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# Iraq and the “Fog of Law”

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**T**he conference “The War in Iraq: A Legal Analysis,” from which this volume derives, covered a variety of topics and a plethora of legal issues. It was followed by a workshop consisting of moderators of the various panels, panelists and commentators with a view to continuing the dialogue begun at the conference. As a commentator at the conference,<sup>1</sup> this author was struck not only by the large number of controversial issues arising out of the conflict in Iraq, but also by the absence of clear resolution of many of these issues, both at the conference and in the wider world outside of the conference, hence my choice of the “fog of law” as part of the title of this article.<sup>2</sup>

By the “fog of law,” I mean not only the debate over the law as it was interpreted and applied in Iraq; but also the issue of what law applied—national law, especially the law of Iraq; the law of armed conflict (or, as preferred by some, “international humanitarian law”); the law of the United Nations Charter, including Security Council resolutions adopted under Chapter VII; or no law at all.<sup>3</sup>

Although the first panel of the conference was titled “Legal Bases for Military Operations in Iraq,” and Andru Wall presented a defense of the legality of the March 2003 invasion of Iraq and the removal of the Saddam Hussein regime from power,<sup>4</sup> this topic was not a primary focus of the conference. Perhaps this was just as well, since the legality of the war in Iraq under the *jus ad bellum*, the law of resort

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to the use of armed force, has been debated extensively in various other forums. Moreover, with the passage of time and a rash of developments in Iraq that have raised a host of other issues, the legality of the 2003 invasion has arguably become a matter of academic interest only. It may be appropriate, however, to make two brief observations before leaving the topic. The first is that there was general agreement in the Security Council debates concerning Iraq on a “strict constructionist” approach to the *jus ad bellum*. That is, the strict limits on the use of force set forth in Article 2(4) of the UN Charter<sup>5</sup> are subject to only two exceptions: (1) self-defense in response to an armed attack and (2) military action taken or authorized by the Security Council.

In the Security Council debates prior to and after the invasion, there was no invocation of Article 51<sup>6</sup> as a basis for the invasion. Rather, the debate focused on whether the particular Security Council resolutions on Iraq, including especially, but not limited to, Resolution 1441,<sup>7</sup> authorized the March 2003 invasion of Iraq without the need for a further resolution explicitly authorizing such an action. The “fog of law” in this case may have been Resolution 1441 itself, which this author has described elsewhere as “a masterpiece of diplomatic ambiguity that masked real differences of view between the United States and the United Kingdom, on the one hand, and France, Germany, and Russia, on the other, in how Iraq’s failure to fulfill its obligations under Resolution 687 should be handled.”<sup>8</sup> In a similar vein, Michael Glennon has suggested that Resolution 1441 “can accurately be said to lend support to both claims. This is not the hallmark of great legislation.”<sup>9</sup>

The second observation concerns whether, assuming *arguendo* that none of the applicable Security Council resolutions authorized the March 2003 invasion of Iraq, this was a “failure of the Security Council,” as suggested by Glennon, or whether the Security Council should have accepted the US and UK proposal that it adopt a resolution explicitly authorizing the use of force if Iraq failed to carry out its obligation to disarm. There has been considerable debate over whether it was necessary or desirable *as a matter of policy* to remove the Saddam regime to maintain international peace and security, but a discussion of the arguments for and against this proposition are beyond the scope of this article. For present purposes, it suffices to note that there was little or no prospect that the Security Council would adopt a resolution authorizing such action, however compelling the reasons for doing so. There is considerable evidence that, far from helping to enforce Resolution 687, France, Russia and China engaged in deals with the Saddam Hussein government that undermined the resolution’s enforcement.<sup>10</sup> In short, the Saddam regime was one favored by three permanent members of the Security Council, and it is reasonable to conclude that they had no interest in its removal

and would have exercised their veto power to block any Security Council resolution that sought to authorize such removal.<sup>11</sup>

Parenthetically, it may be noted that Michael Reisman has argued that Article 2(4) of the UN Charter should be construed in such a way as to enhance “the ongoing right of peoples to determine their own political destinies” and “to maintain the political independence of territorial communities so that they can continue to express their desire for political community in a form appropriate to them.”<sup>12</sup> Hence, in his view, some interventions are permissible under Article 2(4) if they “serve, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their government and political structure.”<sup>13</sup> Since the Saddam Hussein regime was a brutal dictatorship on a local level and had twice invaded its neighbors to deny them the right of self-determination, it could be argued that the March 2003 invasion of Iraq was not a violation of Article 2(4) and that there was therefore no need for a Security Council resolution authorizing it.

To be sure, this kind of argument has been effectively, in my opinion, refuted by Oscar Schachter. In a direct response to Reisman,<sup>14</sup> Schachter stated:

The difficulty with Reisman’s argument is not merely that it lacks support in the text of the Charter or in the interpretation that states have given Article 2(4) in the past decades. It would introduce a new normative basis for recourse to war that would give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or to the goal of self-determination.<sup>15</sup>

Assuming *arguendo* that, as a policy matter, the Saddam Hussein regime *should* have been removed from power, but the lack of Security Council authorization stood in the way of such removal, what are the implications for appropriate action should such a situation arise again in the future? If one agrees with Michael Glennon’s argument that, because they have been so often flouted in the past, Article 2(4) and other limitations on resort to force in the UN Charter are no longer in effect, it necessarily follows that one would agree with Glennon that “[b]y 2003 the main question facing countries considering whether to use force was not whether it was lawful. Instead, as in the nineteenth century, they simply questioned whether it was wise.”<sup>16</sup> But for reasons I have set forth elsewhere, Glennon’s premise that limitations on the use of force in the UN Charter are no longer in effect is not valid.<sup>17</sup>

Shortly after the March 2003 invasion of Iraq, Lee Feinstein, then Acting Director of the Washington Program of the Council on Foreign Relations, and Anne-Marie Slaughter, then Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University and President of the American Society of International Law, proposed a new doctrine, a “collective ‘duty to prevent’

nations run by rulers without internal checks on their power from acquiring or using WMD [weapons of mass destruction].”<sup>18</sup> With specific reference to Iraq, the authors suggested:

