

A. UN Security Council Resolution 1483 (2003)

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Resolution 1483 (2003) of the United Nations Security Council, 23 May 2003, online: [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1483\(2003\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1483(2003))]

The Security Council

[...]

Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, *welcoming* the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and *expressing* resolve that the day when Iraqis govern themselves must come quickly,

Encouraging efforts by the people of Iraq 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, and, in this connection, *recalls* resolution 1325 (2000) of 31 October 2000, [...]

Noting 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 (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the “Authority”),

Noting further that other States that are not occupying powers are working now or in the future may work under the Authority, [...]

1. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;
2. *Calls 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; [...]
3. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through: [...]

(e) promoting economic reconstruction and the conditions for sustainable development, [...]

(i) encouraging international efforts to promote legal and judicial reform; [...]

1. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority; [...]

B. Orders of the Coalition Provisional Authority

[Source: Preliminary provisions of official documents of the Coalition Provisional Authority (CPA), Coalition Provisional Authority, "CPA Official Documents"]

Regulations – are instruments that define the institutions and authorities of the Coalition Provisional Authority (CPA).

Orders – are binding instructions or directives to the Iraqi people that create penal consequences or have a direct bearing on the way Iraqis are regulated, including changes to Iraqi law.

Memoranda – expand on Orders or Regulations by creating or adjusting procedures applicable to an Order or Regulation.

Public Notices – communicate the intentions of the Administrator to the public and may require adherence to security measures that have no penal consequence or reinforces aspects of existing law that the CPA intends to enforce. [...]

1) CPA Order number 7: Penal Code (CPA/ORD/9 June2003/07)

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), relevant U.N. Security Council

resolutions, including Resolution 1483 (2003), and the laws and usages of war,

Reconfirming the provisions of General Franks' Freedom Message to the Iraqi People of April 16, 2003,

Recognizing that the former regime used certain provisions of the penal code as a tool of repression in violation of internationally recognized human rights standards,

Acting on behalf, and for the benefit, of the Iraqi people,

I hereby promulgate the following: [...]

(signed) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

**1bis) CPA Order number 31: Modifications of Penal Code and Criminal Proceedings Law
(CPA/ORD/10 Sep 2003/31)**

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Recognizing that instances of kidnapping, rape, and forcible vehicle larceny represent a serious threat to the security and stability of the Iraqi population,

Understanding that attacks of looting or sabotage against critical electrical power and oil infrastructure facilities undermine efforts to improve the conditions of the Iraqi people,

Noting that the denial of pre-trial bail in certain cases and lengthy jail sentences represent deterrents to such conduct,

I hereby promulgate the following modifications of the Penal Code and Criminal Proceedings Law: [...]

(signed) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

1ter) CPA Memorandum 3: Criminal Procedures (CPA/MEM/18 Jun 2003/03)

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Recognizing the CPA's obligation to restore law and order, provide for the safety of the people of Iraq, and ensure fundamental standards for persons detained,

Acting, in particular, consistent, with the Fourth Geneva Convention of 1949 Relative to the Treatment of Civilians in Time of War (hereinafter "The Fourth Geneva Convention"),

Noting the deficiencies of the Iraqi Criminal Procedure Code with regard to fundamental standards of human rights,

I hereby promulgate the following: [...]

(*signed*) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

2) CPA Order number 10: Management of Detention and Prison Facilities (CPA/ORD/8 Jun 2003/10)

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Recognizing the urgent necessity to ensure safe and humane prisons in order to re-establish law and order and provide for the safety of the people of Iraq,

I hereby promulgate the following: [...]

(*signed*) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

3) CPA Order number 13 (revised): The Central Criminal Court of Iraq(CPA/ORD/11 Jul 2003/13)

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Committed to promoting the development of a judicial system in Iraq that warrants the trust, respect and confidence of the Iraqi people,

Noting the continuing need for military support to maintain public order,

Furthering the CPA's duty to restore and maintain order and its right to ensure its security and fundamental standards of due process;

Recognizing the role that Iraqi jurists and legal systems must assume in addressing those serious crimes that most directly threaten public order and safety,

Acting on behalf, and for the benefit, of the Iraqi people,

I hereby promulgate the following: [...]

(signed) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

4) CPA Order number 15: Establishment of the Judicial Review Committee (CPA/ORD/-Jul 2003/-)

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Noting the obligation on the CPA to restore and maintain order and the right of the CPA to take measures for its security, to ensure fundamental standards of due process and to promote the rule of law,

Noting that the Iraqi justice system has been subjected to political interferences and corruption over years of Iraqi Ba'ath Party rule,

Noting that it is inherent to the stability of any society that the judicial system is independent and impartial but

is seen to be so,

Recognizing the role that the Judicial Review Committee will have in ensuring as far as possible the highest standards of judicial service in,

Acting in accordance with the Administrator's Order Number 1 of May, 16 2003 on the De-Baathification of Iraqi Society (CPA/ORD 16 May 2003/01),

I hereby promulgate the following: [...]

