

A Plurality of Responsible Actors:  
International Responsibility for Acts of the Coalition  
Provisional Authority in Iraq

STEFAN TALMON

P Shiner & A Williams (eds), *The Iraq War and International Law* (Hart, 2008)

**University of Oxford Faculty of Law Legal Studies Research Paper Series**

**Working Paper No 25/2007**

**September 2007**

This paper can be downloaded without charge from the  
Social Science Research Network electronic library at:  
<http://ssrn.com/abstract=1018172>

An index to the working papers in the  
University of Oxford Faculty of Law Research Paper Series is located at:  
<<http://www.ssrn.com/link/oxford-legal-studies.html>>

**A Plurality of Responsible Actors:  
International Responsibility for Acts  
of the Coalition Provisional Authority in Iraq**  
*Stefan Talmon*

- I. Introduction
- II. The Coalition Provisional Authority
  - 1. Occupation Government of Iraq
  - 2. Separation of Civil and Military Responsibilities
  - 3. Organization and Staffing
  - 4. A US Government Enterprise
  - 5. The British Role
- III. International Responsibility of the Occupying Powers for the Acts of the Coalition Provisional Authority
  - 1. Establishment of Responsibility
    - a. Relevant Conduct of the Coalition Provisional Authority
    - b. The Coalition Provisional Authority as Common Organ of the Occupying Powers
    - c. Breach of an International Obligation of the Occupying Powers
  - 2. Questions of Multiple State Responsibility
    - a. Invocation of Responsibility of Each Occupying Power
    - b. Extent of Responsibility of the Individual Occupying Power
    - c. Recourse against the Other Occupying Power
    - d. Admissibility of Claims against One Occupying Power Only
- IV. International Responsibility of Other Actors in Connection with the Acts of the Coalition Provisional Authority
  - 1. Aid or Assistance by the Coalition Partners
  - 2. Delegation of Powers by the United Nations
    - a. Relevant Conduct of United Nations Organs
    - b. Breach of an International Obligation of the United Nations
  - 3. Aid or Assistance by the United Nations
- V. Conclusion

## I. Introduction

From mid-April 2003 to 28 June 2004, Iraq was *de jure* under belligerent occupation by the United States of America and the United Kingdom acting ‘as occupying powers under unified command’.<sup>1</sup> Although a good case can be made that the occupation *de facto* continued after 28 June 2004, the transfer of full governing authority and responsibility to the Iraqi Interim Government (IIG) on that date was considered by the UN Security Council to mark the (at least formal) end of the occupation.<sup>2</sup> For most of the 15-month occupation, Iraq was governed by the occupying powers through the vehicle of the Coalition Provisional Authority (CPA). In a joint letter to the President of the Security Council, dated 8 May 2003, the two countries’ permanent representatives to the United Nations wrote that:

the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority [...] to exercise powers of government temporarily and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.<sup>3</sup>

During the period when it was governing Iraq the CPA may have violated the laws of occupation, as laid down in the Hague Regulations and the Geneva Conventions, and human rights law, or may have contravened binding UN Security Council resolutions. This paper will not primarily examine whether and, if so, which rules of international law the CPA actually violated, but will seek to determine who may be held responsible for any transgression of international law by the CPA. The statement by the Mexican representative to the Security Council that the ‘Authority formed by the occupying Powers bears the responsibility for ensuring the safety and security of the population in the occupied territory’<sup>4</sup> gives the misleading impression that it is the CPA itself that is responsible under international law. Since the CPA as an administrative body is not even a partial subject of international law,<sup>5</sup> the question arises as to whom its actions may be attributed. Several States and the United Nations were involved in the occupation of Iraq. One State that clearly does not bear any responsibility for the CPA’s actions is Iraq itself. The CPA was not its organ, neither was it placed at its disposal by the occupying powers, nor did it exercise any element of Iraqi governmental authority. This is analogous to the German-American Mixed Claims Commission’s denial that Germany had any responsibility for the acts of the Australian occupying power in its colonies during the First World War, on the

---

<sup>1</sup> S/RES/1483 (2003) of 22 May 2003, preambular para. 13; reproduced in Stefan Talmon, *The Occupation of Iraq. The Official Documents of the Coalition Provisional Authority* (2008), Doc. 187.

