately \$8.4 billion,<sup>14</sup> an extraordinary although little noted achievement.

The 3260 remaining timely-filed claims include larger and more complicated claims of governments, international organizations and corporations. In these, the Commission has held more individualized and detailed proceedings, involving progressively greater participation by Iraq.<sup>15</sup> One cannot confidently predict their eventual outcomes from public information. Some published "guesstimates" suggest an eventual total of perhaps \$100 billion,<sup>16</sup> but it is not apparent that these involve much more than multiplying the \$350 billion initially claimed by rates of approval during the Commission's earlier years.

Such estimates may be high. The Commission's work on large claims appears to have been marked by substantial rigor and skepticism. The UNCC recently allowed only \$1.6 billion out of \$86.7 billion claimed by the Kuwait Investment Authority, finding that 98% of this huge claim for lost investment income was outside UNCC jurisdiction or did not involve compensable losses.<sup>17</sup> Professor Caron and Brian Morris indicate an approval rate for lost profits claims of just 10%.<sup>18</sup>

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<sup>14</sup> UNCC Press Release PR/2003/8 (17 July 2003), on UNCC website.

<sup>15</sup> See, e.g., UNCC Governing Council Decisions 114 (S/AC.26/Dec. 114, 7 December 2000) (providing for extensive Iraqi participation in oral and other proceedings in claims above \$1 billion), and 124 (S/SC.26/Dec.124, 19 June 2001), authorizing up to \$5 million in funding for Iraqi environmental experts. Both on UNCC website.

<sup>16</sup> Merritt B. Fox, "Imposing Liability for Losses from Aggressive War: An Economic Analysis of the UN Compensation Commission", 13 *EJIL* 201, 217 (2002). In January 2003, Barton and Crocker estimated Iraq's unpaid claims liability at \$199 billion, but they appear to have valued all unresolved claims at 100% of the principal amount claimed, thus greatly overstating the likely liability. Others have used similar estimates without explanation. "Should the new Iraq honour the financial obligations of the old regime?", *The Economist*, 17 May 2003 at 76.

<sup>17</sup> Stephanie Nebehay, "UN okays \$2.3 billion payout for Gulf War claims", Reuters Foundation AlertNet, 26 June 2003, at <<http://www.alertnet.org/thenews/newsdesk/L26180899.htm>> (visited 15 July 2003). This alone indicates that Barton and Crocker's estimate (apparently based on full face value of pending claims) was at least \$85 billion too high.

<sup>18</sup> Caron and Morris, *supra* note 10, at 194-196. Professor Caron is an experienced UNCC Commissioner; Morris is a member of the UNCC staff.

Writers have noted the poor quality of many claims filings and the rigor of the Commission's processes.<sup>19</sup> While the approval rate of individual claims has been about 60%, the rate for the generally much larger corporate claims is about 32%, while government claims have an approval rate of just 6%.<sup>20</sup> Most of the remaining claims are government claims.

The Commission's second task has been to provide the conduit for actually allocating available funds among claims scrutinized and approved through the UNCC process. As of July 2003, the Commission has actually paid out \$17.77 billion,<sup>21</sup> roughly 38% of the total approved. Throughout, the payment process has recognized that available funds, both at any given time and over the long run, are likely less than approved claims, requiring substantial efforts to develop fair procedures for allocating scarce funds.<sup>22</sup>

Payments have been made in several successive phases, each structured assuming that the total of approved claims at any given time would probably exceed available funds.<sup>23</sup> In phase one, all approved small individual and family claims received substantial payments. The principal amount of these claims was fully paid in phase two. In phase three, over \$9 billion was allocated among 7859 large government, corporate and international organization claims. In June 2003, recognizing its reduced income following SCR 1483, the Commission approved a new system of reduced payments.<sup>24</sup>

So we return to where we began. Whatever the future holds for funding to pay approved claims, I believe that the position suggested in 1992 is valid again today. The Commission should now promptly complete assessment of its remaining claims. All remaining claimants who desire the Commission's structured evaluation of their claims are no less entitled to have it than those coming before. This work, together with earlier assessments of claims not yet paid, will provide a compelling reference point in future claims negotiations between the next Government of Iraq and other governments and private firms concerned.

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<sup>19</sup> Nicholas C. Ulmer, "Claimant's Expectations from the United Nations Compensation Commission", 15 *J. Int'l Arbitration* 7, at 8, 11 (1998).

<sup>20</sup> Derived from "Status of Claims Processing", on UNCC Website (visited 18 Aug. 2003).

<sup>21</sup> UNCC Press Release PR/2003/8, *supra* note 14.

<sup>22</sup> See Merritt B. Fox, *supra* note 16, at 215.

<sup>23</sup> Press Release PR 2003/8, *supra* note 14, details these successive phases.

<sup>24</sup> UNCC Governing Council Decision 197, S/AC26/Dec.197 (26 June 2003), on UNCC website.

In this connection, it must be stressed that UNCC-approved claims reflect real injury caused by Iraq's misconduct as confirmed by a UN mechanism. The notion of wiping away some of Iraq's past public and commercial debts as "odious debts" enjoys considerable currency.<sup>25</sup> Its attraction partly lies in the premise that many loans or credits were freely extended to an odious regime for purposes inimical to Iraq's people, making it fair for creditors to bear losses resulting from their choice to deal with a despot. But claimants before the UNCC had no choice in the matter. They did not voluntarily extend credit or choose to be injured. There is no justice in denying them relief because of the moral failings of the regime that injured them. Further, their injuries are no less real because they happened a dozen or so years ago.

What then? Soon, perhaps not long after the Commission completes its assessments, there should be a repetition of a process that has occurred many times after great transformations in political affairs. There should be claims settlement negotiations, aimed at mutually agreed settlements between the new Iraq and governments and companies seeking to establish (or re-establish) political or economic relationships on a mutually acceptable basis.<sup>26</sup> Lump sum claims settlement agreements between governments offer a proven, powerful tool for accomplishing these ends, and have been used many times before.<sup>27</sup>

Here is where the UNCC's work can make a further contribution. The orderly marshalling and assessment of claims by national claims commissions has often laid the foundation for mutually agreed claims settlements.<sup>28</sup> For governments seeking to settle their own claims, or for those with domestic authority and inclination

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<sup>25</sup> See, e.g., <<http://www.odiousdebts.org>> (visited 28 July 2003) and sources there cited; James Surowiecki, "The Financial Page. A Clean Slate for Iraq", *The New Yorker*, 7 April 2003, at 37; "Paying for Saddam's Sins. Should the new Iraq honour the financial obligations of the old regime?", *The Economist*, 17 May 2003, at 76.

<sup>26</sup> Preliminaries for multilateral agreement to reschedule Iraq's public debts through the Paris Club process are already underway. In July 2003, Paris Club creditors identified total Iraqi public debt having a principal amount of about \$21 billion. The Paris Club's press release notes that creditors do not expect payments to resume before the end of 2004. Paris Club Press Release 10 July 2003, available at <<http://www.clubdeparis.org>> (visited 28 July 2003).

