

# An Analysis of Claims Regarding Transferable “Legal Title” to Iraqi Oil in the Immediate Aftermath of Gulf War II: Paradigm for Insight on Continuation of UN Juridical Regimes Following the Initiation of Belligerent Occupation

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## I. Introduction

As the military phase of the U.S. war against Saddam Hussein's Iraqi regime was drawing to a close, public attention began to focus on a variety of post-war efforts, including that of reactivating oil field activity in Iraq's vast petroleum reserves. In an article appearing in the June 2003 issue of the *European Journal of International Law*, we explored the rights of a belligerent occupant to work government owned oil fields.<sup>1</sup> Particular attention was paid to whether the rule of usufruct, codified in article 55 of the 1907 Hague Regulations on land warfare,<sup>2</sup> restricted a belligerent occupant's authority to employ new technologies in working the reserves of the occupied state,<sup>3</sup> prohibited an occupant from increasing production from those reserves,<sup>4</sup> or established parameters concerning the uses to which the proceeds from the sale of such production could be put.<sup>5</sup> Left completely aside, however, was discussion of the relationship between the UN's oil-for-food program,<sup>6</sup> which governed disposition of Iraqi oil from the mid-1990s forward, and the Hague rules on belligerent occupancy. The significance of this matter was made readily apparent by questions raised, in the wake of the military action against Iraq, about whether a U.S.-led coalition occupying authority, or only the UN, possessed control of transferable “legal title” to Iraq's oil.<sup>7</sup>

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<sup>1</sup> See R. Dobie Langenkamp/Rex J. Zedalis, *What Happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields*, *European Journal of International Law* 417 fn. 1 (2003) (indicating a number of the other interesting, but unexplored issues)(hereinafter cited as “*What Happens to the Iraqi Oil?*”).

<sup>2</sup> For the Hague Regulations, see *Regulations to Hague Convention Respecting the Laws and Customs of War on Land (IV)*, 18 Oct. 1907, available at <[www.yale.edu/lawweb/avalon/lawofwar/hague04.htm](http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm)> (accessed May 15, 2003).

<sup>3</sup> See *What Happens to the Iraqi Oil?*, *supra* note 1 at 421-25.

<sup>4</sup> See *id.* at 425-29.

<sup>5</sup> See *id.* at 430-34.

<sup>6</sup> See *infra* notes 14-15.

Clearly, from the standpoint of international relations, the ultimate answer to that question of control had indisputable importance. By some estimates, the dollar amount of all claims against Iraq totaled nearly (US)\$ 400 billion.<sup>8</sup> This included not yet fully compensated claims arising from the 1991 Gulf War, as well as claims from outstanding obligations for services rendered or goods supplied to the former government of Saddam Hussein, and contractual commitments previously negotiated by representatives of that government but not yet performed. At some juncture, it was feared that claimants might attempt to take legal action in various foreign jurisdictions in order to collect on what they considered to be owed.

Some potential claimants indicated reservations about the strength of the legal bases underpinning their own positions.<sup>9</sup> Conversely, others were extremely confident, with suggestions that at least one claimant insisted that any U.S. or coalition shipments of Iraqi oil leaving that country would be considered "fair game" for legal proceedings aimed at securing debt satisfaction.<sup>10</sup> The situation undoubtedly accounted, in part, for the mid-April 2003 position expressed by the Bush adminis-

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<sup>7</sup> See Bruce Stanley (Associated Press), *Mother of Challenges – Reviving Iraq Oil Output Won't Be Easy*, *Tulsa World*, Apr. 12, 2003 at E1, col. 2 (noting legal title is essential in order to be able to transfer Iraqi oil, and noting U.S. has encountered difficulties on that front). See also Chip Cummins, *Oil-Export Delay Risks Damage to Northern Wells, Reservoirs*, *Wall St. J.*, Apr. 18, 2003 at A3, col. 5 (exports of oil from Iraq held up by questions regarding who has control); Felicity Barringer, *Billions in Aid From the U.N. Is in Limbo, Official Says*, *N.Y. Times*, Apr. 22, 2003 at A10, col. 6 (head of U.N. Iraq Programmes Office indicates transfers of Iraqi oil now complicated by questions of who possesses authority to make legal transfers). On the fact the UN is the proper authority to transfer title to Iraqi oil, see (Reuters), *Australian urges U.N. unity to help post-war Iraq*, 27 Mar. 2003, available at <[www.alertnet.org/thenews/newsdesk/SYD340622.htm](http://www.alertnet.org/thenews/newsdesk/SYD340622.htm)> (accessed Apr. 15, 2003); Statements made by M. Jacques Chirac, President of the Republic, during his joint press briefing with M. Rudd Lubbers, UN High Commissioner for Refugees, Apr. 8, 2003, available at <<http://special.diplomatic.gouv.fr/article-gb293.htm>> (accessed Apr. 15, 2003). It should be noted that various officials from the United States have indicated that Iraqi oil belongs to the people of Iraq. Presumably, the intent of such statements is that during the period of U.S.-led coalition occupation, Iraq's oil will be used for the benefit of Iraq. What remains unclear, however, is the extent to which such official indications imply recognition by the United States that "legal title" to Iraqi oil is vested in the state of Iraq. As belligerent occupation acknowledges the absence of any nation-wide Iraqi controlled and overseen governing authority, the indications that Iraq's oil belongs to the Iraqi people most likely suggests nothing more than that the benefits of such oil will be used, in one way or another, for those who populate Iraq. It is unlikely such indications are meant to signify that "legal title" to Iraqi oil is actually vested in the United States and its occupying allies.

Note: throughout this article, reference is made to United States and its occupying allies, coalition allies, etc. In all cases, however, what is intended is reference to U.S.-led coalition as belligerent occupants. It should also be noted that this article does not examine the possibility that, immediately following Saddam Hussein's ouster from power, transferability of title to Iraqi oil was placed in "suspension," or "abeyance".

<sup>8</sup> See *Debts of a Dictator*, *The NewsHour with Jim Lehrer*, May 6, 2003, available at <[www.pbs.org/newshour/bb/middle\\_east/jan-june03/debt\\_5-6.html](http://www.pbs.org/newshour/bb/middle_east/jan-june03/debt_5-6.html)> (accessed May 8, 2003).

<sup>9</sup> Total Elf Fina president recognizes company has no legally negotiated contract, pre-contract, or memorandum of understanding with Iraq. See Martin Arnold, *Total Confident on Chances of Winning Iraq Oil Contracts*, *Financial Times* (May 7, 2003), available at <[www.globalpolicy.org/security/oil/2003/0507total.htm](http://www.globalpolicy.org/security/oil/2003/0507total.htm)> (accessed May 30, 2003).

<sup>10</sup> This is the position that has been taken by the Russian company Lukoil.

tration that debt forgiveness might be integral to the world community's effort to help Iraq move towards democratic self-rule.<sup>11</sup> In any case, it was soon perfectly clear that potential litigation associated with exports of Iraqi oil might compel confrontation of nettlesome questions regarding transferable "legal title," questions felt better left unfronted. Thus, by early May, the United States began the push for what eventually became Security Council resolution 1483. That resolution, adopted on May 22, 2003, by a margin of 14 to 0, with Syria absent from the vote, called, most importantly, for the dismantling of the Iraqi sanction regime and the phasing-out of the oil-for-food program.<sup>12</sup> Though the resolution may have effectively eliminated the immediate significance of the dispute over UN versus U.S. control of transferable title to Iraq's oil, it did nothing to help provide an answer to who had the better argument about control during the weeks right after Saddam's ouster. Nor did it provide an answer regarding control during the oil-for-food program's phase-out period spanning the six months following resolution 1483's adoption.

From a far broader perspective than the identity of the rightful claimant to control over "legal title" to Iraqi oil during the period leading-up to 1483's adoption and eventual implementation, the differing perspectives of the UN and the U.S. on the matter raised a more timeless and enduring problem. That specific problem concerns the interface between UN juridical regimes articulated in Security Council resolutions, and the rights and duties of an occupying power following the defeat and removal of a government at which Council resolutions have been directed. The UN's recent involvement in Somalia, Haiti, East Timor and elsewhere has certainly presented the prospect that a pre-existing UN program implementing Security Council resolutions could run into difficulties, were military action to result in belligerent occupancy of a state to which a UN juridical regime was applied. Indeed, given current tensions regarding activities by certain states to develop nuclear weapons, one can just imagine a situation in which the Security Council constructs a binding scheme aimed at resolving a stand-off with a particular state, only to see subsequent unilateral military action ousting that state's government and, thus,

<sup>11</sup> Position taken by U.S. Undersecretary of Defense, Paul Wolfowitz. See Alan Murray, In a Forgiving mood, MSNBC, Apr. 11, 2003; Michael Odigbe, Managing Iraq's Post-War Foreign Debt (Apr. 2003), available at <[www.econdad.org/Iraq.htm](http://www.econdad.org/Iraq.htm)> (accessed June 1, 2003).