<sup>2</sup> See S/RES/1546 (2004) of 8 June 2004, para. 2, and the Press Statement by the Security Council President on Handover of Sovereignty to Iraq, delivered on 28 June 2004, UN Doc. SC/8136, 28 June 2004; reproduced in Talmon, n. 1 above, Docs. 200, 201. See also *R (Al-Jedda) v. Secretary of State for Defence*, [2006] 3 WLR 954 at 961, para. 14.

<sup>3</sup> UN Doc. S/2003/538, 8 May 2003, p. 1; reproduced in Talmon, n. 1 above, Doc. 212.

<sup>4</sup> UN Doc. S/PV.4808, 14 August 2003, p. 5.

<sup>5</sup> Compare Supplementary Memorandum Submitted by the Foreign and Commonwealth Office to the House of Commons Foreign Affairs Committee, 5 April 2004, n. 5 above, Ev 35; reproduced in Talmon, n. 1 above, Doc. 223.

grounds that it ‘is fundamental that in the absence of an express stipulation to the contrary a state or person can be held responsible only for its own acts or those for whom it is responsible.’<sup>6</sup> This leaves the two occupying powers, either jointly or separately, their coalition partners and the United Nations as possible subjects of attribution. The international responsibility for the CPA’s actions in Iraq thus raises intricate questions of State responsibility and the responsibility of international organizations.

## II. The Coalition Provisional Authority

Conflicting explanations as to when, how and by whom the CPA was established have left many questions open, particularly in the area of international responsibility.<sup>7</sup> It is thus necessary first to establish the CPA’s status under international law as well as its functions and organization.

### 1. Occupation Government of Iraq

The Commander of Coalition Forces in Iraq, US General Tommy R. Franks, created the CPA as an administrative mechanism through which the coalition partners could fulfil their responsibilities as occupying powers in control of Iraq only days after the occupation of Baghdad. In his ‘Freedom Message to the Iraqi People’, issued on 16 April 2003, he stated:

Therefore, I am creating the Coalition Provisional Authority to exercise powers of government temporarily, and as necessary, especially to provide security, to allow the delivery of humanitarian aid and to eliminate weapons of mass destruction.<sup>8</sup>

That the CPA was created in April 2003 and not, as often claimed, in May 2003 is also shown by CPA Order No. 1 on the ‘De-Baathification of Iraqi Society’, which states in Section 1, paragraph 1: ‘On April 16, 2003 the Coalition Provisional Authority disestablished the Baath Party of Iraq.’<sup>9</sup> The American and British representatives referred to General Franks’ act in their joint letter of 8 May 2003 to the President of the Security Council.<sup>10</sup> The CPA was neither created nor explicitly authorized by an act of the US Congress or the British Parliament, nor was it established pursuant to a UN Security Council resolution.<sup>11</sup> It was established by

<sup>6</sup> *Paula Mendel and Others (United States) v. Germany* (1926), RIAA VII, p. 372 at p. 385. See also First Report on State Responsibility by Mr James Crawford, Special Rapporteur, Addendum, UN Doc. A/CN.4/490/Add.5, 22 July 1998, p. 33, para. 252.

<sup>7</sup> For example, in a Memorandum from the Foreign and Commonwealth Office in response to questions put by the House of Commons Foreign Affairs Committee, dated 18 June 2003, the FCO stated that the CPA ‘was set up at the beginning of June’. The Memorandum is reprinted in Talmon, n. 1 above, Doc. 215.

<sup>8</sup> The ‘Freedom Message to the Iraqi People’ is reprinted in Talmon, n. 1 above, Doc. 146.

<sup>9</sup> CPA Order No. 1, De-Baathification of Iraqi Society (CPA/ORD/16 May 2003/01), published in *Al-Waqai Al-Iraqiya. Official Gazette of Iraq*, Vol. 44, No. 3977 (17 June 2003), pp. 2-3; reproduced in Talmon, n. 1, Doc. 13.

<sup>10</sup> See above at n. 3.