<sup>27</sup> See Richard Lillich and Burns Weston, *International Claims: Their Settlement by Lump Sum Agreements* (1975); Burns Weston, Richard Lillich and David Bederman, *International Claims: Their Settlement by Lump Sum Agreements 1975-1995* (1999).

<sup>28</sup> Richard Lillich, *International Claims: Their Adjudication by National Commissions* (1962).

to settle their nationals' claims, the UNCC's unpaid awards should play a role at the very least equal to that played by assessments by national commissions. Indeed, the rigorous multinational process leading to the UNCC's awards should give them greater authority than the work of a national commission.

The UNCC was not an exclusive remedy.<sup>29</sup> Claimants who feel inadequately protected through such negotiations can pursue litigation or, if there is an appropriate agreement, arbitration, and the UNCC's assessments could be of value here as well. (However, the passage of time and Paragraph 22 of SC Resolution 1483 have impaired prospects for self-help action. Paragraph 22 shields Iraq's oil and its proceeds from legal proceedings and attachments until December 2007.)

Iraq's future integration into the world economy and world financial markets will be far better served by the orderly process of negotiation and agreement urged here than by unilateral repudiation of obligations stemming from actions of the previous odious regime. This result would also strengthen the rule of law. Some losses would almost certainly go uncompensated, but decisions regarding allocations of loss would be consciously made by authorized decision makers through a law-based process of negotiation and mutual accommodation.

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<sup>29</sup> See Ulmer, *supra* note 19, at 12-13.

## United Nations: Time for a New “Inquiry”?

MICHAEL J. GLENNON\*

In the best of times it is no easy task for American foreign policy-makers to look into the world of the future, anticipate its wants and needs, and think through a robust and coherent vision of America's role in it. Beset by an unending stream of “front-burner” crises, most are forced by the press of daily events to push long-range planning to the back-burner. The system encourages deferral just as it discourages re-thinking. Noisy constituencies react to today's headlines and expect policy-makers to do the same. Most of those constituencies push to maintain the status quo. Little wonder, then, that the substance of the “new world order” – and its meaning for the United States – remains as vague and undefined as when the first President Bush first uttered those words thirteen years ago.

It's too bad, because as the UN General Assembly convened on September 16, the rest of the world may have been getting ready to move – with or without the United States. In an extraordinary press conference on July 30, UN Secretary General Kofi Annan warned that “we are living through a crisis of the international system.” We must, he said, “ask ourselves whether the institutions and methods we are accustomed to are really adequate to deal with all the stresses of the last couple of years.” Perhaps “they are in need of radical reform.” Annan's remarks reflected a growing sense among Security Council members that things are amiss. The *Financial Times* had earlier reported a growing “behind-the-scenes debate on the UN's future.” “An increasing number of diplomats are asking,” it said on July 10, “whether it is not time for the UN to stop fooling itself, and admit the old way of doing things must be overhauled.” These concerns extend beyond the structure of the United Nations alone: the whole network of alliances, rules and institutions that dominated life in the 20th century seems suddenly outdated.

This is not the first time that the United States has risked being caught short in the rush of history. Indeed, today's “old world order” was itself once new, having emerged from the bloodiest conflict in history, which confronted another President who had been elected without knowledge or experience in foreign affairs. That global system was shaped by the United States only when it became clear that other powers were rushing to take the lead. The American response was the gov-

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ernment's first real Manhattan Project – directed not at developing an atomic bomb but at devising a new world order. The object and methods of that initiative are instructive.

The year was 1917. The President was Woodrow Wilson. Elected President from a governorship, Wilson was by inclination and training ill prepared to lead the United States in its first European war – or in the making of the peace, which required detailed knowledge of a world far off and little known to Americans. Yet if this was truly to be a “war to end all wars,” as Wilson had promised the American people, he would need comprehensive plans to turn his rhetoric into reality. And he would need them quickly: Felix Frankfurter, then in Paris as a special assistant to the Secretary of War, warned Secretary of State Robert Lansing that “France was at work, through committees, in preparation” for the diplomatic turmoil that all knew would follow the war. “We should equip ourselves with like knowledge,” he advised, or the French would dominate the process. Full-time officials in the State and War departments, however, were consumed with the war; a young Allen Dulles, attached to the American Legation in Berne, Switzerland, complained that he and his colleagues had little time to study the problems that they knew would have to be addressed when the war ended. “[W]e are barely able to keep up with political developments in Germany ...,” Dulles wrote Lansing. Some sort of “outreach” program was clearly called for – long before the concept became accepted.

While the war still raged, Wilson acted. In September, 1917, only four months after the United States had entered the war, Wilson established what would become known as the “Inquiry.” The Inquiry was a group of advisers assembled to prepare American diplomats for what all knew would be a critical post-war peace conference.<sup>1</sup> In so doing it would be necessary to address the myriad issues, large and small, from arms control to economics to the implications of self-determination, which when resolved would yield a new global system.

The Inquiry was assembled under the direction of Wilson's trusted adviser, Col. Edward M. House. The group consisted of about 150 academicians and a smaller paid staff. Its participants and advisers were both Democrats and Republicans, though all were selected with an eye to their general agreement with the President's program and ideas. Some were, or would later become, household names in American arts and letters, including Walter Lippmann, Samuel Eliot Morison, Edward

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<sup>1</sup> L.E. Gelfand, *The Inquiry: American Preparations for Peace, 1917-1919*, Westport, CT, Greenwood Press, 1976. Reprint of the edn. published by Yale University Press, New Haven, CT.

S. Corwin, and Frederick Jackson Turner. Its panels and committees met behind closed doors, and its existence was never publicized. By the time the Inquiry's work wound up in January, 1919, it had produced 1,200 maps and over 2,000 reports. Its influence was enormous: Wilson drew heavily on its research and recommendations in formulating his famous Fourteen Points, including the grand-finale fourteenth point, the League of Nations. It is no exaggeration to say that the Inquiry provided the intellectual blueprint for the 20th century's New World Order.

Yet many of the cracks that have developed in that order can be traced to weaknesses in the Inquiry's structure and work. Wilson, ever the professor, conceived of the project primarily as a scholarly exercise. Its head was Sidney E. Mezes, a professor of religion and philosophy and president of the City College of New York, who had no relevant international experience. (Mezes was also House's brother-in-law.) Virtually no military or business experts or seasoned diplomats were included. Too much of the Inquiry's work product was academically interesting but, for purposes of practical diplomacy, irrelevant. Many of its participants were experts on ancient civilizations and the classics; the group was top-heavy with political scientists (especially experts on American history and government), social theorists, economists, and international law scholars from elite East Coast universities who had little knowledge of the real world across the oceans, which often seemed exotic to its members. A good number lacked relevant credentials for the studies they undertook. "You know one Mohammedan from another" was the reason given one member for his inclusion in the group. One prominent adviser to the British foreign office, Norman Angell, cautioned House that it could be a "fatal handicap" if the Inquiry were "dominated by lawyers whose reputation is based on their knowledge of the old rules." Angell's advice went largely unheeded.