Consider, for instance, how recognizing a duty to prevent could have changed the debate over the war in Iraq. Under existing law, the Bush administration could justify intervention only by arguing that Iraq held WMD in violation of Security Council resolutions. . . . Now suppose that last March, the United States and the United Kingdom had accepted a proposal by France, Germany, and Russia to blanket Iraq with inspectors instead of attacking it. Presumably those inspectors would have found what U.S. forces seem to be finding today—evidence of Iraq’s intention and capacity to build WMD, but no existing stocks. Would the appropriate response then have been to send the inspectors home and leave Saddam’s regime intact? The better answer would have been to recognize from the beginning the combined threat posed by the nature of his regime and his determination to acquire and use WMD. Invoking the duty to prevent, the Security Council could have identified Iraq as a subject of special concern and, as it was blanketing the country with inspectors, sought to prosecute Saddam for crimes against humanity committed back in the 1980s.<sup>19</sup>

There are a number of problems with this proposed alternative approach to Saddam’s Iraq. First, it should be noted that Security Council Resolution 687 had established a Special Commission (UNSCOM) consisting of inspectors who were to inspect and verify that Iraq had destroyed all capability for weapons of mass destruction, but Iraq had consistently refused to allow UNSCOM to carry out its mandate, and in 1998 had forced it to leave Iraq and refused it or a successor team to resume this function. Only in 1999 was the Security Council able to establish the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC)<sup>20</sup> as a successor to UNSCOM. This result is largely attributable to heavy bombing by the United States and the United Kingdom as part of Operation Desert Fox, which occurred in response to the withdrawal by Iraq of cooperation with the UN weapons inspectors.<sup>21</sup> In mid-September 2002, Iraq finally acceded to the Council’s demand that it allow UN inspectors back into its territory, and Resolution 1441 decided that

the Government of Iraq shall provide to UNMOVIC, the IAEA [International Atomic Energy Agency], and the Council, not later than 30 days from the date of this resolution, a currently accurate, full, and complete declaration of all aspects of its programmes to develop chemical, biological, and nuclear weapons, ballistic missiles, and other delivery systems . . . .<sup>22</sup>

In Resolution 1441, the Council also decided that

false statements or omissions to the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below.<sup>23</sup>

On December 7, 2002, Iraq's declaration of its weapons fell far short of the full disclosure demanded by Resolution 1441. Nonetheless, Hans Blix, the chief UN inspector for chemical and biological weapons, in a clash with the view of US Secretary of State Colin Powell, maintained that the inspection process was working and should be given more time and requested four more months.<sup>24</sup>

In light of Saddam's refusal to cooperate with UN inspectors, it is highly unlikely that he would have accepted "blanketing the country with inspectors," especially if this was part of an effort to prosecute him for crimes against humanity committed in the 1980s. Carrying out this policy would have required the use of armed force. Support of Saddam by the Russian, French, German and Chinese governments would have precluded any Security Council authorization of such use of force.

More generally, Feinstein and Slaughter, in support of their proposal for a doctrine of a duty to prevent weapons of mass destruction falling into the hands of regimes like North Korea or Iran, recognize that the "contentious issue is who decides when and how to use force." They further recognize that the Security Council "remains the preferred enforcer of collective measures."<sup>25</sup> At the same time they state:

Given the Security Council's propensity for paralysis, alternative means of enforcement must be considered. The second most legitimate enforcer is the regional organization that is most likely to be affected by the emerging threat. After that, the next best option would be another regional organization, such as NATO, with a less direct connection to the targeted state but with a sufficiently broad membership to permit serious deliberation over the exercise of a collective duty. It is only after these options are tried in good faith that unilateral action or coalitions of the willing should be considered.

In any event, the resort to force is subject to certain "precautionary principles." All nonmilitary alternatives that could achieve the same ends must be tried before force may be used, unless they can reasonably be said to be futile. Force must be exerted on the smallest scale, for the shortest time, and at the lowest intensity necessary to achieve its objective; the objective itself must be reasonably attainable when measured against the likelihood of making matters worse. Finally, force should be governed by fundamental principles of the laws of war: it must be a measure of last resort, used in

proportion to the harm or the threat of the harm it targets, and with due care to spare civilians.<sup>26</sup>

From a strict legal perspective, it must be noted that the Security Council is not only the “preferred enforcer of collective measures”; it is the only enforcer of collective measures under the UN Charter paradigm qualified to use or to authorize the use of force as a collective measure. Regional organizations, including NATO, require Security Council approval to use force unless they are acting in collective self-defense. But in the case of Security Council paralysis, as suggested by Feinstein and Slaughter, they may well be the most legitimate alternative to the Security Council to engage in armed force, subject to certain “precautionary principles” and “fundamental principles of the laws of war.”

At this point it is time to turn to the “fog of law” topics that will be the primary focus of the rest of this article: the occupation in Iraq and the relationship between the law of armed conflict and international human rights law.

### *The Occupation in Iraq*

It is generally recognized that the 1907 Hague Regulations on land warfare<sup>27</sup> and the Fourth Geneva Convention of 1949<sup>28</sup> constitute the primary legal documents governing the traditional law of belligerent occupation.<sup>29</sup> According to Eyal Benvenisti, however, in the case of the 2003 occupation of Iraq by the United States, Great Britain and the “coalition of the willing,” the occupants “were initially reluctant to use the term *occupation*.”<sup>30</sup> They also did not “explicitly acknowledge their status as occupying powers nor did they invoke the Hague Regulations of 1907 or the Fourth Geneva Convention as applicable to their actions in Iraq.”<sup>31</sup>

Approximately seven months after the coalition invaded Iraq on March 20, 2003, David J. Scheffer published an article that demonstrates why the United States and Great Britain were reluctant to use the term occupation.<sup>32</sup> For example, as stated by Scheffer, “[t]he occupation clauses of the Fourth Geneva Convention are far more relevant to a belligerent occupation than to an occupation designed to liberate a society from its repressive governance and transform it as a nation guided by international norms and the self-determination of its liberated populace.”<sup>33</sup> Elaborating on this thesis, Scheffer states:

In recent years, multilateral or humanitarian occupation, particularly that aimed at enforcing international human rights law and atrocity law, has become the more relevant factor in occupation practice. Occupation law was never designed for such transforming exercises. While the humanitarian condition of the occupied society is a paramount concern of the Hague Regulations of 1907, [under] the Fourth Geneva