<sup>12</sup> As early as mid-April 2003 President Bush indicated he preferred to see the termination of the UN sanctions on Iraq. The speculation suggested that this preference was tied to ending the oil-for-food program and, thus eliminating the possibility of UN control over Iraqi oil. See Richard W. Stevenson/Felicity Barringer, Bush Urging U.N. to Lift Sanctions Imposed on Iraq, N.Y. Times, Apr. 17, 2003 at A1, col. 6. By the middle of the second week in May it had become clear that a formal push would be made in the Security Council for a resolution to accomplish that precise objective. See Felicity Barringer/David Leonhardt, U.S. Drafts a Resolution On the Lifting of Sanctions, N.Y. Times, May 8, 2003 at A14, col. 6. For the May 9, 2003, initial draft proposed by the U.S. see Text of U.S.-supported U.N. resolution on Iraq, available at <[www.usatoday.com/news/world/iraq/2003-05-09-un-iraq-text\\_x.htm](http://www.usatoday.com/news/world/iraq/2003-05-09-un-iraq-text_x.htm)> (accessed May 12, 2003); for the May 19, 2003, final draft see Final US-UK-Spain Draft Resolution, UN Doc. SC/2003/556, available at <[www.globalpolicy.org/security/issues/iraq/document/2003/0519draftresol.htm](http://www.globalpolicy.org/security/issues/iraq/document/2003/0519draftresol.htm)> (accessed May 21, 2003). For Security Council resolution 1483, see S.C. Res. 1483, 22 May 2003, U.N. Doc. S/RES/1483.

raising the issue of whether the belligerent occupant must respect aspects of the UN plan. By an examination of the problem involving Iraqi oil, specifically seeking to illuminate the persuasiveness of the differing claims that concerned UN access to transferable "legal title," an ideal opportunity is provided for observations regarding the broader matter of the relationship between UN regimes and the law of belligerent occupancy.

Prior to beginning, however, one would do well to keep in mind that article 55 of the Hague Regulations of 1907 generally provides adequate authority for an occupying military force to tap an occupied nation's oil resources for limited purposes.<sup>13</sup> What complicates the situation in Iraq was the adoption by the Security Council of resolution 986, which created the oil-for-food program in 1995,<sup>14</sup> and its implementing 1996 Memorandum of Understanding (MOU), which fleshed-out the particulars of the program and represented a Council authorized agreement with the government of deposed Iraqi leader Saddam Hussein.<sup>15</sup> More specifically, the Security Council actions creating the oil-for-food program presented the prospect of a definitive legal regime possibly capable of leaving an indelible mark on attempts to transfer Iraqi oil even after both war and the commencement of belligerent occupancy. Whether such could be persuasively argued undoubtedly turns on three matters. The first concerns the precise wording of resolution 986 and its implementing MOU. The second deals with the rules governing state succession to earlier UN legal commitments. And the third, the relevant practice of nation-states in regard to analogous situations in which military action by a member of the world community ousts a government from territory previously subject to a juridical regime fashioned by United Nations' diplomats. In the pages that follow, each of these three matters will be taken up in turn.

## II. The Terms of the UN Documents Creating the Oil-for-Food Program

It would seem that any successful claim the UN possessed control of transferable "legal title" to Iraqi oil, and that such remained unaffected by the belligerent occupancy of the United States and its allies,<sup>16</sup> would have to find its origins in

<sup>13</sup> See generally the authorities cited in *What Happens to the Iraqi Oil?*, *supra* note 1.

<sup>14</sup> S.C. Res. 986, UN Doc. S/RES/986, 14 Apr. 1995.

<sup>15</sup> Memorandum of understanding between the Secretariat of the United Nations and the Government of Iraq on the implementation of Security Council resolution 986 (1995), UN Doc. S/1996/356, 20 May 1996.

<sup>16</sup> See text of *supra* note 7, wherein it is suggested that statements that Iraqi oil belongs to the people of Iraq could be susceptible to the reading that "legal title" is vested in the people of Iraq. It cannot be emphasized strongly enough, though, that the probable intent of such statements extends no further than to the idea of the benefits of Iraqi oil being used, in one way or another, for the populace of Iraq. This would be tantamount to categorizing the Iraqi peoples interest as equitable title.

either Security Council resolution 986 or its implementing MOU. There is nothing inherent in the very nature of the UN that bestows on that organization any sort of automatic authority over natural resources of member states. Indeed, article 2(7) of the UN Charter acknowledges the independent jurisdictional sovereignty of member states in regard to all domestic matters,<sup>17</sup> of which natural resources would surely qualify. And, numerous resolutions adopted over the years by the United Nations explicitly confirm the sovereignty of each state over its own natural resources.<sup>18</sup> Consequently, in the absence of some plain language in 986 or its corresponding MOU, there would seem little basis for suggesting that control of transferable title to Iraq's oil resides in the United Nations.

With specific regard to resolution 986, it builds upon an earlier adopted flat prohibition on member state imports from, exports to, or commercial or financial dealings with Iraq, a prohibition declared by the Security Council immediately after Iraq's invasion of Kuwait in August of 1990.<sup>19</sup> In doing so, resolution 986 departs from the prohibition and explicitly permits member states to import oil from Iraq, so long as imports are made under the resolution-established oil-for-food program.<sup>20</sup> An escrow account to receive the proceeds of such import sales is called for,<sup>21</sup> disbursement priorities are enunciated,<sup>22</sup> and monitoring responsibilities are set forth in the resolution.<sup>23</sup> Further, 986 expressly authorizes the Secretary-General to take the kinds of actions that eventuated in the negotiation of the resolution's implementing MOU.<sup>24</sup> Most importantly for present purposes, however, the language of the resolution contains two sets of references that certainly appear to suggest any UN control over transferable "legal title" to Iraqi oil was not to run indefinitely. The third paragraph of the resolution's preamble represents the first set, and it indicates the humanitarian needs of the Iraqi people convinced the Security Council of the need for the oil-for-food program as a "temporary measure," pending Iraq's full compliance with other Council resolutions.<sup>25</sup> Paragraphs 3 and 4 of resolution 986's substantive provisions represent the second set, and they leave no doubt that the permission to import oil from Iraq pursuant to the oil-for-food program lasts for a renewable fixed-term period. Paragraph 3 provides the permission "shall remain in force for an initial period of 180 days unless the Council takes other relevant action",<sup>26</sup> and paragraph 4 that the Council "expresses its intention

<sup>17</sup> See UN Charter, art. 2, para. 7.

<sup>18</sup> See e.g., Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17<sup>th</sup> Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1963); Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 3171, U.N. GAOR, 28<sup>th</sup> Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1974).

<sup>19</sup> See S.C. Res. 661, U.N. Doc. S/RES/661, 6 Aug. 1990.

<sup>20</sup> See S.C. Res. 986, *supra* note 14 at para. 1.

<sup>21</sup> See *id.* at para. 7.

<sup>22</sup> See *id.* at para. 8.

<sup>23</sup> See *id.* at paras. 1(a), 4, 6, 11-12.

<sup>24</sup> See *id.* at para. 13.

<sup>25</sup> See S.C. Res. 986, *supra* note 14 at third para. of Preamble.

<sup>26</sup> See *id.* at para. 3.

..., to consider favourably renewal of the provisions of [the] resolution".<sup>27</sup> As is well known, the oil-for-food program received regular renewal, expiring in mid-June of 2003.

The language from both the third paragraph of the Preamble, and paragraph's 3 and 4 of the resolution's substantive provisions, may suggest that UN bases for control over transferable title to Iraqi oil rest on a less than ideal foundation. Interestingly, such an interpretation of the technical terminology of these provisions is consonant with the more impressionistic view that the trade embargo on Iraq and the various other UN measures directed at that nation were precipitated by the fact of Saddam Hussein's stranglehold on the reigns of governmental power. And, with his removal by the United States and its allies, the entire web of Security Council resolutions centred on Iraq, including the resolution creating the oil-for-food program, witnessed a concomitant removal of supporting foundational rationale. Accordingly, with Saddam and his cronies gone, all previously relevant Council resolutions were at an end as well. In spite of both the simplistic attractiveness of this interpretation and the textual support in the Preamble of resolution 986 and substantive paragraphs 3 and 4, one cannot ignore the background context and specific terminology of other Security Council resolutions concerning the Iraqi situation.

As alluded to previously, resolution 986 was designed to permit member states to import oil from Iraq, as long as in accordance with the dictates of the oil-for-food program. This permission constituted a specific exception from the more overarching prohibition on trade or financial dealings with Iraq articulated in Security Council resolution 661, adopted on the heels of Saddam Hussein's aggression against neighboring Kuwait.<sup>28</sup> Following Security Council issuance in early April of 1991 of resolution 687, setting out, among other things, the long disputed weapons inspection obligations of Iraq,<sup>29</sup> the removal of 661's basic prohibition was made contingent on Iraq's fulfillment of its weapons obligations. Paragraph 22 of resolution 687 makes that crystal clear. The language of the paragraph states the decision that "upon Council agreement that Iraq has completed all actions contemplated [under its weapons obligations], the prohibitions against the import of commodities and products originating in Iraq ... contained in resolution 661 (1990) shall have no further force or effect".<sup>30</sup> The totality of provisions from relevant resolutions thus suggest a prohibition, outside the confines of the oil-for-food program, on all Iraqi oil trade, until the Security Council acknowledged Iraqi compliance with weapons obligations. And given the idea that oil-for-food required periodic renewal, in the event permitted exceptional oil trade failed to receive Council reauthorization, the basic embargo of 661 was to reactivate.