It may be, of course, that there need be no rush to undertake an Inquiry-like review of where the world is going and how the United States should fit into it. Talk notwithstanding, it is possible that the United Nations won't get a reformist act together any time soon. Amendments to the UN Charter require the approval of two-thirds of all UN members, including all permanent five members of the Security Council. The Charter has been amended only once. It provides for a review conference which was to be held not more than ten years after its founding, subject to members' approval. No such conference was ever held.

Still, it requires an Ostrich-like detachment from reality to fail to appreciate the need for reform. A fundamental transformation in the international order has occurred since the founding of the United Nations in 1945 – and the 1919 League of Nations Covenant on which much of the Charter is based. Colonies have been freed and over 160 new states have been born. Weapons of mass destruction have appeared along with terrorist groups able and willing to use them. One nation has

emerged with greater military power than almost all others combined. Many of the premises on which the old system order was founded no longer apply. Is it any wonder that the Secretary General of the United Nations should have to ask, as Annan did at his press conference, “What are the rules?” The 21st century planet is saddled with the outmoded institutions of a bygone era that have left faded signposts for the present.

We’ve learned a lot about international organizations, and their possibilities and limits, since members of the Inquiry first pondered “international” versus “super-national” bodies. We know that their approval can provide legitimacy to acts of individual states that otherwise could prove politically difficult to carry out. We know that, for that very reason, some states – powerful states in particular – resist getting hooked on international organizations, for fear that the legitimacy they add will become addictive, ultimately narrowing states’ latitude for unilateral action. We’ve learned that power bends law like gravity bends light, providing a disincentive for strong states to subject themselves to rules that bind weaker ones. We’ve learned that a consensus on fundamental values is essential for the operation of all rules. And we’ve learned that some types of international rules work better than others in regulating state conduct – that rules touching upon core security concerns, for example, are less effective than those that govern inter-state transportation, communication and trade, because shared values are thinner when it comes to nerve-center issues of state survival. We’ve learned, in short, that international institutions that work best are based on the world as it is, not the world as we would like it to be.

Perhaps such lessons cannot soon be put into practice. Influential international constituencies continue to take psychic satisfaction in supporting institutions that are spiritually attractive but diplomatically feckless; the forces defending the old order are every bit as protective of their vested prerogatives as they were in 1919. There are times in the world of diplomacy when the outlines of a solution become visible but no one can find a way to get there. It may be that humanity cannot find a way to give up its illusions and move without sentiment and emotion to formulate new institutions, or reformulate old ones, grounded on pragmatic realism.

But that is no reason that the United States should not make its vision clear on how it would like the new world order to look. The successes of the Inquiry suggest one way to formulate such a vision. Its failures suggest many ways that such an approach can be improved. Whatever its organizational or administrative shape, it may well be time to consider a new Manhattan Project that gives the United States – and perhaps the world – the diplomatic framework it needs for the 21<sup>st</sup> century.

No one can be sure where a modern inquiry would lead. One possibility would be a community of democracies. Another would be to build out existing institu-

tions, such as NATO, to fill the juridical vacuum. Yet another would be to beef up regional organizations. Perhaps the United Nations structure is somehow reformable, though given the impediments to change, that seems unlikely. It is conceivable that "benign neglect" would be the most productive course: perhaps *ad hoc* coalitions of the willing, left to develop spontaneously, could reify into a more cooperative international order. Whatever course ultimately commends itself to policy-makers, it is clear that a variety of possible options warrant serious, purposeful attention.

As Lippmann warned Wilson, it is possible to win the war and lose the peace. We lost once before even though we prepared for the peace. Let's not lose again because we failed to prepare.

## Conference Scene / Le tour des conférences

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### International Law Seminar in The Hague: Resolution of Cultural Property Disputes, 23 May 2003

HANNES HARTUNG\*

Even decades after World War II has ended, the phenomenon of that period, and holocaust-looted art still deeply upsets many people around the globe. The enormous scale of art looted from Jews, and other private and state property plundered by the Nazis in the occupied zones is well-documented and common knowledge. The vast transfer of German cultural property (so-called *Beutekunst*) out of Germany to the former Soviet Union as a result of ruthless pillaging should not be forgotten either.

The experience of litigation before public courts has shown that there is a reasonable need for alternative dispute resolution mechanisms to obviate the need for drawn-out cases. Such court cases tend to be protracted with (largely) innocent parties on both sides endeavouring to cope with very specific problems created by the focus, ranging between public and private international law. In addition to this, well known legal issues such as the time bar imposed on a claim, acquisitive prescription and *bona fide* purchase are not to easy to deal with against a backdrop of war crimes and crimes against humanity.

For this reason, the international law seminar “Resolution of Cultural Disputes”, held at the Permanent Court of Arbitration in The Hague on 23 May 2003, discussed new perspectives for the restitution of World War II and holocaust-looted art by means of alternative dispute resolution methods, in particular arbitration. It has to be mentioned straightaway that the program of this seminar failed to concentrate sufficiently on arbitration issues. In fact only two presentations dealt with it directly.

The chairman of the PCA, Tjaco van den Hout, welcomed the participants who came from all parts of the globe and introduced Lyndel V. Prott, former director of the UNESCO Division of Cultural Heritage. She gave a special presentation on “Looting in Iraq: The Legal Remedies”. The systematic plundering of museums

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in Iraq bore witness to yet another chapter in the history of looting. It is hard to accept that although the Hague Convention of 1954 and the Protocols of 1999 are quite clear and well-defined, neither the United States nor the United Kingdom have ratified it. Iraq has been a party to the Hague Convention since 1967. The world heritage of the early Mesopotamian civilizations is under grave threat. At the same time, not all western civilizations seem to apply all the remedies necessary in order to protect this unique cultural property, and what can, at the very least, be considered to be the common heritage of mankind.

What are the dogmatic differences between restitution, repatriation and return? In his general observations, Professor Wojciech Kowalski, from the University of Silesia, introduced the audience to the relationship between factual background and legal concepts. Whilst *restitution* as a term of public international law reverses the effects of looting, *repatriation* represents the close connection (correlation) with an ethnic group as part of the territorial affiliations of cultural property. Moreover, cultural property that was illegally exported from former colonies was not transferred against a backdrop of war and persecution, therefore it should be *returned* too.

Session I was designed to provide new insights into provenance research, a new academic discipline, the purpose of which is to trace the entire pedigree of a work of art, based on an extensive knowledge of art and history with the objective of creating factual grounds for an appropriate answer in legal terms. The session was hosted by Michael Salzman, partner at Hughes Hubbard and Reed in New York. The Senior Director of Sothebys, Lucian Simmons, explained the significance of provenance for an auctioneer, the difficulties in establishing provenance, the scale of displacement and Sotheby's response to provenance issues and possible initiatives. Subsequently, Nancy H. Yeide, Head of the Department of Curatorial Records of the National Gallery of Art in Washington DC referred to several restitution cases which illustrated provenance research in US museums – provenance research was in fact first developed in the United States. As a reaction to the Schiele cases in New York, the AAM and AAMD recommended the review of existing collections to identify any unlawful appropriation during the Nazi era without subsequent restitution.

The afternoon was dedicated to art looted during World War II and legal issues associated with restitution. This was to be rounded off with a discussion about dispute settlement mechanisms relating to cultural property.