Convention, and Geneva Protocol I, a society in political, judicial, and economic collapse or a society that has overthrown a repressive leader and seeks radical transformation requires far more latitude for transformational development than would be anticipated under these instruments. The society may require revolutionary changes in its economy (including a leap into robust capitalism), rigorous implementation of international human rights standards, a new constitution and judiciary, and a new political structure (most likely consistent with principles of democracy) never contemplated by occupation law or the domestic law of the occupied territory. As just one example, the penal law requirements set forth in Article 64 of the Fourth Geneva Convention serve little, if any, purpose in areas such as Kosovo or Iraq or, had it been in force at the time, in Germany after World War II where the Nazi-era national penal system failed to protect individual and collective rights.<sup>34</sup>

Despite the reluctance of the United States and the United Kingdom to use the term “occupation,” and despite their clear intention to transform Iraqi society, they acknowledged their respective obligations to act in accordance with the Hague Regulations of 1907 and the Fourth Geneva Convention.<sup>35</sup> This was followed by the Security Council issuing Resolution 1483,<sup>36</sup> which “[c]alls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”<sup>37</sup>

Scheffer criticizes Resolution 1483 and suggests that

[t]he methodology that should have been invoked . . . was a UN Security Council mandate establishing the transformational tasks of a military deployment and civilian administration of a liberated society that explicitly or implicitly implemented only the provisions of occupation law relevant to the particular situation. That methodology was rejected by the United States immediately following the intervention.<sup>38</sup>

Instead of supporting a Security Council resolution along the lines suggested by Scheffer, the United States and the United Kingdom established the “Coalition Provisional Authority” (CPA), which “replaced the domestic system of governance with a temporary command structure that ruled the country based on the authority of the ‘relevant U.N. Security resolutions, and the laws and usages of war.’”<sup>39</sup> The Security Council formally recognized the CPA in Resolution 1511 of October 16, 2003.<sup>40</sup>

These developments created a major “fog of law” in Iraq because, as noted by Yoram Dinstein, “[w]ithin a brief stretch of time, the Coalition Provisional Authority carried a whole string of legislative and other measures designed to bring about large-scale reforms.”<sup>41</sup> As Scheffer notes, however, by enacting Resolution 1483, the Council “specified additional obligations not required by occupation law, but in doing so invited the Authority to act beyond some of the barriers that

occupation law otherwise would impose on occupying powers.”<sup>42</sup> He suggests further that

[i]n each of these areas of responsibility, a strict reading of occupation law likely would prohibit such bold and transformational control of Iraqi society and economy, unless one views the Security Council decisions as legitimately overriding conflicting norms of occupation law.<sup>[43]</sup> If such is the case, then the Council’s insistence elsewhere in Resolution 1483 on compliance with occupation law breeds confusion.<sup>44</sup>

Interestingly, Scheffer sets forth a lengthy list of acts or omissions of the occupying powers in Iraq that “[i]f proven true . . . may invite varying degrees of civil liability or criminal culpability under occupation law . . . .”<sup>45</sup> Later, Scheffer admits that

this rather anemic body of international law remains difficult to enforce against either governments or individuals. This is not surprising given the paucity of enforceable penalties under international treaties and national criminal codes and the reluctance of national courts to second guess the public policy decisions that dominate occupation practice. For example, a private right of action against the U.S. government for its conduct during an occupation of foreign territory would be problematic.<sup>46</sup>

Gregory Fox has extensively examined the issue of the extent to which the CPA’s actions were compatible with the traditional law of occupation.<sup>47</sup> As an “alternative source” of legitimacy of CPA reforms, he also evaluates the argument that, by adopting Resolution 1483, the Security Council “ratified the [CPA] reforms by effectively legislating a set of goals for the occupation that superseded the limitations of Hague and Geneva law.”<sup>48</sup> He concludes, correctly in this author’s view, that many of the CPA’s reforms were incompatible with the traditional law of occupation and that the Security Council had not ratified these reforms.<sup>49</sup>

Eyal Benvenisti has a somewhat different view from Fox’s concerning the effect of Resolution 1483 on the law of occupation applicable to the CPA:

Resolution 1483 can be seen as the latest and most authoritative restatement of several basic principles of the contemporary law of occupation. It endorses several theses developed in this book. First, it revives the neutral connotation of the doctrine. Occupation is a temporary measure for reestablishing order and civil life after the end of active hostilities, benefiting also, if not primarily, the civilian population. As such, occupation does not amount to unlawful alien domination that entitles the local population to struggle against it. Second, sovereignty inheres in the people, and consequently regime collapse does not extinguish sovereignty. Thus, the Resolution implicitly confirms the demise of the doctrine of *debellatio*, which would have passed sovereign title to the occupant in case of total defeat and disintegration of the governing regime. Instead, and notwithstanding the requirement of Article 43 of the

Hague Regulations to “respect . . . , unless absolutely prevented, the laws in force in the country,” Resolution 1483 grants a mandate to the occupants to transform the previous legal system to enable the Iraqi people “freely to determine their own political future and control their own natural resources . . . to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender.” Hence, the law of occupation, according to Resolution 1483, connotes respect to popular sovereignty, not to the demised regime. Third, the Resolution recognizes in principle the continued applicability of international human rights law in occupied territories in tandem with the law of occupation. Human rights law may thus complement the law of occupation on specific matters. Fourth, Resolution 1483 envisions the role of the modern occupant as the role of the heavily involved regulator, when it calls upon the occupants to pursue an “effective administration” of Iraq. This call stands in contrast to the initial orientation of the Hague Regulations, which envisioned a disinterested occupant who does not intervene in the lives of the occupied population. In the years since, such an “inactive custodian” approach has been rejected as unacceptable. The call to administer the occupied area “effectively” acknowledges the several duties that the occupants must perform to protect the occupied population. It precludes the occupant from hiding behind the limits imposed on its powers as a pretext for inaction.<sup>50</sup>

Elsewhere, Benvenisti acknowledges that Resolution 1483 “did not address a number of key questions concerning the further adaptation of the law of occupation to contemporary governance.”<sup>51</sup> Nonetheless, it is clear that he considers the contemporary law of occupation more adequate for governing an occupation like that in Iraq, where the goal is regime change and radical changes in law and policy of the occupied territory, than do Scheffer and Fox. In such situations, the latter two commentators appear to favor “the establishment of a United Nations legal framework to govern the foreign military deployment and civilian administration.”<sup>52</sup>

This author tends to favor the Scheffer/Fox approach because a United Nations legal framework would have the potential to bring greater clarity to a murky area and thus lift, at least in part, the “fog of law.” It is unclear, however, the extent to which future occupations will have goals similar to those of the occupation in Iraq. If UN member States were to take seriously the so-called “responsibility to protect,” there would be a considerable likelihood of occupations along the Iraq model. At this writing, however, the “responsibility to protect” is under attack in the United Nations and its future is uncertain.<sup>53</sup>