Paragraph 14 of resolution 986 contains additional language that provides even further illumination on such a technical interpretation of relevant texts, and on the

<sup>27</sup> See *id.* at para. 4.

<sup>28</sup> See *supra* note 19 and accompanying text.

<sup>29</sup> See S.C. Res. 687, paras. 8-13, U.N. Doc. S/RES/687, 3 Apr. 1991.

<sup>30</sup> See *id.* at para. 22.

international community's controversy regarding control over transferable "legal title" to Iraq's oil. That provision quite plainly indicates that "petroleum and petroleum products subject to [the oil-for-food] resolution shall while under Iraqi title be immune from legal proceedings and not be subject to any form of attachment or execution".<sup>31</sup> It then requires all member states take whatever steps are necessary to assure such protection under their own domestic legal systems.<sup>32</sup> Admittedly, varying constructions of the phrase "while under Iraqi title" may be proffered. But would it be so completely without merit to suggest that the phrase could be read as recognition by the Security Council that, despite the establishment of the oil-for-food program, title to Iraq's oil remained with the Iraqis until, under UN auspices, it was sold to someone else, and the Council simply wanted to assure that the program's humanitarian objectives were not frustrated by outsiders making claims against Iraq's oil? Accepting such a reading, and conjoining it with the notion that, in the absence of the oil-for-food program, a prohibition exists on trade in Iraqi oil, the following implication would seem to arise. Specifically, Iraq has title to its own oil; resolutions 661 and 687 essentially forbid member states from importing such until Iraq complies with its UN imposed weapons obligations; the only exception concerning importation emerges from resolution 986's renewable oil-for-food program; UN authorized transfers made under that program are immune from external legal claims; and, in the event a lapse in the oil-for-food program, all transfers are to cease, unless and until the Security Council acts to remove resolution 661's embargo.

What about the terms of resolution 986's implementing MOU?<sup>33</sup> Do they provide corroboration for reading the operative Security Council documents as intending to recognize UN continuing control over transferable "legal title" to Iraqi oil? Or, conversely, does a rigorous textual analysis of the terms of the MOU support the non-technical, impressionistic view that with Saddam gone, the programmatic regimes set forth in all relevant resolutions came to an end? Clearly, accepting the former reading would open the door for the insistence that, following the U.S. military action against Iraq, control over transferable title to Iraqi oil remained in the United Nations. The latter reading, on the other hand, would provide support for the notion that such control devolved to the United States as the occupying belligerent authority.

As a whole, the implementing MOU sought to provide particular details regarding several aspects of the oil-for-food program. A distribution plan was set forth to assure equitable distribution of humanitarian supplies within Iraq.<sup>34</sup> The specifics of the oil-for-food program's escrow account,<sup>35</sup> and the contractual procedures by which sales of Iraqi oil were to take place,<sup>36</sup> received substantial attention. Procure-

<sup>31</sup> See S.C. Res. 986, *supra* note 14 at para. 14.

<sup>32</sup> See *id.*

<sup>33</sup> See MOU, *supra* note 15.

<sup>34</sup> See *id.* at Sec. II, paras. 5-11.

<sup>35</sup> See *id.* at Sec. III, paras. 12-15.

ment monitoring<sup>37</sup> and oversight mechanisms for the distribution of humanitarian supplies<sup>38</sup> were also treated at length. But with regard to whether UN control over transferable “legal title” to Iraq’s oil was envisioned as running indefinitely into the future, the MOU contains a couple of references worth noting. These appear in paragraphs 4 and 50 of the Memorandum itself,<sup>39</sup> and paragraph 1 of Annex II,<sup>40</sup> which is made a part of the MOU by virtue of language indicating that the provisions of that Annex “constitute an integral part of [the] Memorandum”.<sup>41</sup>

In point of fact, both paragraph 4 and paragraph 50 of the MOU bear a striking resemblance to the third paragraph of resolution 986’s Preamble, and paragraphs 3 and 4 of the resolution’s substantive provisions. Paragraph 4 of the MOU provides that it is clearly understood by both the UN and the government of Iraq that the negotiated regime established by the Memorandum is “exceptional and temporary”.<sup>42</sup> This closely tracks the sentiment expressed in the third paragraph of resolution 986’s Preamble. Paragraph 50 of the MOU, in line with paragraphs 3 and 4 of 986’s substantive provisions, explicitly declares that the regime the Memorandum establishes “shall remain in force until the expiration of the 180 day period referred to in paragraph 3 of the Resolution” itself.<sup>43</sup> Essentially, the language from these two paragraphs of the MOU leave little question that the Memorandum’s regime was not to last indefinitely.

Then there is paragraph 6 of the MOU’s Annex II. That Annex sets forth some of the particulars regarding contractual arrangements to purchase and pay for Iraqi oil, and it provides for oil export monitoring arrangements.<sup>44</sup> In addressing the approval process for contracts to purchase Iraqi oil, the Annex clearly indicates purchase contracts and associated documents are to be endorsed by the government of Iraq or the Iraqi State Oil Marketing Organization (hereinafter SOMO).<sup>45</sup> In a way, such language is consistent with resolution 986’s paragraph 14, which, as alluded to above, recognizes Iraq’s title in its oil.<sup>46</sup> Paragraph 6 of Annex II then employs language that could be read as indicating an intent of the drafters to extend UN control over transferable legal title for as long as possible. The language provides that the UN Secretariat and SOMO “shall maintain continuing contact” to review market conditions and oil sales.<sup>47</sup> However, it seems likely that the notion of maintaining continuing contact expressed in paragraph 6 was simply aimed at assuring the cooperative free-flow of information, not at manifesting a desire that

<sup>36</sup> See *id.* at Sec. IV, paras. 16-18.

<sup>37</sup> See *id.* at Sec. V, paras. 19-31.

<sup>38</sup> See *id.* at Sec. VI, paras. 32-33, and Sec. VII, paras. 34-44.

<sup>39</sup> See *id.* at Sec. I, para. 4, and Sec. X, para. 50.

<sup>40</sup> See *id.* at Annex II, para. 1.

<sup>41</sup> See MOU, *supra* note 15 at Sec. IV, para. 18.

<sup>42</sup> See *id.* at Sec. I, para. 4.

<sup>43</sup> See *id.* at Sec. X, para. 50.

<sup>44</sup> See *id.* at Annex II, paras. 1-5.

<sup>45</sup> See *id.* at Annex II, para. 1.

<sup>46</sup> See text accompanying *supra* note 31.

<sup>47</sup> See Annex II, para. 6.



UN control over transfers was to continue indefinitely. Nevertheless, at least two other reasons exist for believing the MOU contemplates some sort of continuing UN control over transfers of "legal title" to Iraq's oil.

The first reason draws on a basic point presented earlier in connection with resolution 986's overall relationship to other Security Council Iraq resolutions, and especially resolutions 661 and 687.<sup>48</sup> Specifically, in the absence of the oil-for-food program, the UN unequivocally signified that trade with Iraq was absolutely prohibited, even trade involving Iraqi oil. Up until the end of May 2003 adoption by the Security Council of resolution 1483,<sup>49</sup> removal of the prohibition was conditioned on certification of Iraqi compliance with its weapons obligations. Thus, in the event of discontinuation of the permissive and limited trade regime under the oil-for-food program, the UN's total embargo reactivated, evidencing that control of a somewhat enduring nature had been vested in the United Nations. The opening paragraph of the MOU explicitly recognizes that its generative authority is grounded in resolution 986.<sup>50</sup> As a consequence, would it not seem reasonable to suggest that the collapse of the oil-for-food program, as fleshed-out in the MOU between the Security Council and Iraq, would merely mean continuing UN authority over transferable title through the embargo regime of the other relevant Council resolutions?

The second reason for believing the MOU contemplates continuing UN control, has to do with what the recent adoption of Security Council resolution 1483 suggests about the meaning and intent of the MOU, and of resolution 986 which it implements. Referenced here is the fact that, by taking pains to phase out trade sanctions on Iraq,<sup>51</sup> and further pains to authorize U.S. and allied occupants to sell Iraqi oil<sup>52</sup> and participate in managing the proceeds of such,<sup>53</sup> resolution 1483 acknowledges that, without its adoption, UN control was probably undeniable. After all, if the temporary nature of the UN's control over Iraqi oil, and the framework of Security Council resolutions regarding Iraq, were brought to an end by Saddam Hussein's removal from power, there would have been no need for such a new resolution. The adoption of such resolution signifies recognition that the successful military action against Baghdad did not remove doubt about UN control over Iraqi oil sales. Only through a new Security Council resolution could doubt of that sort be once-and-for-all laid to rest.<sup>54</sup>

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<sup>48</sup> See text accompanying *supra* notes 28-33.

