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

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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”. 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). 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. 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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1 See para. 7 of the Preamble of Resolution 1483 (2003).
2 See para. 5 of Resolution 1483 (2003).
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. 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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4 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”. 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”. 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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5 Para. 8 c), g) and i) of Resolution 1483 (2003).
6 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.” 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, 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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8 See para. 12 of Resolution 1483 (2003).
tional organizations concerned. 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”. 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. 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.

9 See Le Monde, 5 September 2003, p.5.
10 See para. 8 (d) and (e) of Resolution 1483 (2003) as well as its para. 15.
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 multinational 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.