### ***The Law of International Armed Conflict and International Human Rights***

By way of transition from the previous section, it should be noted, as Yoram Dinstein has helpfully pointed out, that, despite the reluctance of the occupying powers in Iraq to apply the ordinary norms of belligerent occupation because of

their being ill-suited to the transformative objectives they had in mind, “[i]n the event, the status of belligerent occupation in Iraq remained legally valid for just a little over a year . . . .”<sup>54</sup> By adopting Resolution 1546,<sup>55</sup> the Security Council set in train the process whereby the belligerent occupation came to an end. Specifically, the Council declared that “by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and . . . Iraq will reassert its full sovereignty.”<sup>56</sup> Two days earlier than the deadline CPA Administrator Paul Bremer formally transferred political authority to the Iraqi interim government and left the country.<sup>57</sup>

The practical effect of Resolution 1546, however, is unclear. Yoram Dinstein has suggested:

In theory, since the end of June 2004, the continued presence of coalition forces in Iraq is by invitation of the new Iraqi government. In practice, there was little change on the ground following the decreed termination of the occupation. As long as coalition forces are engaged in combat in order to extinguish pockets of resistance of the *ancien regime* (or its putative supporters)—exercising at least some administrative authority in certain areas of Iraq—the occupation has come to a close only “notionally.”<sup>58</sup>

As we shall see later in this article, the situation has changed radically recently with the adoption of two international agreements between the United States and the Iraq government.

As to the applicability of human rights law to the period of belligerent occupation of Iraq, this has been a question of some controversy. The United States, for example, takes the position that the International Covenant on Civil and Political Rights (ICCPR)<sup>59</sup> does not apply outside of the United States or its special maritime and territorial jurisdiction and that it does not apply to operations of the military during an international armed conflict.<sup>60</sup> The US position that the ICCPR does not apply outside of the territory of the United States has been rejected by the United Nations Human Rights Committee<sup>61</sup> and the International Court of Justice (ICJ) in an advisory opinion.<sup>62</sup> It is worth noting, however, that neither the views of the Human Rights Committee nor the ICJ’s advisory opinion has any binding effect, and the United States and other countries have maintained their position.

The United States has also maintained that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment applies only within US territory, although the territorial scope clause that appears in several articles of this convention contains the phrase “in any territory under its jurisdiction.”<sup>63</sup> Leading authorities on the drafting history of the Convention have concluded that this phrase extends the treaty to “territories under military occupation, to colonial territories and to any other territories over which a State has factual

control.”<sup>64</sup> For its part, the UN Committee against Torture, which is the Convention’s counterpart to the UN Human Rights Committee, has endorsed an “effective control” standard and concluded that “this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised. The Committee considers [the US] view that those provisions are geographically limited to its own de jure territory to be regrettable.”<sup>65</sup> Again, the United States is not bound by the views of the Committee against Torture and has maintained its position to the contrary. As is so often his practice, however, Dinstein adds another consideration to the mix:

As treaty laws, the Covenant and the European Convention (whatever the correct interpretations of their texts) are, of course, limited in application to Contracting Parties. But it is necessary to pay heed to the customary law of human rights, which is frequently reflected in the substantive clauses of these instruments. Customary human rights are conferred on human beings wherever they are. Irrefutably, the inhabitants of occupied territories are in principle entitled to benefit from the customary *corpus* of human rights that coexists with the law of belligerent occupation. The International Court of Justice observed, in the *Armed Activities* case, that “both branches of international law, namely, international human rights law and international humanitarian law, would have to be taken into consideration” in occupied territories.<sup>66</sup>

The US view that the ICCPR does not apply to operations of the military during international armed conflict is contrary to the view expressed in two advisory opinions of the International Court of Justice: *Legality of the Threat or Use of Nuclear Weapons*<sup>67</sup> and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>68</sup> In its *Nuclear Weapons* opinion, the Court stated that “the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of emergency.”<sup>69</sup> Similarly, the Court opined in *Wall* that “the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind found in Article 4 of the International Covenant on Civil and Political Rights.”<sup>70</sup>

Dinstein has provided a concise rationale to support the ICJ view: “The very fact derogation is required to suspend the operation of given stipulations of the Covenant in wartime attests that—when no permissible derogation is in effect—human rights continue to be in force.”<sup>71</sup>

To be sure, as Dinstein notes, Article 4(1) of the ICCPR<sup>72</sup> does not contain any explicit reference to war or even armed conflict.<sup>73</sup> Dinstein, however, quotes Thomas Buergenthal, now a judge on the International Court of Justice and an

eminent authority on human rights, to deny any legal significance to this omission: “the omission of specific reference to war was surely not intended to deny the right of derogation in wartime; war is the most dramatic example of a public emergency which might ‘threaten the life of the nation.’”<sup>74</sup> It is noteworthy that neither the United States nor the United Kingdom has invoked Article 4 of the Covenant with respect to Iraq.

Elsewhere in his treatise *The International Law of Belligerent Occupation*, Dinstein discusses in detail Article 4(1), as well as the general subject of derogations from obligations to respect human rights.<sup>75</sup> In a section on non-derogable human rights,<sup>76</sup> Dinstein compares the non-derogable provisions of the ICCPR, the European Convention on Human Rights and Fundamental Freedoms, and the American Convention on Human Rights.<sup>77</sup> He concludes that “[t]he lists of non-derogable human rights appearing in the three instruments coincide in part but they are not conterminous”<sup>78</sup> and illustrates this fact in some detail.<sup>79</sup> Perhaps the most interesting observation Dinstein makes in this exercise is set forth below:

It is surprising that the human right to judicial guarantees of fair trial—enshrined in all the instruments—is not included in the list of non-derogable rights. Only the American Convention enumerates as non-derogable those judicial guarantees that are essential to the protection of other non-derogable rights. This loose end was deftly used by the Inter-American Court of Human Rights—in two Advisory Opinions delivered on the subject in 1987—to extrapolate that judicial remedies like the writs of habeas corpus and *amparo* can never be derogated, and they can therefore be used to exercise control also over the suspension of derogable rights.<sup>[80]</sup> More radically, the Human Rights Committee expressed the non-binding view—in General Comment No. 29 of 2001—that the list of non-derogable rights (as it appears in Article 4(2) of the Covenant) is not exhaustive, and there can be no derogation (in particular) from judicial guarantees.<sup>81</sup>