Laurie Stein, Vice President & Midwest Director of Christie's USA chaired Session II. It began with a presentation of Lyndel Prott on the response to World

War II looting. A mere 20 minutes were insufficient to do full justice to the most important facts in this issue. In spite of this, the survey presented gave an impressive response to all the “patchy” historical and legal streams of art looted during World War II. In disputes in which emotional and sensitive issues run deep, binding principles resolving the complexity of problems between public and private international law are virtually impossible to enforce, but they are necessary nevertheless. Constance Lowenthal, former Director of the Commission for Art Recovery, reported on the practical difficulties arising in cases of restitution, especially those related to holocaust-looted art. Unfortunately she was forced to pass the remark that in many places in Europe, *e.g.* in museums in Eastern Germany, cooperation with a claimant is still not as good as it could be. Furthermore, she pointed out that she still felt uncomfortable with the legal situation surrounded by factual obstacles, and she provided a few telling examples. The well-known provenance researcher Konstantin Akinsha pointed out that the registries of art looted during World War II were still not working efficiently enough, because there was still no central registry. Since all the countless internet databases have still not been amalgamated to create a single comprehensive metasearch machine, whether legal questions such as due diligence have been dealt with is largely a matter of chance, depending on the fact whether you do your research in the “right” database and in the one in which the lost masterpiece might be found.

Session III followed, moderated by Michael Salzman.

Michael Carl, partner at Eversheds, London, shed light on the murky area of the conflict of law rules concerning ownership and statutes of limitation. The standard rule is the well established *lex rei sitae*. Its legal consequences are not appropriate when someone devalues it by forum shopping and hopping. Thus, new perspectives such as the *lex origio* have to be considered. Michael Carl concluded that a special protection of cultural property by the remedy of exclusion such as *res extra commercium* might ameliorate the current situation, although it is obvious that a proper definition of cultural property is not easy to make.

A claimant’s position is only strong when supported with facts to prove his case. Hans Das of the Catholic University of Leuven described the challenges concerning the administration of evidence due to the war, the long lapse of time since the war, lack of continuous and comprehensive records and the high cost of research through sources in search of evidence. These are all conditions which mean that evidence is difficult to acquire and is consequently patchy. He compared the burden of proof in cultural property disputes with analogous procedures (*e.g.* The United Nations Compensation Commission UNCC, the Claims Resolution Tribunal for Dormant Accounts CRT I, the Commission for Real Property Claims

CRPC and the German Forced Labour Compensation Programme GFLCP). He underlined the fact that strict *probatio diabolica* is being relaxed in these procedures by the preponderance of *prima facie* evidence. It should be emphasized that the German redress rules such as the *Bundesrückerstattungsgesetz* stipulate a primary presumption that cultural property of Jewish origin was unlawfully misappropriated. The so-called *freiwillige Selbstverpflichtung* (willingly self-binding principles) applicable in Germany from 1999 onwards, which makes the principles of the *Bundesrückerstattungsgesetz* applicable again asks all public museums to verify acquisitions made from 1933 to 1945 and to prove that the cultural property was sold voluntarily under normal circumstances excluding persecution.

The omnipresent question of good faith in the purchase of cultural property was portrayed by Marc-André Renold, attorney with Barreau in Geneva. He outlined the significance of good and bad faith in comparative law, referred to their definitions under statutes of Swiss and French civil law, analysed the 1995 UNIDROIT convention and from this he derived the legal consequences. Helped by the court decision dealing with the due diligence of an art dealer in France (dealing with a painting by Franz Hals), it can be said that the standards of due diligence required based on the personal experience of a buyer or seller confronted with the circumstances of war and persecution represented by the value of a work of art are becoming higher. The presumption of good faith is about to become irrelevant.

In Session IV, Professor Norman Palmer from the University of London weighed up the question: litigation, is it the best remedy? He reported from his own experience that litigation is not the most appropriate procedural remedy to meet the challenges of finding a just and fair solution within a reasonable time-span. Using many examples, he identified the need for arbitration by showing the typical factors found in a trial before a public court, such as the necessary professional background of a judge in respect of international art law issues, the typical behavioural patterns of the parties being confronted with such issues before a public court, the long lapse of time before a decision is reached, and finally the manifest urgency to act now because of the advanced age of the last witnesses still waiting for justice. The potential for arbitration was then balanced by Owen C. Pell, partner at White & Case in New York City. He postulated the establishment of a Specialised International Arbitral Tribunal that could take advantage of existing international law. Bringing such a tribunal to life, Pell outlined the prime conditions which would have to be fulfilled in the process of establishment, such as the necessary qualification of the members of the tribunal, the dollar limits on jurisdiction over at least \$ 250,000, the binding nature of its authority and, last but not least, the limit on protection for *bona fide* purchasers as developed from the system of laches.

Finally, Teresa Giovannini, from Lalive & Partners in Geneva, gave her closing comments.

The seminar did not refer to arbitration issues and its related issues to the extent originally intended. The success of any arbitration depends on specific circumstances which tend to be found in holocaust-looted art disputes rather than in the *Beutekunst* debate. In these procedures it is important that fair solutions are enforced within a reasonable time-span due to the advanced age of claimants. But arbitration can only lead to fair solutions when it is carried out on appropriate legal grounds in substantive and procedural law. In this respect a distinction has to be made between the nature of parties resorting to arbitration, since it only works efficiently between individuals. In disputes dealing with the restitution of art looted during World War II in the forum of public international law, nation states hardly seem to recognize arbitration. This can be seen by the fact that neither Russia nor Germany has signed the preliminary injunction under the jurisdiction of the Permanent Court of Justice. A more detailed discussion about the advantages of arbitration and mediation in respect of the restitution of holocaust-looted art would have mentioned the need for these alternative dispute resolution mechanisms as a prepared ground for remembrance, reconciliation and redress. The powerful advantage of arbitration is the option for customising the dispute and to give the parties the right to create their own forum where, not subject to the demands of law, non-binding principles (soft law) reflecting the moral and personal aspects can be emphasized.

To conclude, the legal treatment of restitution is still dependant on the law in force at the place where looted art is found. Consequently, the outcome of a cultural property dispute often depends on the “generosity” of a particular system of law for redress respecting the legal instruments reviewed during the seminar. While it is an established fact that much work has been done in this field, more work still has to be done in order to collate divergent laws into one binding legal framework for restitution.<sup>1</sup> The law was not designed to deal with civil actions brought as a result of (cultural) genocide and crimes against humanity before a public court. Here, arbitration has the capacity to deliver a much more flexible mechanism.

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<sup>1</sup> See Hartung, “Holocaust and Art Looted during World War II Arbitrated between Great Dreams and Reality”, Peace Palace Papers 2003 (in print).