<sup>49</sup> See text accompanying *supra* note 12.

<sup>50</sup> See MOU, *supra* note 15 at Sec. I, para. 1.

<sup>51</sup> See *supra* note 12 at paras. 10, 16, and 18-19.

<sup>52</sup> See *id.* at para. 20.

<sup>53</sup> See *id.* at para. thirteen of the Preamble, and substantive paras. 4, 8, 12-14, and 17.

<sup>54</sup> Admittedly, it is also possible to read 1483's language on the ending of sanctions, and U.S. and allied authority to sell Iraqi oil, as "recognition" of an antedating legal reality. What cuts against that kind of interpretation of the resolution, however, is the fact it appears inconsistent with the contextual background drawn from all the other Iraqi resolutions, background that, as we have seen, suggests any collapse of the oil-for-food program reactivates resolution 661's basic embargo regime. To a

### III. Succession of States to UN Commitments and Other Important Considerations

Despite the fact the relevant UN documents concerning Iraqi oil seem best interpreted as having envisioned control of the transfer of that oil as under the authority of the United Nations, what if the language of those documents failed to speak to that matter in any clear way? Would international law in general offer any assistance on whether or not a belligerent occupant succeeds to international commitments of an occupied state? And, would it matter that the commitments concerning which succession was an issue were based on Security Council resolutions and agreements, that is to say, legal documents endorsed by an international organization, rather than typical international treaties or conventions entered into by sovereign and autonomous nation-states?

The principal codification of international rules governing state succession to international commitments is the 1978 Vienna Convention on Succession of States in Respect of Treaties<sup>55</sup>. Obviously, one of the central hurdles in looking to that instrument for guidance on the question of the UN's Security Council regime surviving the belligerent occupancy of Iraq concerns the ability to view the relevant Council documents as tantamount to international treaties. The Vienna Convention, by its very title, deals only with succession to those international instruments known as treaties. Therefore, in the absence of the relevant Security Council documents being understood as the equivalent of "treaties", the rules of the Convention would have no direct applicability.

In connection with that matter, the precise status of UN actions in the form of Security Council resolutions is interesting and complex.<sup>56</sup> Although the UN has been deemed to be an "international person",<sup>57</sup> with attendant rights and responsibilities, it quite correctly has not been seen as a "state". Regarding that latter reality, the UN's power to enter into contracts is seen as absent. This proceeds from the fact that, since the international organization is not a state, there is a complete lack of a governing municipal law system capable of recognizing, validating, and regulating UN authority to make contracts. Therefore, in the event the UN desires to seek binding commitments with others, it is of necessity required to act by "treaty" under the umbrella of international law.<sup>58</sup>

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certain extent, suggestions from some UN member-states during the days and weeks immediately following the ouster of Saddam that IAEA and UNMOVIC weapons inspectors return to Iraq, have relevancy here. States voicing those suggestions must have been acutely aware of the public dialogue regarding eventual exports of Iraqi oil. They also must have been aware that, taken together, resolutions 661 and 687 prohibited exports, outside the context of the oil-for-food program, until the IAEA and UNMOVIC had certified Iraq to be free of banned weapons.

<sup>55</sup> Available at <[www.un.org/law/ilc/texts/tresu.htm](http://www.un.org/law/ilc/texts/tresu.htm)> (accessed June 10, 2003).

<sup>56</sup> See Clive Parry, *The Treaty Making Power of the United Nations*, 26 *Brit. Yb. Int'l L.* 108 (1949).

<sup>57</sup> See *id.* at 109.

<sup>58</sup> See *id.* at 116.

The treaty making power of the UN can be derived from four UN Charter provisions. Article 43 is specifically applicable to the Security Council, and it empowers the Security Council to make agreements with member countries for armed forces and assistance to maintain international peace and security.<sup>59</sup> Given the nature of the United Nations itself, any exercise of the authority of this Charter provision can be viewed as an act of either an international "quasi-person,"<sup>60</sup> or as a device by which a number of states collaborate and act in a collective or corporate, rather than individual, capacity. Article 24(1) seems to support the concept of collective or corporate action by stating that the members "agree that in carrying out its duties ... the Security Council acts *in their behalf*."<sup>61</sup> Conceivably, the Security Council's MOU with Iraq, which implements resolution 986, falls within these authorities, especially since the individual member states could have so acted on their own, and the Council's action seems at least tangentially connected to the maintenance of international peace and security. Articles 63 and 105 of the Charter also imply that the UN possesses the capacity to make treaty-like commitments, but these concern the General Assembly and the trusteeship authorities of the United Nations, not the power of the Security Council.

Clearly, in light of the obligatory character of Security Council resolutions under article 25 of the Charter, whether or not resolutions are formally designated "treaties" may seem a bit like arguing whether the *Odyssey* was written by Homer or another blind Greek author of the same name. In either event, the expressed intent and legal force of Council resolutions is all that matters. Whether binding on member states because they comprise part of the corpus of general international law, or because they represent treaties to which successor states succeed, the effect is identical. But with respect to the ability to argue that the 1978 Vienna Convention on Succession of States obligates belligerent occupants to honor pre-existing Security Council regimes, like the oil-for-food regime, in the absence of being able to demonstrate that resolutions are regarded as "treaties", one would face a difficult task. With regard to the oil-for-food program, however, the fact Security Council resolution 986 was supplemented with a binding MOU seems to more favorably position the situation. The MOU represents a treaty between the Council and the government of Iraq. And, to that extent, the MOU and implemented Security Council resolution provides a regime upon which the Vienna Convention would seem provisionally capable of operating.

Yet having established that the Security Council's MOU with Iraq could fall within the scope of treaties contemplated by the terms of the Vienna Convention, it must be acknowledged that other potential problems exist that could prevent the Convention's application. In particular, there is the problem of succession to trea-

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<sup>59</sup> See UN Charter, art. 43.

<sup>60</sup> See Parry, *supra* note 56 at 119 (this is the term used by Parry). See also Research in International Law Under Auspices of the Harvard Law School, Draft Convention on the Law of Treaties with Comment, 29 Am. J. Int'l L. (Supp.) 686 (1935), art. 1(a).

<sup>61</sup> See UN Charter, art. 24, para. 1 (emphasis added).

ties in the context of belligerent occupation. The Convention is designed to address a variety of succession situations ranging from newly independent states, to re-drawing of borders, to political divisions resulting in multiple sovereign units. The matter of belligerent occupation is an entirely different sort of situation. Does the collapse of Saddam Hussein's Iraqi regime and its replacement by American and coalition occupying forces fail to constitute an event which, under the law of state succession, the continuation of UN control over Iraqi oil under the oil-for-food program is assured? No foreign sovereign is permanently placed in control of the territory occupied. Belligerent occupancy is temporary in nature and involves little more than administrative authority. Thus, the concept of belligerent occupancy as set forth in the Hague and Geneva provisions on armed conflict accepts that the law of the occupied country survives occupation, except to the extent it must be superseded or suspended in the interest of safety and security of the occupying forces, or in the interest of some larger occupation purpose.<sup>62</sup>

Given that an occupying power is only provisionally and temporarily in administrative control of occupied territory, sovereignty, if it can said to exist in any form in the belligerent occupant, is *de facto*, not *de jure*. The Hague and Geneva rules on armed conflict both contemplate occupation being temporary, if not brief.<sup>63</sup> Belligerent occupation is not regarded as conquest. It is a provisional condition that does not involve the transfer of full sovereignty, as conquest does.<sup>64</sup> And since the belligerent occupant is not exercising sovereignty, it would not seem to be a successor state. Without the presence of a successor state, *ipso facto* the law of state succession would not be applicable. Article 2(1)(b) of the Vienna Convention defines succession of states as "the replacement of one State by another in the responsibility of international relations for the territory".<sup>65</sup> At no point does the Convention speak of a mere occupant as succeeding to the international agreements of an ousted state. Repeatedly, it references successor states inheriting the agreements of their predecessors. In the absence of the transfer or assumption of governmental power that would render the beneficiary a full sovereign, the fundamental *sine qua non* of the law of state succession would be missing.

Then there is the further problem of the language of article 3 of the Vienna Convention. That language clearly suggests that the Convention's codification of the law of state succession was quite specifically not meant to apply to international agreements between states and international organizations. The article provides in relevant part that "the present Convention does not apply to the effects of a succession of States in respect of international agreements concluded between

<sup>62</sup> See U.S. Dep't of the Army, Laws of Law Warfare, paras. 400 and 402 (FM 27-10)(1956). The occupant does not have the right of sale of non-military real property, but does have usufructuary rights, including the right to use public buildings and sell timber and mineral products.

<sup>63</sup> The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 Aug. 1949) art. 6 provides "the application of the present convention shall cease one year after the close of military operations ...".

<sup>64</sup> See U.S. Dep't of the Army, Laws of Land Warfare, para. 353 (FM 27-10)(1956).