(signed) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

5) CPA Order No. 39: Foreign Investment (Amended by Order 46) (CPA/ORD/19 September 2003/39)

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA) and the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Having worked closely with the Governing Council to ensure that economic change occurs in a manner acceptable to the people of Iraq,

Acknowledging the Governing Council's desire to bring about significant change to the Iraqi economic system,

Determined to improve the conditions of life, technical skills, and opportunities for all Iraqis and to fight unemployment with its associated deleterious effect on public security,

Noting that facilitating foreign investment will help to develop infrastructure, foster the growth of Iraqi business, create jobs, raise capital, result in the introduction of new technology into Iraq and promote the transfer of knowledge and skills to Iraqis,

Recognizing the problems arising from Iraq's legal framework regulating commercial activity and the way in which it was implemented by the former regime,

Recognizing the CPA's obligation to provide for the effective administration of Iraq, to ensure the well being

of the Iraqi people and to enable the social functions and normal transactions of every day life,

Acting in a manner consistent with the Report of the Secretary General to the Security Council of July 17, 2003, concerning the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect,

Having coordinated with the international financial institutions, as referenced in paragraph 8(e) of the U.N. Security Council Resolution 1483, In close consultation with and acting in coordination with the Governing Council, I hereby promulgate the following: [...]

Section 3: Relation to Existing Iraqi Law

1. This Order replaces all existing foreign investment law. [...]

Section 4: Treatment of Foreign Investors

1. A foreign investor shall be entitled to make foreign investments in Iraq on terms no less favourable than those applicable to an Iraqi investor, unless otherwise provided herein.
2. The amount of foreign participation in newly formed or existing business entities in Iraq shall not be limited. [...]

Section 5: Areas of Foreign Investment

1. Foreign investment may take place with respect to all economic sectors in Iraq, except that foreign and direct ownership of the natural resources sector involving primary extraction and initial processing remains prohibited. In addition, this Order does not apply to banks and insurance companies. [...]

(signed) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

5bis) CPA Order No. 54: Trade Liberalization Policy 2004 (CPA/ORD/24 February 2004/54)

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), and the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolutions 1483 and 1511 (2003),

Noting the responsibility of the Department of Border Enforcement, in CPA Order Number 26, to monitor and control the movement of persons and goods into and out of Iraq,

Further implementing the Reconstruction Levy imposed by CPA Order Number 38 (CPA/ORD/19 September 2003/38),

Having worked closely with the Governing Council, international organizations and relevant Ministries in developing policies that will foster international trade and a free market economy in Iraq,

I hereby promulgate the following: [...]

Section 1: Suspension of Customs Charges

All customs tariffs, duties, import taxes [...], and similar surcharges for goods entering or leaving Iraq are suspended until the sovereign transitional Iraqi administration imposes such charges following the CPA's transfer of full governance authority to that administration. [...]

(signed) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

5ter) CPA Order No. 64: Amendment to the Company Law No. 21 of 1997 (CPA/ORD/29 February 2004/64)

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA) and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolutions 1483 and 1511 (2003),

Having worked closely with the Governing Council to ensure that economic change as necessary to benefit the people of Iraq occurs in a manner acceptable to the people of Iraq,

[...] *Recognizing* that some of the rules concerning company formation and investment under the prior regime no longer serve a relevant social or economic purpose, and that such rules hinder economic growth,

Noting that Iraqi entrepreneurs and businesses will benefit from more streamlined requirements for forming companies and investing in them,

Recognizing the CPA's obligation to provide for the effective administration of Iraq, to ensure the well-being of the Iraqi people and to enable the social and economic functions and normal transactions of every day life,

Acting in a manner consistent with the Report of the Secretary General to the Security Council of July 17,

2003, concerning the need for the development of Iraq and its transition from a nontransparent centrally planned economy to a free market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect, [...]

I hereby promulgate the following: [...]

14) Article 12, paragraph First of the Law is amended to read as follows: “A juridical or natural person foreign or domestic has the right to acquire membership in the companies stipulated in this law as founder, shareholder, or partner, unless such person is banned from such membership under the law, or due to a decision issued by a competent court or authorized governmental body.”

[...]

(signed) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

C. “Free Market Iraq? Not so fast”

[Source: EVIATAR Daphne, “Free Market Iraq? Not So Fast”, in *New York Times*, 10 January 2004]

There is no doubt about American intentions for the Iraqi economy. As Defense Secretary Donald H. Rumsfeld has said, “Market systems will be favored, not Stalinist command systems.”