## The Growing Impact of Non-State Actors on the International and European Legal System

ANGELA M. BANKS\*

In 1995, the world witnessed the creation of the World Trade Organization, (“WTO”).<sup>1</sup> This international organization would assume an important role in the regulation of international trade and would influence domestic economic and social policies. As an inter-governmental organization, states are the main decision makers within the WTO; however, in 1996 the organization recognized that non-governmental organizations can play an important role in educating the public about the WTO.<sup>2</sup> To facilitate this role and increase the organization’s transparency, the WTO allows non-governmental organizations to attend Ministerial Conferences, participate in issue-specific symposia, and submit issue papers to the WTO Secretariat. Despite limited access to formal decision-making channels within the WTO, non-governmental organizations and other non-state actors have been involved in increasing public awareness about the effect WTO decisions have on the lives of individuals throughout the world. Facilitating transparency and building awareness are two of the many ways in which non-state actors are playing a progressively more important role in the development of international law and the regulation of international affairs. Participants at the 2003 Hague Joint Conference on Contemporary Issues of International Law had the opportunity to explore the details of this expanding role and its implications. The conference was organized around the theme “From Government to Governance? The Growing Impact of Non-State Actors on the International and European Legal System.”<sup>3</sup>

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<sup>1</sup> The World Trade Organization was created by the Uruguay Round of trade negotiations that were concluded in 1994 and it was established 1 January 1995. See Marrakesh Agreement Establishing The World Trade Organization, Annex 1A, Legal Instruments-Results of the Uruguay Round vol. 1, 33 I.L.M. 1154 (1994); Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments-Results of the Uruguay Round vol. 1, 33 I.L.M. at 1125.

<sup>2</sup> World Trade Organization, *Guidelines for arrangements on relations with Non-Governmental Organizations*, WT/L/162 (23 July 1996), available at [http://www.wto.org/english/forums\\_e/ngo\\_e/guide\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/guide_e.htm) (last visited 5 Aug. 2003) (“Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs.”).

<sup>3</sup> The conference took place 3-5 July 2003 in The Hague, Netherlands.

Three types of non-state actors were the focus of the conference: inter-governmental organizations (“IGOs”),<sup>4</sup> non-governmental organizations (“NGOs”), and multinational corporations. The panel discussions were organized around three topics: the status and role of IGOs and NGOs in international lawmaking and implementation; the role of multinational corporations in the development of corporate governing principles; and responding to international terrorism at the international and European level. This paper provides an overview of conference events that focused on the first two themes, with a special emphasis on the importance of non-state actor accountability.

Rather than declaring the end of the nation-state as a significant entity in international affairs, conference participants examined the non-state actor phenomenon as one developing “parallel to the traditional state model” and noting that “states remain the primary subjects in the international and European legal systems.”<sup>5</sup> Despite the continued importance of states, a recurring point at the conference was that states are no longer the sole actors within the international and European legal systems.

The keynote addresses by Judge Pieter H. Kooijmans of the International Court of Justice (“ICJ”), expounded on the conference theme by explaining the ways in which the role of non-state actors is changing, and the significance of these changes. Judge Kooijmans remarked on the existence of non-state actors in traditional international law venues making specific reference to the role of human rights NGOs in *Certain Criminal Proceedings in France*,<sup>6</sup> a case currently before the ICJ. On 5 December 2001, various human rights organizations filed a complaint in a French court alleging that the President of the Republic of the Congo, Mr. Denis Sassou Nguesso, the Minister of the Interior, General Pierre Oba, and other government officials committed crimes against humanity and torture in the Congo against individuals of Congolese nationality. An investigation was initiated in France and

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<sup>4</sup> While inter-governmental organizations are comprised of states, and could therefore be seen as state actors, such organizations have an independent existence and limited international personality. See “Wrap Up: Non-State Actors and Their Influence on International Law”, 92 *ASIL Proc.* 380, 386 (1998) (remarks by Virginia Leary). These factors make it appropriate to consider international organizations as non-state actors.

<sup>5</sup> Hague Joint Conference on Contemporary Issues of International Law 2003 – From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal Systems Program at 2, available at <http://www.asil.org/HagueJcfinal.pdf> (last visited 12 Aug. 2003).

<sup>6</sup> *Certain Criminal Proceedings in France (Rep. of the Congo v. Fr.)*, available at <http://www.icj-cij.org/icjwww/idocket/icof/icofframe.htm> (last visited 8 Aug. 2003).

the Congo has requested the ICJ to annul the investigations and prosecution measures taken by French judicial authorities. While the ICJ will not address the merits of the crimes against humanity and torture allegations, it is faced with determining the appropriate limits of a state's criminal jurisdiction for acts committed outside of the state's territory. The fact that this issue is currently before the ICJ is due in large part to the actions of human rights NGOs, which exemplifies one way in which non-state actors can be relevant in the creation of international law.

International organizations also generate soft law that often hardens. Judge Charles N. Brower of the Iran-United States Claims Tribunal detailed the ways in which international organizations have developed international commercial legal principles that are utilized by parties, courts, and arbitrators. The United Nations Commission on International Law has created model laws on topics such as international commercial arbitration, cross-border insolvency, and international commercial conciliation, and has drafted numerous treaties. Judge Brower also discussed the work of the International Institute for the Unification of Private Law and the development of the Principles of International Commercial Contract, which are "concrete, accessible and pragmatic" principles that are utilized in commercial litigation and arbitration.<sup>7</sup>

Not only are non-state actors instrumental in generating soft law, but they can also be influential in accelerating the political process to motivate states to create hard law, as noted by Judge Shi Jiuyong, President of the ICJ, in his closing remarks. This can be done through lobbying efforts, informational campaigns, and coordinating action among various organizations and segments of society.<sup>8</sup> International organizations also make it easier to conclude multilateral agreements. Professor José A. Alvarez, Professor of Law at Columbia University, stated that international organizations increase the options for initiating treaties, which creates an alternative to the state-initiated and state-coordinated conference system. This alternative requires states to invest less diplomatic and other resources, expands the diversity of actors involved, and increases the amount of information available to treaty initiators.<sup>9</sup>

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<sup>7</sup> Charles N. Brower, "The Interaction of International Organizations and Arbitral Tribunals in the Development of Transnational Commercial Law", Address before the Hague Joint Conference on Contemporary Issues of International Law 2003 (3 July 2003) (on file with author).

<sup>8</sup> Cf. Harold Hongju Koh, "A World Drowning in Guns", 71 *Fordham L. Rev.* 2333, 2342-2343 (2003).

<sup>9</sup> See also Jose E. Alvarez, "The New Treaty Makers", 25 *B.C. Int'l & Comp. L. Rev.* 213, 223-232 (2002).

In addition to presentations about the role of non-state actors in generating soft law and facilitating the creation of hard law, conference participants also discussed non-state actors' participation in international negotiations. While such negotiations are generally conducted by states, non-state actors are playing a variety of influential roles. Pieter-Jan Kuijper, from the Legal Service of the European Commission ("Commission"), discussed the role of the Commission in the negotiations for the World Health Organization Framework Convention on Tobacco Control. This framework establishes international rules on smoking prevention and treatment, advertising, labeling, illicit trade, taxation, and product regulation.<sup>10</sup> The Commission was responsible for conducting negotiations in the areas that are within the European Community's competence and the Presidency coordinated member-state positions for issues within national sovereignty. To execute these duties, Mr. Kuijper explained that the Commission had observer status and negotiated "in the margins" by, for example, lobbying other states, coordinating member-state activity, and advising the Presidency to state the Commission's position. NGOs were also active in the negotiations for the Rome Treaty creating the International Criminal Court, although in a different manner. Rolf Einar Fife, who served as Chairman of the Working Group on the First Year Budget in the United Nations Preparatory Commission for the International Criminal Court, noted that states played the key role in the Rome negotiations, but explained that NGOs as representatives of civil society worked to hold states accountable. This was done by providing states with information, asking the hard questions, and facilitating transparency. States made the ultimate decisions, but once those decisions were made NGOs disseminated information, which prompted discussions thus continuing the information cycle between states and international civil society.