<sup>65</sup> See Vienna Convention on Succession of States in Respect of Treaties, art. 2 (1)(b).

States and other subjects of international law ...".<sup>66</sup> The UN is an acknowledged subject of international law that possesses a character other than that of a state. Thus, given the Convention's directive as set forth in this particular article, it would appear little doubt should exist regarding the fact of the inapplicability of the Convention's rules on state succession in the context of the Iraqi oil-for-food program.

There is also the additional problem of article 40 of the Vienna Convention. The language of that provision complicates the certainty of whether the Convention's rules on state succession do or do not govern situations involving belligerent occupation. Article 40 provides that "[t]he provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from the military occupation of a territory".<sup>67</sup> Surely it would not seem totally unreasonable for one to contend the choice of such phraseology supplies a colorable basis for arguing that the Convention has left open the possibility of treaty commitments surviving belligerent occupation. However, it is certainly one thing suggest article 40 leaves that possibility open, and something entirely different to suggest that means the occupying power succeeds to those treaty commitments. To indicate the provisions of the Convention "shall not prejudice any question that may arise in regard to a treaty" when military occupation is involved, may be read as simply signifying that the occupation could leave the treaty in place for whatever governing body assumes authority following the conclusion of the occupation itself. What exactly is it that is contained in the wording of article 40 that compels it to be read as signifying the occupying power takes on the treaty commitments of the government that has been displaced from authority? At best, the wording does little more than leave open the possibility that such commitments might be left unaffected by military occupation.

Despite the various foregoing problems, it could be argued that the basic rationale underlying the law of state succession might seem to make the particulars of the Vienna Convention's rules applicable during belligerent occupancy. After all, such occupancy involves control, albeit temporary or limited, over foreign territory formerly under the control of another governmental structure. In view of this, would it not make sense to see the operation of relevant treaties merely suspended rather than abrogated? And, would such an approach not prove consistent with one of the viable interpretations of article 40? Is it not possible to envision a temporary occupation followed by a full reinstatement of the *status quo ante*? In such a circumstance, occupation would merely provide a hiatus in the operation of a previously established governmental regime, and a hiatus in the applicability of various treaties and international commitments. In the case of Iraq today, however, it is clear that the occupation is not temporary in that sense, and no reinstatement of the *status quo ante* is at all likely or desirable. Thus, even though it might be possible, as a theoretical matter, to accept the applicability of the concepts of state suc-

<sup>66</sup> Id. at art. 3.

<sup>67</sup> Id. at art. 40.

cession in situations involving belligerent occupancy, and thereby permit the survival of treaty commitments so as to bind the government replacing an occupying power, where that government does not involve a restoration of what had existed before, it would seem inappropriate to follow such an approach.

Aside from the difficulties associated with law of state succession applying to belligerent occupation, the doctrines of changed circumstances and impossibility of performance would seem to be two other important considerations that could bear on the question of whether UN control over transferable title to Iraqi oil survived the U.S. military occupation of that nation. Both doctrines assume the continued existence of the two parties that originally entered into the relevant international commitment. Neither doctrine assumes that one party has ceased to exist. Review of articles 61 and 62 of the Vienna Convention on the Law of Treaties pertaining to impossibility and changed circumstances respectively do not contemplate the disintegration or dissolution of one of the two parties to a treaty, and substitution with a temporary, *de facto*, quasi-sovereign administrator. It could, of course, be suggested that the occupying American and allied forces are exercising the full power and authority of the defeated government on a temporary and fiduciary basis until a permanent peace treaty or final settlement arrangement can be obtained.

Codified in Article 62 of the Vienna Convention on the Law of Treaties, the doctrine of changed circumstances provides that a treaty commitment may not be terminated unless the circumstances that have changed were unforeseen by the parties, "the existence of those circumstances constituted an essential basis of the consent of the parties ...", and the effect of the change is "radically to transform the extent of the obligations still to be performed under the treaty".<sup>68</sup> In a general sense, it could be argued that the changed circumstances incident to Iraq being under the authority of the occupying coalition powers would seem to meet this test. At the time of occupation, Saddam Hussein's government had dissolved, and thus there were no official instrumentalities of the former Iraqi regime left to perform the various duties under the oil-for-food program. Furthermore the fundamental purpose of the program, the "essential basis of the consent of the parties", had disappeared. Iraqi oil revenues would no longer be diverted to weapons activities, and the people of Iraq would at least have access to needed food and medicine. Conversely, however, it could be suggested that the change in circumstances that occurred did not "radically ... transform the extent of the obligations still to be performed ...". The obligations were to conduct Iraqi oil sales under the terms and conditions of the oil-for-food program, and then adhere to the mechanisms assuring that the United Nations controlled the application of those revenues so as to provide for the essential needs of the Iraqi people. Even after the commencement of coalition occupation, these obligations remained in place, and the intent of the Security Council in that respect clearly emerged from the background context associated with the adoption of resolution 1483.<sup>69</sup>

<sup>68</sup> See Vienna Convention of the Law of Treaties, Art. 62 (1) (a) and (b).

<sup>69</sup> See text accompanying *supra* Sec. II.

The doctrine of impossibility, under article 61, finds itself in a similar situation. The article provides for invoking the doctrine "if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty". Obviously, following the commencement of occupation, no Iraqi government operatives existed to serve as contacts with the UN under the oil-for-food program. Nor were there any Iraqi agencies to make the decisions regarding the sale procedures and prices of the Iraqi oil. Thus, it could be suggested that the program envisioned by the earlier UN-Iraq MOU, and resolution 986 which it implemented, became impossible to perform. On the other hand, though, only the continued existence of Iraqi oil proves an "object indispensable" for the MOU's execution. And in spite of the operations associated with occupying Iraq, that oil remains in-place and available for sale. Administrative organs, like SOMO, can easily be reconstituted or replaced by comparable organs established by the occupying powers. The fact that their existence or operation is affected by the ouster of the supporting regime does not produce the "permanent disappearance or destruction" of the very thing that is essential for the execution of the oil-for-food program.

Why then did the occupying coalition return to the UN to seek the passage of Security Council resolution 1483? The answer seems to lie in simple commercial reality: the vulnerability of occupant-produced and sold Iraqi oil to international litigation. Even if court adjudication of an attachment of a tanker of Iraqi oil for a pre-existing debt or some other claim were ultimately settled in favor of the occupying powers, a great deal of time, energy, and money would, of necessity, be expended. Some jurisdictions might prove unreliable or hostile in litigating the controversial question of UN or U.S. control over transferable title. The certainty of numerous claims by Iraq's many substantial creditors would render disposition of that nation's crude oil difficult, if not impossible, without dollar for dollar guarantees. In short, once Iraqi oil was placed on the high seas, it would be vulnerable to the many uncertainties of international judicial proceedings. Clearly, the desire to eliminate or minimize such proved the driving force behind the coalition powers' effort to secure what finally became resolution 1483.

#### IV. UN Practice and Belligerent Occupant Inheritance of Commitments Deriving From UN Imposed Juridical Regimes

What does state practice show with regard to whether obligations established by international organizations survive the onset of *de jure* or *de facto* belligerent occupation? Does it support the proposition that an occupying power is bound to observe antedating international legal regimes that had been applicable to a certain territory prior to the commencement of such occupation? Or, conversely, does it suggest that antedating regimes have generally been viewed as ending with the in-

itation of belligerent occupation? In either case, to what extent has language used in the legal instruments creating the regime seemed pivotal in regard to the matter of regime survival? Has it appeared that, in the absence of language suggesting duration of an indefinite nature, the regime has been seen as at an end? Or has it seemed that a legal regime, once established and made applicable to a territory under the control of a particular government, remains applicable in spite of the targeted government's removal by military forces of another nation?

The Somalia, Haiti, and East Timor situations were referenced in the opening paragraphs of this essay. However, given that all three involved the introduction of outside military forces operating under the auspices of the United Nations, the 1974 Turkish invasion of the island of Cyprus, and the 2001 Afghanistan action by U.S. and allied military forces, seem perhaps more directly relevant to the Iraq situation. In contradistinction to Somalia, Haiti, and East Timor, both of the latter two situations, just as in Iraq, involved a pre-existing international legal regime established by the United Nations, with subsequent external military action placing territory affected by the regime under the control of either a *de jure* or a *de facto* occupying power. On the island of Cyprus, the subsequent external military action resulted in substantial numbers of Turkish forces remaining on the island to this very day, occupying what is essentially 40 % of the island's northern portion. In Afghanistan, however, the situation has been somewhat distinct. While American and coalition military units remain in that country, force structures have decreased, with mop-up operations and security assistance provided to Afghanistan's new internationally supported government serving as the main objectives.