And so the American-led coalition has fired off a series of new laws meant to transform the economy. Tariffs were suspended, a new banking code was adopted, a 15 percent cap was placed on all future taxes, and the once heavily guarded doors to foreign investment in Iraq were thrown open.

In a stroke, L. Paul Bremer III, who heads the Coalition Provisional Authority, wiped out longstanding Iraqi laws that restricted foreigners’ ability to own property and invest in Iraqi businesses. The rule, known as Order 39, allows foreign investors to own Iraqi companies fully with no requirements for reinvesting profits back into the country, something that had previously been restricted by the Iraqi constitution to citizens of Arab countries.

In addition, the authority announced plans last fall to sell about 150 of the nearly 200 state-owned enterprises in Iraq, ranging from sulfur mining and pharmaceutical companies to the Iraqi national airline.

But the wholesale changes are unexpectedly opening up a murky area of international law, prompting thorny new questions about what occupiers should and should not be permitted to do. While potential investors have applauded the new rules for helping rebuild the Iraqi economy, legal scholars are concerned that the United States may be violating longstanding international laws governing military occupation.

History provides limited guidance. The United States signed both the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949 and has incorporated their mandates regarding occupation into the Army field manual "The Law of Land Warfare." But foreign armies, whether the Vietnamese in Cambodia, the Turks in Northern Cyprus or the United States in Panama and Haiti, have rarely declared themselves to be occupying forces. After World War II, for example, the Allies claimed the Hague Regulations did not apply because they had sovereign power in Germany and Japan, which had surrendered. And although most of the world calls Israel's control of the West Bank and Gaza since 1967 an occupation, the Israeli government has not accepted that status, although it has said it will abide by occupation law.

Reconstruction and privatization in Kosovo, for example, have been bitterly debated. The United Nations authority over Kosovo, set up by the peace treaty after a war that was unsanctioned by the United Nations, hesitated to privatize what was in essence seized state property, but it decided the economic future of Kosovo was too important to wait for a final peace settlement that would fix Kosovo's legal status.

The government in Belgrade and the much-reduced Serbian community in Kosovo have argued that such sales are specifically forbidden in the United Nations resolution setting up the authority itself. This dispute, though similar, sidesteps questions of occupation law because Kosovo, unlike Iraq, involves United Nations and NATO forces.

In Iraq the latest pronouncements by the Security Council only add to the muddle. Resolution 1483, issued in May, explicitly instructs the occupying powers to follow the Hague Regulations and the Geneva Convention, but in a strange twist it also suggests that the coalition should play an active role in administration and reconstruction, which many scholars say violates those treaties.

The conflict centers on Article 43 of the Hague Regulations, which says an occupying power must "re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

In other words, the occupying power is like a temporary guardian. It is supposed to restore order and protect the population but still apply the laws in place when it arrived, unless those laws threaten security or conflict with other international laws.

"Under the traditional law the local law should be kept unchanged as much as possible," said Eyal Benvenisti, professor of international law at Tel Aviv University and author of "The International Law of

Occupation" (Princeton, 1993). Repairing roads, factories and telephone systems, then, is a legitimate way to get the economy running again. But transforming a tightly restricted, centrally planned economy into a free-market one may not be.

In a memo written last March and leaked in May to *The New Statesman*, the British magazine, Lord Goldsmith, Prime Minister Tony Blair's top legal adviser, warned that "the imposition of major structural economic reforms" might violate international law, unless the Security Council specifically authorized it.

Officials of the coalition authority insist the Security Council did that with Resolution 1483. They maintain that wiping out Saddam Hussein's entire economic system falls within Resolution 1483's instructions "to promote the welfare of the Iraqi people through the effective administration of the territory" and assist the "economic reconstruction and the conditions for sustainable development."

So the authority is pressing ahead with most of the plans for economic reform in Iraq and promises to have new laws in Iraq governing, among other things, business ownership, foreign investment, banking, the stock exchange, trade and taxes by June, when power is to be transferred to the Iraqis.

"We believe the C.P.A. can undertake significant economic measures in Iraq particularly where those measures support coalition objectives and the security of coalition forces," said Scott Castle, general counsel to the coalition. "There's a close nexus between the economic health of Iraq and the security of Iraq."

Some experts in international law call that a stretch. "The Security Council cannot require you to comply with occupation law on one hand and on the other give you authority to run the country in defiance of that law," said David Scheffer, a professor of international law at Georgetown University and a former United States ambassador at large for war crimes issues. He added that "1483 is internally inconsistent."