One of the main reasons non-state actors are significant is because they often represent interests different than those of state actors and they are primarily accountable to different people, a point made by Judge Kooijmans. The representation of different interests can be an important factor in reducing the perceived democratic deficit operating in the development of international law and regulation of international affairs; however, it is not the only factor.<sup>11</sup> Just as states, which are responsible for representing the national interests, are subject to capture, so too are non-state actors. As Professor Alvarez noted, international organizations face

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<sup>10</sup> See World Health Organization, "Twenty-eight countries and the European Community sign tobacco treaty at first opportunity" (16 June 2003), available at <http://www.who.int/mediacentre/releases/2003/pr49/en> (last visited 12 Aug. 2003).

<sup>11</sup> See "The FP Interview: Lori's War", *Foreign Policy*, Spring 2000, at 36-37.

this threat from hegemonic states. He noted that international organizations replicate patriarchy and fail to promote women's issues or gender equality, have been enablers of the "Washington Consensus," and favour economic rights over social values. While non-state actors have called for increased state accountability in matters relating to international affairs, it is also important that non-state actors adopt methods of good governance, particularly as related to accountability.<sup>12</sup>

Non-state actors often do not have accountability mechanisms within their own organizations similar to those they require of states. One member of the audience at the panel entitled "Review of application of principle of good governance by international organizations in practice" highlighted this hypocrisy in the context of United Nations Interim Administrations, which was the subject of presentations by Christa Meindersma, Political Officer for Security Issues with the United Nations Mission for Support in East Timor, and Ralph Wilde, Lecturer in Law at University College London. As the United Nations ("UN") undertakes the administration of territories that, for a variety of reasons, face an administrative vacuum, the organization is facing increasing criticism regarding its accountability to the inhabitants of the areas it governs. The interim administrations are given absolute powers to govern the relevant territory. The executive, legislative, and judicial functions are consolidated in one entity, causing the UN interim administrations to govern in an autocratic manner.<sup>13</sup> Both Ms. Meindersma and Mr. Wilde acknowledged this problem in discussing the limited or nonexistent means for local inhabitants to register complaints against UN interim administration officials.<sup>14</sup> The paradox noted by the speakers is that when a UN interim administration is preparing a territory for self-rule, like East Timor, it provides a model that would be deemed unacceptable by the international community if adopted by the independent state.

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<sup>12</sup> See, e.g., Joseph S. Nye, Jr., "Globalization's Democratic Deficit: How to Make International Institutions More Accountable", *Foreign Affairs*, July-Aug. 2001, at 2 (2001) (stating that increased transparency is essential in establishing better accountability for international organizations, that NGOs play an important role in creating transparency, and that transparency is equally important for NGOs).

<sup>13</sup> See Ralph Wilde, "Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor", 7 *ILSA J. Int'l & Comp. L* 455, 458 (2001) (quoting Sergio Vierra de Mello, *How Not to Run a Country: Lessons from Kosovo and East Timor* (2000)).

<sup>14</sup> In 2000, an Ombudsman position was created with the power to investigate complaints regarding the abuse of authority by the interim administration or any emerging local or central institutions. A proposal for a similar position in East Timor was drafted but never adopted. See Wilde, 7 *ILSA J. Int'l & Comp. L* at 456.

Another area of accountability addressed at the conference was corporate liability for human rights violations, including aiding and abetting and conspiracy liability. Pieter H.F. Bekker, Counsel in the arbitration group at White and Case, argued that “aiding and abetting or conspiracy liability of private companies has not been universally accepted as a discrete violation of international law and is, therefore, not part of the contemporary body of general international law.”<sup>15</sup> This thesis was vigorously contested by Harold Koh, Professor of International Law at Yale Law School, who concluded his remarks by encouraging the audience not to “bend it like Bekker” – a play on the title of a popular film. Professor Koh stated that private corporations can be liable for human rights violations under international law. Despite Dr. Bekker’s distinction between legal liability and moral responsibility, Professor Koh argued that it is a myth that domestic litigation is a bad way to inspire better behavior. While treaties are another means of addressing corporate liability for human rights abuses, that is not the only way to deal with the issue. André Nollkaemper, Professor of Public International Law and Director of the Amsterdam Center for International Law at the University of Amsterdam, echoed Professor Koh’s point, stating that it was unlikely that adequate treaty commitments could be obtained. He suggested that the creation of international non-binding norms was the way forward.

The 2003 Hague Joint Conference on Contemporary Issues of International Law was a forum in which the specific ways in which non-state actors are operating within international law and international affairs was discussed in addition to the related benefits and challenges. One of the most salient challenges is the accountability of non-state actors because of the growing concern about a democracy deficit in international decision making. Conference participants tackled this issue providing information on best practices and ideas for future efforts. Not only should non-state actors be concerned about accountability within their organizations, but they should also focus on accountability to their stakeholders – those whose interests are directly effected by the organization’s actions.<sup>16</sup> This point was highlighted

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<sup>15</sup> Pieter H.F. Bekker, “Corporate Aiding & Abetting and Conspiracy Liability Under International Law”, Address before the Hague Joint Conference on Contemporary Issues of International Law 2003 (3 July 2003) (on file with author).

<sup>16</sup> See, e.g., G. Richard Shell, “Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization”, 44 *Duke L.J.* 829 (1995) (advocating a trade stakeholder model for WTO participation that includes those with a stake in international trade policy. Not just states and those representing commercial interests, but also those advancing noncommercial interests related to, for example, the poor, environmentalists, consumers, and labour).

during the discussion on UN interim administrations. As the world becomes increasingly integrated, international organizations that previously focused on narrow technical issues now find their decisions affecting a wider range of technical issues and broader social issues. As a result of this widening sphere of influence, it is critical that stakeholders have access to the relevant non-state actors and the means to hold them accountable.

## The Bookshelf / La bibliothèque

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### Of Christopher Pinto\*

#### The Neptune Effect

I remember being told how my great-grandfather, an amateur astrologer well known in his circle for the reliability of his predictions, had abandoned his hobby and thrown away his books on the subject when the planet Neptune was discovered in 1856. He was quite unable to comprehend how insights and predictions drawn from meticulous calculations based on the movement of seven planets could have had any validity when, in fact, there had been all the time an eighth planet of no less significance orbiting the sun. One may only guess at his reaction, had he lived, to the discovery of Pluto in 1930. Some, of course, continue to believe in the influence of the planets on our lives, merely factoring in new planetary information in the expectation that it would refine the quality of their conclusions. He did not share that view, and so turned his attention to other pursuits.