*Cyprus.* With greater specificity to the continuing presence of Turkish military forces in Cyprus, one would do well to recall that hostilities between the majority Greek-Cypriot and minority Turkish-Cypriot inhabitants proved a complication for the island's British overseers for a number of years following the Second World War.<sup>70</sup> In 1960, however, London was able to mastermind a negotiated compromise between itself, Greece, Turkey, and the two antagonistic ethnic communities on the island. The compromise produced a new constitution for the Republic of Cyprus, and treaties between the negotiating nations. The treaties were signed on 16 August 1960 in Nicosia, Cyprus, and guaranteed the island's independence and assured both non-interference by Greece or Turkey as well as recognition of the Cypriot constitution.<sup>71</sup> By late 1963 and early 1964, it had become clear to the UN Security Council that the resumption of ethnic hostilities between inhabitants of the island threatened to bring Greece and Turkey into confrontation with one another.<sup>72</sup> On 4 March 1964 the Council thus adopted resolution 186,<sup>73</sup> which did several things

<sup>70</sup> See Cyprus: Two Nations in One Island, Bow Educational Briefing No. 5, Pt. I, available at <<http://faculty.menlo.edu:8080/~jhiggins/tcvoices/bowpart1.html>> (accessed May 29, 2003).

<sup>71</sup> See id. and Bow Educational Briefing No. 5, Pt. II.

<sup>72</sup> See Repertorie Practice of the Security Council, 1964-65 at 108-111, available at <[www.un.org/Depts/dpa/repertoire/64-65\\_08.pdf](http://www.un.org/Depts/dpa/repertoire/64-65_08.pdf)> (accessed May 28, 2003).

<sup>73</sup> See S.C. Res. 186, UN Doc. SC/RES/186, 4 Mar. 1964.



of significance. These included calling on member states (e.g., Greece and Turkey, in particular) to refrain from actions likely to worsen the situation,<sup>74</sup> urging the government of Cyprus to take measures to stop bloodshed,<sup>75</sup> and creating the United Nations Peace-keeping Force in Cyprus (UNFICYP) to assist in the prevention of fighting.<sup>76</sup> Of the various provisions of the resolution, especially important was the reference in the second paragraph of the preamble. That paragraph provided that the Council's listing of measures, such as UNFICYP's creation, and the call for avoidance of bloodshed and actions that might worsen the situation, was made in full "[c]onsider[ation] [of] the positions taken by the parties in relation to the treaties signed in Nicosia on 16 August 1960".<sup>77</sup> Essentially, the preambular statement suggests Security Council recognition that the concerned parties had settled upon a completed plan designed to resolve long-standing differences, and that the situation on the island brought about in March of 1964 by the government of Cyprus was clearly at variance with that plan.

What makes such an understanding of the preambular statement in the second paragraph all the more convincing is the language in paragraphs 2 and 3 of resolution 186's substantive provisions. Both of these paragraphs are directed at Cypriots, with the former requesting the Greek-Cypriot controlling government of the island "take all additional measures" to dampen the violence,<sup>78</sup> and the latter calling on the ethnic communities and their leaders to "act with the utmost restraint".<sup>79</sup> In the context of the second paragraph of the preamble, these two substantive paragraphs would suggest nothing be done to undermine the previously negotiated 1960 compromise solution. Measures by the Greek-Cypriot government frustrating the objectives of the Republic's 1960 constitution, would appear to contravene both paragraphs 2 and 3. Such measures represented a refusal to take "all" the additional steps to break the cycle of violence, as required by paragraph 2, and demonstrated a further refusal to "act with the utmost restraint", as required by paragraph 3. Both paragraphs from the resolution's substantive provisions were inextricably bound to the Security Council's full "[c]onsider[ation]" of the positions taken by Britain, Greece, Turkey, and the two ethnic communities on Cyprus, in their signing of the 1960 Nicosia treaties.

From 1964 until July of 1974, the Security Council adopted various additional resolutions and statements addressing the situation in Cyprus.<sup>80</sup> By-and-large, these either extended UNFICYP's operational mandate,<sup>81</sup> or spoke to especially

<sup>74</sup> See *id.* at para. 1.

<sup>75</sup> See *id.* at para. 2 and 3.

<sup>76</sup> See *id.* at para. 4 and 5.

<sup>77</sup> See *id.* at second para. of Preamble.

<sup>78</sup> See *id.* at para. 2.

<sup>79</sup> See *id.* at para. 3.

<sup>80</sup> For a survey of the resolutions, and debates thereon, see *Repertoire Practice of the Security Council, 1966-68* at 105-113, available at <[www.un.org/Depts/dpa/repertoire/66-68\\_08.pdf](http://www.un.org/Depts/dpa/repertoire/66-68_08.pdf)> (accessed May 28, 2003); *id.*, 1969-71 at 121-126, available at <[www.un.org/Depts/dpa/repertoire/69-71\\_08.pdf](http://www.un.org/Depts/dpa/repertoire/69-71_08.pdf)> (accessed May 28, 2003); *id.*, 1972-74 at 144-159, available at <[www.un.org/Depts/dpa/repertoire/72-74\\_08.pdf](http://www.un.org/Depts/dpa/repertoire/72-74_08.pdf)> (accessed May 28, 2003).

significant episodes in the ethnic hostilities on the island.<sup>82</sup> Resolution 207 deserves particular mention, as it diverges somewhat from this pattern. The Security Council adopted the resolution on August 10, 1965, in response to actions of the controlling Greek-Cypriot government that were generally seen as inconsistent with the earlier 1960 compromise.<sup>83</sup> During the Security Council's deliberations on the two brief substantive provisions of the resolution, several Council members explicitly criticized the Greek-Cypriot government for contravening the terms of resolution 186 through measures taken by that government in violation of the Cypriot constitution.<sup>84</sup> Presumably, in the estimation of these Council members, it was such contravening action that necessitated resolution 207's adoption. When these criticisms are conjoined with the fact the resolution left absolutely no doubt the terms of resolution 186 were being reaffirmed, the reality that the 1960 negotiated compromise solution was envisioned by the Security Council as surviving efforts to undo it seems beyond serious challenge.

This same impression emerges from resolution 244 of December 22, 1968, and continues through the adoption of resolution 353, unanimously agreed upon by the Security Council contemporaneously with Turkey's sending of occupying military forces to the island of Cyprus. Paragraph 5 of resolution 244 explicitly urges the parties to undertake determined efforts "with a view ... to keeping the peace and arriving at a permanent settlement in accordance with Security Council resolution 186 ...".<sup>85</sup> The second preambular paragraph of resolution 353 expresses the Council's concern about the need for restoring the constitutional structure of Cyprus "established and guaranteed by international agreements", undoubtedly those of 1960, and the third paragraph indicates the Council's recollection of "its resolution 186 (1964) of 4 March 1964 ...".<sup>86</sup> However, what appears to be a monumental and radical shift in the Security Council's approach on the survival of the pre-existing 1960 legal regime begins to unfold within 5 months of Turkey's July 1974 introduction of military forces.

On December 13, 1974, the Security Council adopted resolution 365, by a consensus vote.<sup>87</sup> Apparently, frustrations over the long, unsuccessful efforts to implement the 1960 solution, as well as the bifurcation of Cyprus effected through the

<sup>81</sup> Originally, UNFICYP had a three month renewal mandate. See S.C. Res. 186, *supra* note 58 at para. 6. That mandate was later lengthened to six months. See S.C. Res. 206, para. 5, UN Doc. S/RES/206, 15 June 1965.

<sup>82</sup> See e.g., S.C. Res. 193, UN Doc. S/RES/193, 9 Aug. 1964 (Turkish aerial attacks); Appeal by President of the Security Council, 5 Nov. 1965, cited in Repertoire Practice of the Security Council, 1964-65 at 125-126, available at <[www.un.org/Depts/dpa/repertoire/64-65\\_08.pdf](http://www.un.org/Depts/dpa/repertoire/64-65_08.pdf)> (accessed May 28, 2003) (Greek-Cypriot cleansing actions against Turkish-Cypriot coastal town of Famagusta).

<sup>83</sup> See S.C. Res. 207, UN Doc. S/RES/207, 10 Aug. 1965. See Repertoire Practice of the Security Council, 1964-65 at 125, available at <[www.un.org/Depts/dpa/repertoire/64-65\\_08.pdf](http://www.un.org/Depts/dpa/repertoire/64-65_08.pdf)> (accessed May 28, 2003).

<sup>84</sup> See Repertoire Practice of the Security Council, id. at 124-25.

<sup>85</sup> See S.C. Res. 244 at para. 5, UN Doc. S/RES/244, 22 Dec. 1968.

<sup>86</sup> See S.C. Res. 353 at paras. 6 and 7 of the Preamble, UN Doc. S/RES/353, 20 July 1974.