In subsequent sections of his treatise, Dinstein, in a *tour de force*, explores the many nuances of the following topics: “Built-in limitations of human rights,” including “Explicit limitations” and “Implicit limitations”;<sup>82</sup> “Balance between competing human rights”;<sup>83</sup> and “The Interaction between the law of belligerent occupation and the law of human rights,” including “Convergence and divergence,” “The advantages of the law of belligerent occupation,” “The advantages of human rights law” and “The *lex specialis* rule.”<sup>84</sup> Time and space limitations preclude exploring Dinstein’s treatment of these important topics in any depth. It is fair to say, however, that it helps to lift the “fog of law” covering some very important issues. In particular, it effectively refutes the thesis that the law of international armed conflict and international human rights are mutually exclusive;

illustrates how, “[f]or the most part, in occupied territories, there is enough room for a symbiotic relationship between the two [branches of international law]”;<sup>85</sup> suggests that

[w]hen both alternative paths of human rights law and the law of belligerent occupation are open to a protected person whose rights have been infringed in an occupied territory, there may be a practical advantage in exploring the former, since an international mechanism may be readily available, enabling the injured party to seek and obtain effective redress . . .<sup>86</sup>

and points out that, in the event of an irreconcilable conflict between the two fields of law, “the special law of belligerent occupation trumps the general law of human rights on the ground of *lex specialis derogat lex generali*.”<sup>87</sup>

As noted earlier, on June 28, 2004, CPA Administrator Paul Bremer formally transferred political authority to the Iraqi interim government,<sup>88</sup> two days prior to the date decreed by the Security Council in Resolution 1546.<sup>89</sup> At that time, pursuant to Resolution 1546, the occupation came to an end and Iraq asserted its full sovereignty.<sup>90</sup> To be sure, as reported earlier, Dinstein, quoting and citing Adam Roberts, has suggested that the occupation came to a close only “notionally” because there was little change on the ground following the decreed termination of the occupation.<sup>91</sup>

At present, however, the occupation has come to a close more than notionally. Exercising its sovereign powers, the government of Iraq has entered into two international agreements with the United States that have radically changed the power balance in Iraq.

### *The Strategic Framework Agreement and the Security Agreement*

In Resolution 1511,<sup>92</sup> the Security Council authorized the multinational force in Iraq. This resolution was followed by Resolution 1546,<sup>93</sup> which, in addition to bringing the occupation of Iraq to an end, reaffirmed the authorization for the multinational force.<sup>94</sup> Resolution 1546 was in turn followed by a series of other resolutions that reaffirmed and extended the authorization for the multinational force. The last of these was Resolution 1790,<sup>95</sup> which provided that the authorization of the multinational force would expire on January 1, 2009. Prior to the expiration of the authorization of the multinational force, on November 17, 2008 the United States and Iraq entered into two bilateral agreements that took the authorization’s place.

The two agreements are (1) the Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq (SFA)<sup>96</sup> and (2) the Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq (SA).<sup>97</sup> Interestingly, the executive branch initially intended that the SFA would be a non-binding political commitment in order that it would be free from the US constitutional constraints that apply to international legal agreements;<sup>98</sup> however, the United States and Iraq decided to recast the SFA as a legally binding treaty commitment, like the SA.<sup>99</sup>

It is noteworthy that neither agreement uses the term “status of forces agreement” or SOFA.<sup>100</sup> Commander Trevor A. Rush has explained the reason for the absence of the term SOFA:

First, in a technical sense, it is not accurate to use the term SOFA for either of the two agreements. The SFA is an agreement that defines the long-term strategic relationship between the U.S. Government and the [government of Iraq]. It contains none of the typical provisions one might expect to find in a SOFA and, with regard to “Defense and Security Cooperation,” the SFA contains no actual substance. Instead, it specifically refers to the U.S.-Iraq SA, for the nature of that cooperation. On the other hand, the SA goes far beyond a regular SOFA, to include authorizing combat missions and detentions, discussing the deterrence of “security threats” and the termination of U.N. Security Council measures, as well as U.S. efforts to safeguard Iraqi economic assets and obtain Iraq debt forgiveness.<sup>[101]</sup>

Second, and more importantly, the reason not to use the term SOFA for these two agreements is related to the significant political sensitivities surrounding the presence of foreign forces in the Middle East. The coalition campaigns in Iraq and Afghanistan have added new twenty-first century images to those deep-seated regional concerns. History has witnessed various western powers seek to control Middle Eastern territories, but these attempts at colonization and foreign domination have ultimately, always, been rejected. In this context, a “SOFA” can give the impression of a willing consent to *permanent* foreign military occupation. Skeptics need only look to such places as Europe, Korea, and Japan and see more than half a century of U.S. military presence operating under SOFAs.<sup>102</sup>

Rush gives an extensive and excellent overview of both the SFA and the SA. No attempt will be made in this article to match Rush’s efforts. It is significant, however, that Rush is of the view that “these U.S.-Iraq agreements should be heralded as a major step forward in Iraq’s assumption of responsibility for its own security and governance.”<sup>103</sup> At the same time, Rush recognizes that application of the agreements can give rise to disputes between the United States and Iraq. He notes

that, at the time of writing, the United States had already been accused of violating the SA through a military raid that left two people dead,<sup>104</sup> and suggests that “the first true test of public perception could come in 2009 if an Iraqi referendum on the agreements is held as planned.”<sup>105</sup> At this writing, however, it is uncertain whether such a referendum will take place. Although Sunni lawmakers insisted that a referendum on the SA be held as a condition for their support, and a referendum was originally scheduled for July of 2009, it was delayed. In August, Iraq’s cabinet officially set a new date of January 16, 2010 for the referendum, a date coinciding with nationwide parliamentary polls.<sup>106</sup>

The SA calls for all American troops to be out of Iraq by the end of 2011.<sup>107</sup> If Iraqi voters reject the SA in a referendum held on January 16, 2010, this would force an accelerated US withdrawal, resulting in a full American troop withdrawal almost a year ahead of schedule. Recent reports, however, indicate that worry over Iraq’s ability to take over security from the United States faster—should the referendum force an early American withdrawal—“appears to have cooled some Sunnis’ insistence on the referendum,” and some Sunni politicians have reportedly said that a referendum was no longer necessary because the US military had so far abided by the SA.<sup>108</sup>