In the spring of 1994 I experienced something of the bewilderment that must have affected my ancestor when he encountered the planet Neptune. The outcome was significant as far as my Bookshelf was concerned. In 1956, when I began to learn public international law, I was introduced to Professor Eagleton's *International Government*, a book that remains for me a guide and valued resource. The work as a whole, and particularly chapter 8, entitled "International Legislation", presented a record of linear progress in the development of participatory techniques in the making of law governing the relations between States. Indeed, most standard works on international law appeared to do the same. The underlying thought seemed to be that, in a world of States each possessing relative freedom to act – as in a world of humans similarly endowed – taking part in the formulation of a binding norm facilitates its internalization and ultimately promotes, at least in a socially oriented majority, the will to comply with it.

For modern times, a frequent starting point for that development is the Congress of Vienna of 1815, when the victors in the wars against Napoleon invited a number of European States to endorse their decisions on several basic legal principles. But, as C.K. Webster observed:

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“... the Congress of Vienna as a congress of all Europe was never constituted. It remained a Congress of the great Powers who for their convenience had summoned the smaller Powers of Europe to meet them. The idea of a constituent assembly, imagined by some ... was found to be impossible. The large number of small States made such an assembly impracticable in any case. But the wishes of the masters of Europe were from the first clear and unbending on this point. They considered themselves as ‘Europe’, and at the congress they asserted successfully the ascendancy of the Great Powers. The smaller States were only to be admitted at such terms as suited those who had great resources and armies at their command.” (*The Congress of Vienna 1814-1815 (1919)*, p.77.)

As to conferences in the twentieth century, some 24 States took part in The Hague Peace Conference of 1899, and some 47 States attended its sequel in 1907. While the great majority were from Europe and North America, a few Latin American States attended in 1907. There were even four States from Asia, but none from Africa. There were 27 original Members of the League of Nations, and 13 other States were “invited to join”, and in conferences convened in the aftermath of World War I, participation was somewhat broader than before. The process of codification of international law, begun in private associations like the *Institut de Droit International* and the *International Law Association*, came to be sponsored at the inter-State level with the establishment, by the Council of the League of Nations, of the Committee of Experts for the Gradual and Progressive Codification of International Law. General acceptance of the notion of the juridical equality of States, whether great or small, meant that their preferences were counted at plenipotentiary conferences. Voting took place on a one-State-one-vote basis, but unanimity was required for the adoption of a proposal.

Major developments in the participatory process came at the end of World War II with the creation of the United Nations and the rapid increase in the number of sovereign States with opinions on legal issues seeking the right to express them. The International Law Commission was established, and the practice developed of convening “universal” plenipotentiary conferences on legal issues under the auspices of the United Nations, sometimes styled “law-making”, or, more accurately, “treaty-making” conferences. The first of them, in 1958, was attended by some 86 States. It dealt with the Law of the Sea and was adopted as the basis for its deliberations the meticulous preparatory studies carried out by the International Law Commission. It did not apply the unanimity rule, but took decisions on the basis of specified pluralities of votes. Since then, many, but not all, such conferences have followed that careful practice. One of the most significant and acclaimed Conferences in the series, the UN Conference on the Law of Treaties (1968/9), took as its “basic” text (*i.e.*, a text that would stand unless changed by a prescribed majority of

votes) the product of nearly two decades of consideration by the International Law Commission. Significantly, that Conference, which was attended by some 110 States and produced the “treaty on treaties”, also took decisions in accordance with prescribed majorities. It seemed that unanimity, while still a desirable objective, was no longer required, and that the will of the majority of States would prevail. The Conference went on to declare that multilateral treaties which deal with the codification and progressive development of international law, or the object and purpose of which are of interest to the international community as a whole, should be open to *universal participation*.

Following the development and application of complex voting rules in the preparation and adoption of the United Nations Convention on the Law of the Sea (1982), the General Assembly commissioned a study of such rules, and in 1983 reviewed “Draft Standard Rules of Procedure for United Nations Conferences”. But it seemed that a watershed had been reached in Member States’ assessment of the efficacy of decisions taken by prescribed majorities. The study was not completed, and may never be. Decisions taken on the basis of prescribed voting rules throughout a decade of negotiation and compromise that produced the 1982 *UN Convention on the Law of the Sea* endorsed by the overwhelming majority of States were firmly set aside in 1994 by the subsequent adoption of the *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*. This unprecedented action was taken under pressure from a small group of economically powerful States with the avowed objective of achieving “universal” adherence to the Convention – in this context a coded reference to cleansing the 1982 text of provisions that had made the most powerful of their number reject a “package deal” concluded with their collaboration. Eventual acquiescence in this unusual process demonstrated, for me, the decisive role of *power* over “international legislation”. It was an obvious factor, which naivete, youthful enthusiasm, and the *hubris* generated by the multilateralist spirit of the times had tended to obscure. The crowning irony: the State for whose adherence laboriously negotiated texts had been swept aside chose to remain outside a Convention that was hailed as a “Constitution for the Oceans”, and that recalls, in every significant aspect, the influence of its leadership and persuasive capability.

“Consensus” has since become the guiding principle at inter-governmental meetings. As now applied, “consensus” seems to amount to resurrection of the unanimity rule and brings to mind Lorimer’s comment that “Unanimity was possible only by the majority giving way to the minority” (Lorimer, J., *The Institutes of the Law of Nations* (1883), Vol. I). Thus in a little over a hundred years, participation in treaty-making and the development of decision-by-majority at inter-State

gatherings had come full circle. It was my planet Neptune and induced in me the kind of “Neptune effect” that had so affected my ancestor.

Since then it seems that what I had been taught of international law, that it was true law, but a law which functioned differently from its domestic counterpart and constrained behaviour through reason rather than the threat or use of force; and of the value of participation in a process perhaps optimistically styled “international legislation”, had come to be of little account, and virtually irrelevant. Continuing to proclaim international law’s generalized, if sometimes faltering efficacy, or even its moderating influence, when confronted almost daily by evidence of State action starkly at variance with its most basic tenets, tends merely to exaggerate the proven weakness of what I had thought to be a viable system. I do not mean to suggest here that all such State action is necessarily “wrong”: only God may judge the “rightness” of an action, since that judgement would be made from the perspective of the ages. Mortal judgements are made within a perceived time frame, and often in ignorance of some vital fact, and therefore flawed. What may often be determined, however, is whether or not an act is inconsistent with existing law, and such inconsistencies are now revealed each passing day.

What ails international law – or me, for that matter, in failing to make sense of the trend of events? Has a century of apparent progress toward universal participation in the law-creating process, itself thought to promote compliance, and to be a means of approaching some ideal of “justice”, been halted and reversed? Has the “equality of States” doctrine, utopian at best, been finally abandoned? Should it be assumed that the affluent (= the powerful few) of the world have a monopoly on wisdom, and that support for their convictions as to what is to be done will bring peace, order and development to all? Do the rules of procedure, especially those on decision-making among States, give undue weight to the opinion of the majority? Are multilateral conferences on legal issues like those of the last century to be considered merely a waste of time and other precious resources, and not to be repeated? Should the great majority of States accept a benevolent hegemony as perhaps the only effective way to maintain order in the unruly world of States, and be willing to pay a price through voluntary acceptance of secondary status? Or should they embark on the perilous enterprise of devising ways of exercising countervailing pressure? Is *order*, then, the primary value? Are the methods of negotiation, or what we might call the rules of “political engagement”, in need of radical over-haul? Should a State, on any issue of general international concern, only deal directly with its hegemon? Or, in recognition of the notion of a three-tiered world reflecting three orders of power, should the majority first present their petitions to States of medium influence (Europe?), and then have them negotiate an approved version with States, or a State, credited with having *decisive* authority?