<sup>87</sup> See S.C. Res. 365, UN Doc. S/RES/365, 13 Dec. 1974.

introduction of Turkish military forces, resulted in the Council recognizing the need for an entirely new approach. The approach the Council opted for was reflected in a recently adopted unanimous resolution of the UN's General Assembly, resolution 3212. Without specifying the details of resolution 3212, it essentially envisioned the negotiation of a completely new constitution between the two ethnic communities on Cyprus. Security Council resolution 365 embraced this approach. Paragraph 1 of that resolution expressly provided that the Council "[e]ndorses General Assembly resolution 3212 ... and urges the parties concerned to implement it as soon as possible".<sup>88</sup> Within weeks of resolution 365's adoption, Turkish-Cypriots declared separation from the Republic of Cyprus, thus leading the Security Council to adopt resolution 367, reaffirming commitment to the new course and condemning separatist inclinations.<sup>89</sup> That same reaffirmation of commitment repeatedly appeared in subsequent resolutions in 1976<sup>90</sup>, 1977<sup>91</sup>, and 1978<sup>92</sup>. References in any of the relevant resolutions to the earlier resolution 186 might be suggested as indicating a continuation of the 1960 regime. Such suggestions, however, seem thoroughly undercut by the fact the language of the resolutions as a whole reflects nothing but Council approval of 186's establishment of UNFICYP and other related matters.

From the preceding it is clear that, up until the 1974 Turkish occupation of the northern portion of Cyprus, the resolutions of the Security Council viewed the pre-existing 1960 legal regime as surviving evolving political developments on the ground. With the commencement of belligerent occupancy, however, the Council plainly recognized the need for change. Thus, the 1960 solution was no longer seen as viable. The suggestion thus arising is that UN practice does not support the continuation of pre-existing international legal regimes following belligerent occupation. However, such an explanation, in the context of the Cyprus situation, emerges from the Council's deliberate effort to cast the language of its resolutions so as to reflect UN acceptance of a new political reality. With regard to Iraq, over the years the UN fashioned an extensive and elaborate network of legal obligations applicable to Baghdad. And, unlike with its resolutions on Cyprus, the Security Council's relevant Iraqi resolutions, when judged against the backdrop of resolution 1483, appear to be intended to survive belligerent occupation.

*Afghanistan.* As for Afghanistan, the situation seems to have been more akin to that involving Iraq than to the situation involving Cyprus. Essentially, the UN sanctions imposed against Afghanistan's pre-occupation Taliban government came under immediate Security Council review following the American military action taken on the heels of al-Qaeda's September 11, 2001 terrorist attacks on the United States. The review, however, did not result in an immediate move to undo the

<sup>88</sup> See *id.* at para. 1.

<sup>89</sup> See S.C. Res. 367 at paras. 2, 4, and 5, UN Doc. S/RES/367, 12 Mar. 1975.

<sup>90</sup> See S.C. Res. 391 at para. 2, UN Doc. S/RES/391, 15 June 1976.

<sup>91</sup> See S.C. Res. 410 at para. 2, UN Doc. S/RES/410, 15 June 1977.

<sup>92</sup> See S.C. Res. 440 at para. 1, UN Doc. S/RES/440, 27 Nov. 1978.

Council's antedating sanctions regime. The implication flowing from this is that all portions of the UN legal regime established prior to the U.S. military action against Afghanistan were deliberately contemplated as surviving the belligerent occupation that followed. In large measure, this appears to buttress the impression that whether or not a UN legal regime survives *de jure* or *de facto* belligerent occupation turns more on the particular language of relevant Security Council resolutions than on some universal, general rule applicable in each and every conceivable situation. Two observations merit reference, however, prior to detailing the Security Council resolutions suggesting the aforementioned conclusion regarding the Afghan situation. First, the fact the Security Council may have explicitly continued the UN sanctions regime against Afghanistan, even after occupation by U.S. and allied forces, may suggest nothing more than that UN regimes survive when cast in language permitting such, but not when the Council opts for some alternative formulation. Cyprus is a prime example of the latter case. And second, the situation in Afghanistan saw the initial military action and occupation by the United States and its allies overtaken by a UN approved international security assistance force (ISAF) charged with stabilizing the countryside and aiding transition to a new governing structure. In such a context, the continued involvement of an antedating UN legal regime is quite explicable.

The most relevant resolutions of the Council begin with resolution 1267 in late 1999.<sup>93</sup> Though others had been adopted by the Council as early as October of 1996, immediately after the Taliban's emergence as the dominant political force in the civil war that battered Afghans following the former Soviet Union's withdrawal in 1989,<sup>94</sup> those resolutions were restricted to condemning the Taliban for its treatment of women, tolerance of terrorist groups and international drug trafficking, religious and ethnic persecution, and lack of respect for the country's cultural heritage and treasures.<sup>95</sup> With 1267 the Security Council initiated its sanctions regime against Afghanistan. By paragraph 4 of the resolution, the Council indicated it intended to institute a flight ban on Ariana Afghan Airlines, the airlines owned, leased or operated by or on behalf of the Afghan government, and freeze funds owned or controlled by the Taliban.<sup>96</sup> The specifics of the resolution triggered these sanctions once the Taliban refused to accede to the UN's demand that Osama bin Laden, incriminated in attacks against U.S. embassies in east Africa, be handed over to appropriate authorities for prosecution.<sup>97</sup>

December 2000 saw the Security Council's next instalment in the sanctions regime against Afghanistan. Resolution 1333 demanded Taliban compliance with

<sup>93</sup> See S.C. Res. 1267, U.N. Doc. S/RES/1267, 15 Oct. 1999.

<sup>94</sup> See Gilles Dorransoro, *The World Isolates the Taliban: Afghanistan All Alone*, *Monde Diplomatique* (June 2001), available at <[www.globalpolicy.org/security/sanction/afghanistan/2001/0619tali.htm](http://www.globalpolicy.org/security/sanction/afghanistan/2001/0619tali.htm)> (accessed June 5, 2003).

<sup>95</sup> See generally S.C. Res. 1076, U.N. Doc. S/RES/1076, 22 Oct. 1996; S.C. Res. 1193, U.N. Doc. S/RES/1193, 28 Oct. 1998; S.C. Res. 1214, U.N. Doc. S/RES/1214, 8 Dec. 1998.

<sup>96</sup> See *supra* note 93 at para. 4.

<sup>97</sup> See *id.* at paras. 2 and 3.

1267.<sup>98</sup> Paragraph 5 then both imposed an embargo on the supply of arms and related material to territory under Taliban control, and directed all states to prevent the provision of technical assistance or training to the Taliban.<sup>99</sup> Additionally, paragraph 8 directed all states to close Taliban offices in their territory and freeze assets of Osama bin Laden and individuals or entities associated with him.<sup>100</sup> Paragraph 11 followed this by requiring all states deny any aircraft flight clearance if that aircraft left from or landed in Afghan territory under Taliban control.<sup>101</sup> By the terms of paragraph 23, the Security Council indicated its decision to continue the aforementioned sanctions for one year, with possible renewal for additional periods, dependent upon Taliban compliance with Council demands.<sup>102</sup>

Subsequent to resolutions 1267 and 1333, the Security Council adopted several other resolutions regarding Afghanistan, a couple of which deserve passing reference. These include resolution 1373, adopted after the September 11, 2001, terrorist attacks on the United States, and resolutions 1378 and 1386, both adopted in the concluding two months of 2001. Resolution 1373 demanded that all states, though not mentioning Afghanistan by name, cooperate in efforts to control international terrorism.<sup>103</sup> Resolution 1378, adopted after U.S. and allied military action to remove the Taliban from power, reaffirmed 1267 and 1333, and urged support for Afghanistan's effort to transition to a more democratic and civil form of governing structure.<sup>104</sup> To assist in facilitating the transition, and to provide international support to U.S. and allied military units, resolution 1386 both established and empowered a UN international security assistance force (ISAF), consistent with the earlier Bonn Agreement signed December 5, 2001, by the various factions vying for power following the Taliban's ouster.<sup>105</sup>

While the relevance of 1373, 1378, and 1386 is apparent, they add little to the sanctions regime established by resolution 1267 and 1333. They do, however, set the stage for two additional resolutions of substantial import in that respect: resolutions 1388 and 1390. Both resolutions were adopted in mid-January 2002, many weeks after the U.S. military had consolidated its position in Afghanistan and removed the Taliban from power. With respect to 1388, paragraphs 1 and 2 made clear the Security Council was not prepared to do more than lift the limitations imposed by the sanctions regime on Ariana Afghan Airlines.<sup>106</sup> As if to emphasize the extremely restricted nature of the Council's willingness to relent on the pre-existing sanctions regime, the day after resolution 1388 was adopted, the Council re-

<sup>98</sup> See S.C. Res. 1333, U.N. Doc. S/RES/1333, 19 Dec. 2000, at para. 1.

<sup>99</sup> See *id.* at para. 5.

<sup>100</sup> See *id.* at para. 8.

<sup>101</sup> See *id.* at para. 11.

<sup>102</sup> See *id.* at para. 23.

<sup>103</sup> See S.C. Res. 1373, U.N. Doc. S/RES/1373, 28 Sept. 2001.

<sup>104</sup> See S.C. Res. 1378, U.N. Doc. S/RES/1378, 14 Nov. 2001, first paragraph of Preamble and para. 1 of substantive provisions.

<sup>105</sup> See S.C. Res. 1386, U.N. Doc. S/RES/1386, 20 Dec. 2001, paras. 1 and 3.