Even if no referendum is held on the SA, Article 30, paragraphs 1 and 3, of the SA allows either party to terminate the agreement one year after written notice is given to the other party.<sup>109</sup> As noted by Rush in his article, there are a number of provisions in the SA that may prove to be significant friction points between the United States and Iraq.<sup>110</sup> As to ways to minimize the chances of a breakdown in US-Iraqi relations leading to termination of the SA, Rush sets forth the following poignant suggestions in the concluding paragraph of his article:

There are two clear ways to help ensure the SA is viewed positively by the Iraqis. First, U.S. leaders must make every effort to adhere to the terms. This article has identified various gray areas where friction may occur. These areas must be handled delicately and in cooperation with Iraqi counter-parts [sic]. Although the United States must protect its interests, it must not do so in a way that sacrifices the greater objective of maintaining good relations with Iraq. The United States cannot be seen as exploiting its position or strong-arming Iraq. To do so risks public condemnation and loss of public support. The second way to help ensure the SA is viewed positively falls on the shoulders of every Soldier, Sailor, Airman, Marine, Coast Guardsman, and Civilian of the U.S. Forces serving in Iraq. There is no room for any misconduct toward Iraqi citizens, nor can individuals afford to act beyond the scope of their missions. A single failure in this area is potentially catastrophic to the U.S.-Iraq Security Agreement. The U.S. chain of command must continue to impress upon all members of the U.S. Forces in Iraq that mission success can only be achieved through their individual good

conduct and their good relations with the Iraqis that they are in Iraq to support and protect.<sup>111</sup>

### *A Few Concluding Observations*

At this writing, the SA appears to be functioning effectively. In accordance with Article 24 of the SA,<sup>112</sup> all US combat forces have been withdrawn from Iraqi cities, villages and localities and have been stationed in agreed facilities and areas outside these cities, villages and localities. Although this is not entirely clear from published reports, it appears that the primary function of US troops in their new locations is to train and advise Iraqi forces, rather than carry a major burden in combat.

To be sure, areas of instability still remain, especially in the city of Mosul and northern Iraq, where unresolved Kurdish-Arab tensions over oil and political control of the area remain. Nonetheless, the top US commander in Iraq, General Raymond Odierno, has reportedly said he is

increasingly confident Iraq’s recent security gains are irreversible despite high-profile attacks like the string of bombings in Baghdad last month [August] that killed roughly 100 people. “We’ll have bad days in Iraq,” he said. “But the bad days are becoming fewer. The numbers of deaths are becoming fewer. We’re making slow, deliberate progress.”<sup>113</sup>

Perhaps the most encouraging development at this juncture is reports of the decline of the religious and sectarian parties that have fractured Iraq since 2003 and of a movement emphasizing national unity that seeks to reach across ethnic or sectarian lines.<sup>114</sup> If this movement continues, the chances of the national elections scheduled for January 2010 going well will greatly improve.

Last year the United States and Iraq agreed that American combat forces would be out of Iraq by August 2010, leaving fifty thousand troops to advise and support the Iraqis.<sup>115</sup> General Odierno, however, has reportedly stated that he could reduce American forces to that level even before the summer of 2010 if the expected January elections in Iraq go well.<sup>116</sup> This could ease the current strain on US forces and free up extra combat troops for duty in the Afghanistan war, especially if the Obama administration decides to accede to the military’s request for more combat troops in Afghanistan.

There is, of course, no guarantee of success in Iraq. But it is clear that ultimate success or failure is now largely in the hands of a sovereign Iraq government. If success in Iraq is ultimately achieved, the implications for greater stability in the Middle East will be enormous. Not a bad denouement for a “war of choice.”

Notes

1. The author was the commentator on the panel “Issues Spanning the War in Iraq,” which was the closing panel of the conference.

2. The concept of the “fog of law” is not, of course, original with me, especially as it applies to armed conflict. See, e.g., Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 539 (2002). See also Yoram Dinstein, *Concluding Remarks on Terrorism and Afghanistan*, 39 ISRAEL YEARBOOK ON HUMAN RIGHTS 315, 330 (2009) (“the fog of the law of war”).

3. Michael J. Glennon has famously and controversially contended that “international ‘rules’” concerning use of force are no longer considered obligatory by States. See Glennon, *supra* note 2, at 540, 541. For a more elaborate development of this thesis, see MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* (2001).

4. See Andru E. Wall, *Was the 2003 Invasion of Iraq Legal?*, which is Chapter IV in this volume, at 69.

5. Article 2(4) provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

6. Article 51 of the UN Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

7. S.C. Res. 1441, U.N. Doc. S/RES/1441(Nov. 8, 2002).

8. JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 169 (2004).

9. Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFFAIRS, May–June 2003, at 16, 27.

10. *Id.* at 16.

11. For a detailed discussion of the extent of the dealings between the Saddam government and France, Russia and China, see JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY* 127–32 (2010).

12. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AMERICAN JOURNAL OF INTERNATIONAL LAW 642, 643 (1984).

13. *Id.*

14. Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AMERICAN JOURNAL OF INTERNATIONAL LAW 645 (1984).

15. *Id.* at 649.

16. Glennon, *supra* note 9, at 16.

17. See MURPHY, *supra* note 8, at 177–81.

18. Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFFAIRS, Jan.–Feb. 2004, at 136, 137.

19. *Id.* at 138–39.