Do the doctrines and practices of the latter now constitute “instant customary law”, a magic that was, in the decade of the 1970s, attributed to certain General Assembly resolutions that had received overwhelming support? These are not “rhetorical” questions in the sense that they have a hidden persuasive purpose. They are questions to which the bewildered seeker needs answers, thoughtful responses free from patronage and cynicism.

If what were presented to us as rules of international law are no longer valid, or are by now so nuanced as to be no longer recognizable; or again, if those rules are applicable among some countries and not others, how did this disorder occur, and wherein might lie the remedy? It seems to me that, as was once famously observed,

“The fault, dear Brutus, is not in our stars,  
But in ourselves, that we are underlings.”

The remedy lies in the individual, in her or his capacity to act responsibly, to exercise rights and fulfil obligations with due regard for the welfare of others. Only adherence to ethically motivated conduct on the part of individual citizens, and eventually of their governments, can restore and strengthen respect for the law as it existed, or may in future be created. We need to bring about a change in the world of human beings before we can hope to order the world of States. This is not, of course, some monumental discovery. That thought has been around for upward of 2000 years, but the ambitions inherent in leaders, and the limited human life-span in which they seek to achieve them, nearly always foreshadow adoption of short-term goals, and the tendency to treat the symptom while ignoring the cause. And here, at last, I come to my *Bookshelf*.

My small library on international law was dominated successively by books on treaties, the law of the sea and international dispute settlement, subjects with which I have been most closely associated over a period of some 40 years. Many of these are gone now, donated to a university in Sri Lanka. They are being replaced gradually by books that reflect a rather desultory search for a resource that would revitalize and underpin an international law that could attract and retain the allegiance of all communities. One cause for the erosion of confidence in the international legal order is surely the fault lines that divide systems of values, causing exclusionary and conflicting interpretations of rules – even rules that had been jointly formulated and explicitly recognized. A daunting, but worthwhile, task might be collaboration in an effort to arrive at an agreed, universally acceptable set of culture- and ideology-free human values, formulated unambiguously by an eminent group drawn from all major cultural persuasions: perhaps a *World Commission on Human Values*. Their conclusions, when infused into every educational system and internalized by general agreement, may, in a few generations, penetrate upward to re-

orient political thinking and behaviour, first nationally and in due time, internationally.

There would remain the virtually unexplored question of how best to relate the opinions of the citizenry to the international law-forming activity of States. Nowhere is the issue stated more eloquently than in Philip Allott's *Eunomia*. Of the "democratization" and "socialization" of state-societies, he says:

"It would have been possible for international society to develop a theory of *representation*, to articulate the way in which the state-societies aggregated the willing of their citizens in order to will and act internationally as the representatives of their citizens. Instead, the consciousness-controlling activities of government, and their supporters, ensured that sovereignty would be externalized into a society which was conceived as being a society containing only sovereigns, a society which would contain no theory of representation, which would leave obscure and unexplained the sense in which the people of the world might be virtually present in international society by reason of the participation of the state-societies. The result was the stunted and primitive reality of an international society in which only the voices of governments are heard, and those voices evoke only a weak and distant resonance of the infinitely rich internal social processes of the state-societies, of the self-creating willing and acting of the internal social process of the state-societies." (1990 edn., p. 303)

Other books that have begun to displace old friends on my bookshelf bear witness to recent attempts to formulate the terms of a global ethic. Deeply concerned by the inability of forms of social control to stem the prevailing tides of greed, corruption, hatred and violence, pioneers in the attempt to formulate a global ethic have as their aim the creation of a new world order, not merely the underpinning of international law. Given the links between ethics and religion, it is not surprising that the religious have taken the lead in this endeavour. While the religions of South Asia have seemed willing to co-exist with those from outside the region, provided the latter made no attempt to proselytize, it was only within the past century that Christianity, which had been carried round the world by mercantile or imperial power, became more open to such a prospect. The World Council of (Christian) Churches, established in 1948, eventually began a dialogue with other religions, while the Roman Catholic church seemed to have taken a similar step at the Second Vatican Council (1962-1965). A "Parliament of the Religions", first held in Chicago in 1893, reconvened there in 1993. What seems to be the gradual abandonment by religion of its exclusionary mode has resulted in an increasing number of works demonstrating the common elements and aims of all the great religions, and this, in turn, has influenced intellectual effort in the direction of eclectic approaches to moral values and the formulation of a global ethic. Pioneers

in the field include Dr. Hans Küng and his colleagues at Tübingen University (*Global Responsibility* (1990, English trans. 1991) and *Yes to a Global Ethic* (1995)). India has been the origin of several movements inspired by religious eclecticism, such as those of Annie Bessant and Mahatma Gandhi. A recent movement that seeks to synthesize and propagate the spiritual values inherent in all religions is led by Sri Sri Ravi Shankar and promotes the application of those values in some 144 countries.

Secular writing, too, advocates the search for commonly held values. Professor Huntington's book, published in 1995, is often referred to by an abbreviation of its title "The Clash of Civilizations...". Such a reference suggests the inevitability of such a "clash", while neglecting the rest of the title "... and the Re-making of World Order", as well as the author's valuable prescriptions to that end. Among the latter, the author urges first, that States abstain from intervention in conflicts in other civilizations; and second, that "core States negotiate with each other to contain or to halt fault line wars between states or groups from their civilizations". As to a third requirement, he says:

"... whatever the degree to which they divided humankind, the world's major religions – Western Christianity, Orthodoxy, Hinduism, Buddhism, Islam, Confucianism, Taoism, Judaism – also share key values in common. If humans are ever to develop a universal civilization, it will emerge gradually through the exploration and expansion of these commonalities. Thus, in addition to the abstention rule and the joint mediation rule, the third rule for peace in a multicivilizational world is the *commonalities rule*: peoples in all civilizations should search for and attempt to expand the values, institutions, and practices they have in common with peoples of other civilizations." (p. 320)

All those who were connected with treaty-making in the decades of the 1960s and 1970s – now seemingly the apogee of collaborative international rule-making – appreciated that the creation and internalization of such rules was to be a lengthy and uncertain process. In retrospect, perhaps there should have been a second and parallel endeavour integrated internationally with the other, one which might be called "acculturation", or merely "education". Its aim might have been the creation of a matrix of common values, to be introduced at the appropriate level in every national constituency, with a view to maximizing receptivity to the international "legislative" process. To start, in the evening of one's life, on that road not taken, may seem futile. But it could serve to keep more negative feelings from taking control of the Neptune effect.

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