Order 39 "raises the biggest single question about coalition policy as it relates to the laws of war," said Adam Roberts, a professor of international relations at Oxford University and an editor of "Documents on the Laws of War" (Oxford, 2000). "That order embodies a major change not just in human rights or the political situation, but in the economic one. It would appear to go further in a free market direction and in allowing external economic activity in Iraq than what one would expect under the provisions of the 1907 Hague law about occupations."

International business lawyers at a conference of investors in London in October similarly warned that the coalition authority's orders might not be legal.

Part of the problem is that the old occupation law does not seem to fit the realities of modern warfare. As Mr. Benvenisti explains in his book and in a forthcoming article in the *Israel Defense Forces law review*, when the Hague Regulations were initially drafted, war was understood to be a legitimate contest between professional armies, not a messy attempt to remove a tyrannical leader.

“The Hague law reflects the interests of sovereigns to maintain their basis of power, their property and their institutions,” Mr. Benvenisti said. Instead of wholesale transformation of a nation, then, occupation was supposed to be a short, transient state of affairs, with minimal intervention of the occupying authority in the lives of civilians.

But in Iraq the United States’ explicit goal is to completely remake Iraqi institutions and society. “Their objectives far exceed the constraints of the law,” Mr. Scheffer said, noting that occupation laws were restrictive precisely in order to prevent overzealousness on the part of an occupying power. “We’re squeezing transformation into a very tight square box called occupation law, and the two really are not a good match.”

In a forthcoming article in the *American Journal of International Law*, he sets forth a dozen possible violations by the occupying powers of international law, including failure to plan for and prevent the looting of hospitals, museums, schools, power plants, nuclear facilities, government buildings and other infrastructure; failure to maintain public order and safety during the early months of the occupation; and excessive civilian casualties.

In the article Mr. Scheffer explains how individuals could use United States laws to sue individual coalition officials in American courts. “This is a rather uncharted field in U.S. jurisprudence,” he said in an interview. “But I would not underestimate how far litigation might go.”

Ruth Wedgwood, a professor of international law at Johns Hopkins University and a member of the Defense Policy Board, which advises the Pentagon, is not so concerned. In her view the Iraqi laws do not deserve much deference because they were issued by an authoritarian government. “If it’s not a democratically crafted law, it lacks the same legitimacy,” she said.

Coalition officials have recently backtracked on privatization, in part because of the legal concerns. “We recognize that any process for privatizing state-owned enterprises in Iraq ultimately must be developed, adopted, supported and implemented by the Iraqi people,” Mr. Castle said.

Still, some specialists worry that the radical economic changes that are moving forward will lack legitimacy in the eyes of Iraqi citizens. Iraqis may see such wholesale economic transformation as “threatening and potentially exploitative,” said Samer Shehata, professor of Arab politics at Georgetown University. “I think the sensible answer is to leave extremely important decisions like the possibility of complete foreign ownership of firms to a later date, when a legitimate Iraqi government is elected by the Iraqi people in free and fair elections.”

Discussion

1. In general, what powers, responsibilities and obligations do occupying forces have in relation to

maintenance of law and order? May an occupying power introduce changes to legislation and to the political and economic system necessary to consolidate peace? Does it matter whether the local legislation had been democratically adopted? (HR, Art. 43; GC IV, Arts 47 and 64)

2. In this case, do the changes made by the Coalition Provisional Authority (CPA) respect the letter and spirit of the provisions of Convention IV relating to penal legislation in an occupied territory? Are they perhaps even required by IHL? (GC IV, Arts 64, 67, 68 and 71-76)
3.
 1. a. Does IHL permit the Coalition not to apply local Iraqi law that contravenes the principles and rules of international law? Which rules? Which principles? (HR, Art. 43; GC IV, Art. 64)
 2. b. Does international human rights law apply in an occupied territory? Does IHL prevail in all respects? Do the treaty obligations of the occupying power or those of the occupied power apply? Does IHL permit occupying forces to abolish institutions and rules contrary to human rights? (HR, Art. 43; GC IV, Art. 64)
4.
 1. a. What would justify the introduction of fundamental changes, such as the reform of the economic system, administrative structures, or the electoral system, by the Coalition forces?
 2. b. Would a Security Council resolution be sufficient to authorize such changes? If so, would this not invoke a *jus ad bellum* argument to respond to an issue arising in *jus in bello* (i.e. in the law of military occupation)?
5. What are the implications of the recognition of the United States and the United Kingdom as occupying powers in Resolution 1483 for the IHL that is applicable?
6. Who or what gives the CPA the right to legislate? The CPA itself? IHL? Security Council resolution 1483?
7. What changes may an occupying power make to the economic system? May the United States introduce a free-market economy in Iraq under IHL? Can the United States argue that IHL obliges it to make such changes?