20. See S.C. Res. 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999).
21. For discussion, see MURPHY, *supra* note 8, at 152–54.
22. See operative para. 3, S.C. Res. 1441, *supra* note 7.
23. *Id.*, operative para. 4. In operative paragraph 11, the Council “[d]irects the Executive Chairman of UNMOVIC and the Director General of IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution.” In operative paragraph 12, the Council “[d]ecides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with the relevant Council resolutions in order to secure international peace and security.” Lastly, operative paragraph 13 “[r]ecalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.”
24. See MURPHY, *supra* note 8, at 170.
25. Feinstein & Slaughter, *supra* note 18, at 148.
26. *Id.* at 148–149.
27. Convention No. IV Respecting the Laws and Customs of War on Land, Regulations Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 69 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
28. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 27, at 301.
29. See, e.g., Gregory H. Fox, *The Occupation of Iraq*, 36 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 195, 229–32 (2005).
30. See *Preface to the Paperback Edition*, in EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION ix (2004).
31. *Id.*
32. David J. Scheffer, *Beyond Occupation Law*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 842 (2003).
33. *Id.* at 849.
34. *Id.*
35. *Id.* at 850, citing, *inter alia*, the Letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, U.N. Doc. S/2003/538 (2003).
36. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).
37. *Id.*, operative para. 5.
38. See Scheffer, *supra* note 32, at 850, citing Roger Hardy, *Struggle for Power in Iraq*, BBC NEWS, Apr. 13, 2003, [http://news.bbc.co.uk/2/hi/middle\\_east/2944915.stm](http://news.bbc.co.uk/2/hi/middle_east/2944915.stm); Jane Perlez, *U.S. Team Arrives in Iraq to Establish Postwar Base*, NEW YORK TIMES, Apr. 9, 2003, at B10; Richard W. Stevenson, *Bush Sees Aid Role of U.N. as Limited in Rebuilding Iraq*, NEW YORK TIMES, Apr. 9, 2003, at A1.
39. See Benvenisti, *supra* note 30, at ix, citing the preamble to the Coalition Provisional Order No. 1 (De-Baathification of Iraqi Society), May 16, 2003, *available at* [http:// www.iraqcoalition.org/regulations/20030603\\_CPAMEMO\\_1\\_Implementation\\_of\\_De-Ba\\_athification.pdf](http://www.iraqcoalition.org/regulations/20030603_CPAMEMO_1_Implementation_of_De-Ba_athification.pdf).
40. S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003).
41. YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 12 (2009).
42. Scheffer, *supra* note 32, at 846 n.18 (citing as examples “the Security Council’s decisions regarding the Development Fund for Iraq, the management of petroleum, petroleum products,

and natural gas, and the formation of an Iraqi interim administration as a transitional administration run by Iraqis”).

43. Article 103 of the UN Charter provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

44. Scheffer, *supra* note 32, at 846 n.18.

45. *Id.* at 855–56.

46. *Id.* at 857.

47. Fox, *supra* note 29, at 229–97.

48. *Id.* at 246, 255–62.

49. *Id.* at 295–97.

50. BENVENISTI, *supra* note 30, at xi.

51. *Id.* at xii. As one example, Benvenisti mentions “the question of whether an occupant can undertake international obligations as part of its temporary administration of the occupied territory.” *Id.*

52. Scheffer, *supra* note 32, at 843.

53. See, e.g., Neil MacFarquhar, *When to Step In to Stop War Crimes Causes Fissures*, NEW YORK TIMES, July 23, 2009, at A10; *An idea whose time has come—and gone?*, ECONOMIST, July 25, 2009, at 58.

54. See DINSTEIN, *supra* note 41, at 12.

55. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004).

56. *Id.*, operative para. 2.

57. See Fox, *supra* note 29, at 227.

58. See DINSTEIN, *supra* note 41, at 273. In using the term “notionally,” Dinstein cites and quotes Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES, ESSAYS IN HONOUR OF YORAM DINSTEIN 448 (Michael Schmitt & Jelena Pelic eds., 2007).

59. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

60. See, e.g., Ralph Wilde, *The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq*, 11 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 485, 487 (2005), citing US Department of Defense, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf>; U.N. Human Rights Committee, *Third Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/Q/3/Annex (Oct. 21, 2005); *United States Responses to Selected Recommendations of the Human Rights Committee*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 (2007).

61. See U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

62. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, paras. 108–9, 111 (July 9) [hereinafter Legal Consequences of the Construction of a Wall].

63. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 3(1), 5(1), 6(1), 7(1), 11(1), 12, 13, 16(1), 20, Dec. 10, 1984, 1465 U.N.T.S. 85.

64. J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER

CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 131 (1988), *cited and quoted in* LOUIS HENKIN ET AL., *HUMAN RIGHTS* 22 (2d ed. 2009).

65. U.N. Committee against Torture, *Conclusions and Recommendations on the United States’ Second Periodic Report*, para. 15, CAT/C/USA/CO/2 (July 25, 2006), *cited and quoted in* LOUIS HENKIN ET AL., *supra* note 64, at 22–23.

66. DINSTEIN, *supra* note 41, citing Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1 (Dec. 19).

67. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) [hereinafter Nuclear Weapons].

68. Legal Consequences of the Construction of a Wall, *supra* note 62, at 136.

69. Nuclear Weapons, *supra* note 67, at 240.

70. Legal Consequences of the Construction of a Wall, *supra* note 62, at 1038.

71. DINSTEIN, *supra* note 41, at 70.

72. Article 4(1) of the Covenant provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

73. DINSTEIN, *supra* note 41, at 72.

74. Thomas Buergenthal, *To Respect and to Ensure State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72, 79 n.375 (Louis Henkin ed., 1981). *Cited in* DINSTEIN, *supra* note 41, at 72.

75. DINSTEIN, *supra* note 41, at 71–74.

76. *Id.* at 74–77.

77. ICCPR, *supra* note 59, art. 4(1); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 25(2), Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 222; American Convention on Human Rights art. 27(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

78. DINSTEIN, *supra* note 41, at 75.

79. *Id.* at 75–77.

80. The two advisory opinions referred to are Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8 (Jan. 30, 1987) and Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. (ser. A) No. 9 (Oct. 8, 1987).

81. DINSTEIN, *supra* note 41, at 76–77, citing U.N. Human Rights Committee, *General Comment 29: States of Emergency (Article 4)*, paras. 13–15, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

82. DINSTEIN, *supra* note 41, at 77–79.

83. *Id.* at 80–81.

84. *Id.* at 81–88.

85. *Id.* at 81.

86. *Id.* at 85.

87. *Id.* To illustrate an application of the *lex specialis* rule, Dinstein quotes from the International Court of Justice's *Nuclear Weapons* advisory opinion. The issue facing the Court in these proceedings was the relationship between the law of international armed conflict and Article 6(1) of the ICCPR, which provides that "[n]o one shall be arbitrarily deprived of his life." The Court stated:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

*Nuclear Weapons*, *supra* note 67, at 240.

88. *See supra* text accompanying note 57.

89. *See* S.C. Res. 1546, *supra* note 55.

90. *See id.*, operative para. 2, quoted *supra* in text accompanying note 56.

91. *See* Dinstein analysis, *supra* note 58, and accompanying text.

92. S.C. Res. 1511, *supra* note 40.

93. *See* S.C. Res. 1546, *supra* note 55.

94. *Id.*, operative para. 9.