<sup>106</sup> See S.C. Res. 1388, U.N. Doc. S/RES/1388, 15 Jan. 2002, paras. 1 and 2.

iterated, in paragraph 1 of resolution 1390, that the other dimensions of the regime continued to survive the foreign military occupation of Afghanistan.<sup>107</sup> Paragraph 2 then imposed further financial and transit sanctions on the Taliban, and those associated with them.<sup>108</sup> Interestingly, the U.S. apparently favored the action taken by the UN both to continue and to expand the principal dimensions of the Afghan sanctions regime.<sup>109</sup> With the subsequent adoption by the Security Council on January 17, 2003, of resolution 1455, the international community left no doubt of its unequivocal intent to continue the sanctions regime for an additional year, despite American and allied military forces remaining in Afghanistan.<sup>110</sup>

Any fair and impartial evaluation of the Afghanistan situation would have to acknowledge that the UN sanctions regime with regard to that nation survived the occupation by U.S. and coalition allies. Admittedly this occurred in the context of eventual Security Council approval of an ISAF, thus giving at least tacit, after-the-fact blessing to the American military action against the Taliban and its sympathizers. It also occurred against a backdrop of U.S. support for continuation of the Security Council's Afghan sanctions regime. Nonetheless, when looked at with the Cyprus and Iraqi situations in mind, Afghanistan certainly suggests the UN knows how to stress that its pre-existing legal regimes remain viable and in-place long after foreign belligerent military occupation. From this, would it not seem safe to conclude that, rather than state practice establishing some general rule providing pre-existing regimes of international organizations survive or are destroyed by belligerent occupancy, their status is to be determined on a case-by-case basis? Would it not seem reasonable to conclude that the only sure way to unravel the question of whether the UN legal regime governing transfers of Iraqi oil remained intact after U.S. and allied occupation of Iraq, is to search out the international community's intent as reflected in the precise wording of Security Council resolutions adopted before and after the relevant military action? And, as has been seen earlier, would it be completely without merit to read those Council resolutions on Iraq as envisioning the continuation of UN control over transferable title to Iraqi oil, even after foreign military occupation of that country?

## V. Conclusion

The relevant Security Council documents, general international rules concerning the succession of states to international commitments, and state practice in situations comparable to that arising in Iraq, suggest there is reason to believe the UN controlled the transferable "legal title" to Iraqi oil in the immediate aftermath of

<sup>107</sup> See S.C. Res. 1390, U.N. Doc. S/RES/1390, 16 Jan. 2002, para. 1.

<sup>108</sup> See *id.* at para. 2.

<sup>109</sup> See Nicholas Kravlev, US to Ask UN for Continuing Afghan Sanctions, *Wash. Times* (Jan. 8, 2002), available at <[www.globalpolicy.org/security/sanction/afgnstan/2002/0108update.htm](http://www.globalpolicy.org/security/sanction/afgnstan/2002/0108update.htm)> (accessed June 5, 2003).

<sup>110</sup> See S.C. Res. 1455, U.N. Doc. S/RES/1455, 17 Jan. 2003.

the successful U.S.-led coalition military action against Baghdad. Both this conclusion, and the informative light it casts on the broader question of the continuation of UN juridical regimes following belligerent occupation, prove significant. However, forgoing an opportunity to either reiterate in summary form the reasons for that conclusion, or explore in any detail the implications, for the broader question, of the particular situation in Iraq, another seemingly more fundamental point bears observation. Specifically, UN involvement in various aspects of managing the post-war Iraqi situation cannot help but add to the sheer complexity and difficulty of the tasks encountered. It clearly would be easier and cleaner were the United States and its principal allies to be left in the position of making decisions about the full range of matters from re-establishing Iraqi domestic stability to initiating the process for creating future governing arrangements. Everything in between, such as Iraqi oil sales, the use of proceeds therefrom, the honoring of preliminary and final oil contracts entered into by the government of Saddam Hussein, could surely be disposed of far more neatly were the number of nation-state decision-makers kept to a minimum.

The recently adopted Security Council resolution 1483 does not opt for such a streamlined and unilateralist course of action. And, as we have seen, there is plenty of evidence to suggest that such a course of action was not operative, in connection with transferability of title to Iraq's oil, prior to the adoption of that resolution. A true conflict would have arisen between the UN's oil-for-food regime and the occupant's rights under the Hague regulations had the Security Council refused to pass 1483. In such a case, would the occupying coalition, with its heavy burden of restoring order and providing for the Iraqi citizenry, have been barred from sale of Iraqi oil to meet occupation purposes? The essence of the UN's oil-for-food regime suggests an affirmative answer, while the concept of necessity so implicit in the Hague and Geneva rules of war argues for the contrary. Assuming litigation regarding transfers of title, would the U.S.-led coalition have been held to have committed tortuous conversion had it acted to sell Iraqi oil to pay for relief efforts? In some respects, resolution 1483 exposes the inadequacy of both the UN and the Hague regimes, and the virtue of the existence of the United Nations. Clearly, the oil-for-food regime had been compromised by Iraq's occupation. On the other hand, without UN support, the difficulties of the coalition meeting its responsibilities as an occupant were apparent. That the world's superpowers could invade without the approval of the UN, but not occupy Iraq effectively without that organization's assistance and tacit approval, is both an irony and an encouraging sign of the continuing relevance and authority of that body.

While many would prefer that it were otherwise, the international legal process is not always efficient, rational, and linear. As with much that is the product of humankind's creative instinct, international law mutates, evolves, and progresses in a halting, oft-times error-ridden fashion. Many decades may pass, and numerous missteps may be taken, before the realization is apprehended that a more effective or, perhaps, acceptable direction exists. Undoubtedly to the consternation of those who confidently assert identification of the most straight-forward and appropriate

way to secure the elimination of troublesome international legal issues, suggestions are often voiced of a role for the United Nations. But the mere fact of having to collaborate with others in that international forum to resolve difficulties facing the community of nations can prove immensely frustrating and complicated. For some, this provides adequate reason for minimizing the UN's role in addressing international problems, even though specific legal rules may require a particular interpretation to accomplish that objective. For others, however, this simply highlights the fact that the international legal process has the capacity to promote interests and considerations far beyond those immediately linked to the resolution of specific international problems. Legal issues, and the methods by which they come to be handled, offer not only opportunities to resolve current, pressing difficulties, but to assure that longer-term interests – interests with no necessary connection to a problem at-hand – are open for treatment as well.

Admittedly, from the standpoint of the United States, questions regarding control over transferable “legal title” to Iraqi oil, before as well as after resolution 1483, might have been settled in a cleaner and crisper fashion through exclusive application of the relevant Hague rules on belligerent occupancy. Introducing the notion that the UN legal regime antedating Gulf War II survived the ouster of Saddam Hussein and governed subsequent dispositions of such oil provides an unwelcome and potentially exasperating inconvenience. However, at the same time, it could well be that that notion serves multiple long-term interests. Most obviously, it facilitates re-engagement between the United States and historic allies who expressed reservations on Iraq serious enough to frustrate efforts to get a Security Council resolution authorizing the overall military operation. The importance of that interest seems recognized in the very fact the U.S. actively took the lead in drafting resolution 1483, and there is every reason to believe that same interest would have been served by acknowledgement of UN control over transferable title even prior to such resolution's adoption. Further, there is the long-term interest of addressing international problems through collective, rather than unilateral or seriously limited multilateral action. Collective action gives voice to the full range of options available. Through the radically diverse perspectives that thereby emerge, chances are minimized that a legitimate angle on a solution will be ignored or pushed to the margins. Positions have to be explained and justified. There is also an increased likelihood that countries consulted in a collective process will feel as though they have a greater stake in helping to solve problems confronting the international community. Inclusion in a participatory process has the effect of neutralizing one's inclination to deny that a problem once perceived no longer exists. And, without putting too fine a line on it, collective action has the further advantage of assuring that the costs associated with particular solutions are distributed among all nations, and not borne by a small handful who have acted outside the approval of the international community.

Apart from these long-term interests in being engaged internationally and acting through collective rather than unilateral mechanisms, two other relevant interests served by involvement of the United Nations in the Iraqi situation deserve men-



tion. Specifically, there is the long-term interest in a rule-based system of international relations. Rule-based systems are not immune from various deficiencies. To the extent they approve action only when certain clear standards have been met, they provide frequent opportunity for situations of insufficient evidence to result in complete paralysis. Nonetheless, rule-based systems prevent degeneration into complete arbitrariness and power politics, and they engender a feeling of fair treatment and even-handedness that can assist in reducing international confrontation. Perhaps less obvious, but no less significant in the context of the question of control over transferability of Iraqi oil, is the somewhat shorter-term interest in providing international legitimacy to subsequent transactions concerning that oil. Clearly, by involving the UN, the chances are minimized that legal claims against such oil are likely to be judged meritorious. Having established a role for the United Nations in dispositions of Iraq's oil wealth, member states would not be anxious to permit the use of their own courts to inject legal confusion. International legitimacy provides transactional certainty. And transactional certainty is indispensable to the quick generation of revenues for the rehabilitation of Iraq's war-torn infrastructure.