95. S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

96. Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq, U.S.-Iraq, Nov. 17, 2008, *available at* [http://www.mnf-iraq.com/images/CGs\\_Messages/strategic\\_framework\\_agreement.pdf](http://www.mnf-iraq.com/images/CGs_Messages/strategic_framework_agreement.pdf).

97. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, *available at* [http://www.mnf-iraq.com/images/CGs\\_Messages/security\\_agreement.pdf](http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf) [hereinafter SA].

98. *See* Duncan B. Hollis & Joshua J. Newcomer, "Political" Commitments and the Constitution, 49 VIRGINIA JOURNAL OF INTERNATIONAL LAW 507, 510 (2009).

99. *Id.* at 510.

100. *See* Trevor A. Rush, *Don't Call It a SOFA! An Overview of the U.S. Security Agreement*, ARMY LAWYER, May 2009, at 34.

101. Rush cites the following provisions of the SA: Article 4 (missions), Article 22 (detention), Article 25 (measures to terminate the application of Chapter VII to Iraq), Article 26 (Iraqi assets) and Article 27 (deterrence of security threats).

102. Rush, *supra* note 100, at 34–35.

103. *Id.* at 35.

104. *Id.*

105. *Id.*

106. Gina Chon, *Iraq Vote on Pullout Put on Back Burner*, WSJ.COM, Oct. 5, 2009, <http://online.wsj.com/article/SB125470311713563191.html>.

107. *See* SA, *supra* note 97, art. 30, para. 1.

108. Chon, *supra* note 106.

109. Article 30, paragraph 1, of the SA provides: "This Agreement shall be effective for a period of three years, unless terminated sooner by either Party pursuant to paragraph 3 of

this Article.” Paragraph 3 provides: “This Agreement shall terminate one year after a Party provides written notification to the other Party to that effect.”

110. For example, Rush highlights Article 4 of the SA, which covers “missions” or military operations. As to Article 4, Rush states:

Article 4 of the SA covers “missions” or military operations and is one of the articles which make the agreement fundamentally different from all other U.S. SOFAs. Article 4 begins with a request from the GOI [government of Iraq] for “the temporary assistance of the United States Forces for the purposes of supporting Iraq in its efforts to maintain security and stability in Iraq, including cooperation in the conduct of operations against al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime.” Standard SOFAs do not discuss engaging in combat operations, whereas this SA provision invites U.S. Forces to participate in Iraq’s internal armed conflict. It also provides internationally accepted legal authority for U.S. Forces to conduct combat operations in Iraq. This was necessary to fill the legal vacuum created by the expiration of [UN Security Council Resolution] 1790.

The SA’s grant of authority for military operations is based upon Iraq’s sovereignty, which includes the right to consent to the presence of the U.S. military and to allow the United States to conduct military operations that comply with international and domestic Iraqi law. This differs from the U.N. Security Council’s Chapter VII authorization to the multinational force to “take all necessary measures to contribute to the maintenance of security and stability in Iraq.” Now, instead of U.S. Forces operating unilaterally, subject only to multinational force regulations and rules, their operations must be . . . “conducted with the agreement of the Government of Iraq” and, in fact, must “be fully coordinated with Iraqi authorities.” This coordination “shall be overseen by a Joint Military Operations Coordination Committee [hereinafter JMOCC] to be established pursuant to” the SA. Lastly, military operations “shall not infringe upon the sovereignty of Iraq and its national interests, as defined by the Government of Iraq.”

The practical reality of these limitations is that U.S. commanders must work “by, with, and through” the Iraqis and develop processes for obtaining the appropriate Iraqi operating authorities. Preferably this cooperation and coordination is occurring at the lowest levels through U.S. commanders’ relationships with the GOI and Iraqi Security Forces (ISF) leadership. However, the exact level of mission coordination required by Article 4 may prove to be a significant friction point between the United States and Iraq. For instance, in April 2009, U.S. Forces conducted a raid in Wasit province that left two Iraqis dead and resulted in the detention of six men. The raid “set off public protests and drew a pointed complaint from Prime Minister Nuri Kamal al-Maliki that the operation violated [the SA].” U.S. Forces issued a statement that “the raid had been ‘fully coordinated and approved’ by the Iraqi government.” At the same time, “the Iraqi Defense Ministry announced it had detained two top Iraqi military officials in Wasit province for authorizing the American raid without obtaining approval from their commanders.” This incident illustrates the difficulties of coordination, but despite the inherent challenges in such processes, the transition of security responsibilities to the ISF is a necessary part of creating a stable Iraq in which the ISF assumes the major role for defending the nation.

Rush, *supra* note 100, at 38–40.

111. *Id.* at 60.

112. Article 24 of the SA, *supra* note 97, reads as follows:

Article 24

Withdrawal of the United States Forces from Iraq

Recognizing the performance and increasing capacity of the Iraqi Security Forces, the assumption of full security responsibility by those Forces, and based upon the strong relationship between the Parties, an agreement on the following has been reached:

1. All the United States Forces shall withdraw from all Iraqi territory no later than December 31, 2011.
2. All United States combat forces shall withdraw from Iraqi cities, villages, and localities no later than the time at which Iraqi Security Forces assume full responsibility for security in an Iraqi province, provided that such withdrawal is completed no later than June 30, 2009.
3. United States combat forces withdrawn pursuant to paragraph 2 above shall be stationed in the agreed facilities and areas outside cities, villages, and localities to be designated by the JMOCC [Joint Military Operations Coordination Committee] before the date established in paragraph 2 above.
4. The United States recognizes the sovereign right of the Government of Iraq to request the departure of the United States Forces from Iraq at any time. The Government of Iraq recognizes the sovereign right of the United States to withdraw the United States Forces from Iraq at any time.
5. The Parties agree to establish mechanisms and arrangements to reduce the number of the United States Forces during the periods of time that have been determined, and they shall agree on the locations where the United States Forces will be present.

113. See Youchi J. Dreazen, *U.S. General Says Iraq Exit Is on Track*, WSJ.COM, Sept. 30, 2009, <http://online.wsj.com/article/SB125426788854050939.html>.

114. See Steven Lee Myers, *National Unity is Rallying Cry in Iraq Elections*, NEW YORK TIMES, Oct. 1, 2009, at A1.

115. See Thom Shanker, *U.S. General Says Iraq Troop Reductions May Quicken if Elections Go Well*, NEW YORK TIMES, Sept. 30, 2009, at A5.

116. *Id.*