<sup>11</sup> Article 1.3 of the Iraq Mobile Cellular Public Telecommunications License Authorization and Agreement somewhat misleadingly states: “‘CPA’ means the Coalition Provisional Authority

General Franks as supreme commander of the coalition forces ‘under the laws of war for the occupation of Iraq’.<sup>12</sup> The CPA was an occupation government, that is ‘a government imposed by force, and the legality of its acts is determined by the law of war’ irrespective of whether it consisted of a military, civil or mixed administration.<sup>13</sup> That the CPA served as the temporary government of Iraq is also shown by early CPA documents which speak, for example, of the ‘CPA Ministry of Justice’<sup>14</sup> and by a statement by the CPA Administrator, Ambassador L. Paul Bremer III, that ‘Coalition officials ran Iraq’s ministries’.<sup>15</sup>

## 2. Separation of Civil and Military Responsibilities

Coalition Provisional Authority was initially the overall name for the joint military-civilian presence in Iraq, not just for the civilian occupation government.<sup>16</sup> That the CPA also included the coalition forces in Iraq is shown, for example, by the existence of a ‘Coalition Provisional Authority Forces Apprehension Form’ (the CPA’s version of the traditional capture card for prisoners of war used by armies in the field) to be filled in by the capturing coalition forces.<sup>17</sup>

The CPA originally comprised two wings: ‘security and support’ and ‘non-security’. The ‘security and support’ wing was identical to the coalition armed forces in Iraq under unified command, first the Coalition Forces Land Component Command (CFLCC), then the Coalition Joint Task Force 7 (CJTF-7) and finally the Multinational Corps and Multinational Force in Iraq (MNF-I).<sup>18</sup> It was responsible for security/military forces, support services and the Iraq Survey Group.

The ‘non-security’ wing consisted of the Office of Reconstruction and Humanitarian Affairs (ORHA), which had already been established under the authority of the US Department of Defense by US President George W. Bush in January 2003.<sup>19</sup> It was headed by a civil administrator and was responsible for reconstruction, humanitarian assistance and civil administration or government affairs, i.e. the day-to-day running of the country. In its latter capacity, ORHA was running or controlling the ministries in Baghdad and the administrations in the 17 governorates. The Office of Reconstruction and Humanitarian Affairs was headed by

---

recognized as the temporary government in Iraq pursuant to United Nations Security Council Resolution 1483 (2003).’

<sup>12</sup> Statement by US President on H.R. 3289, 6 November 2003 (<http://www.whitehouse.gov/news/releases/2003/11/20031106-12.html>).

<sup>13</sup> US Department of the Army, *The Law of Land Warfare*, FM 27-10, para. 368.

<sup>14</sup> See e.g. CPA, Ministry of Justice National Policy Guidance, 23 June 2003, reproduced in Talmon, n. 1 above, Doc. 149. See also Center for Law and Military Operations, The Judge Advocate General’s Legal Center and School, US Army, *Legal Lessons Learned from Afghanistan and Iraq: Volume II, Full Spectrum Operations (2 May 2003 -- 30 June 2004)* (2005), p. 25.

<sup>15</sup> [http://www.cpa-iraq.org/transcripts/20040329\\_bremer\\_health.html](http://www.cpa-iraq.org/transcripts/20040329_bremer_health.html).

<sup>16</sup> See US Department of Defense, Coalition Postwar Government in Iraq, Organizational Chart, July 2003, reproduced in Talmon, n. 1 above, Doc. 155.

<sup>17</sup> For a specimen of the form, see Center for Law and Military Operations, n. 14 above, Appendix A-1, pp. 289-290.

<sup>18</sup> CJTF-7 was created on 14 June 2003 and replaced CFLCC. It itself was replaced on 15 May 2004 by MNF-I. CFLCC was commanded by Lt. Gen. David McKiernan, US Army; CJTF-7 was initially commandee by Lt. Gen. William S. Wallace. From July 2003, CJTF-7 and, later, MNF-I were commanded until the end of June 2004 by Lt. Gen. Ricardo Sanchez, US Army.

<sup>19</sup> ORHA was established in National Security Presidential Directive (NSPD) 24, Post-War Iraq Reconstruction, which is not publicly available.

Jay M. Garner, a retired Lieutenant General, US Army.<sup>20</sup> That ORHA was but a part of the joint military-civilian presence referred to as CPA can also be seen in the joint letter of 8 May 2003, mentioned above, in which the United States and the United Kingdom informed the Security Council President that they ‘have created the Coalition Provisional Authority, which *includes* the Office of Reconstruction and Humanitarian Assistance’.<sup>21</sup> Both wings were initially under the operational control of General Franks, Commander, US Central Command (CENTCOM), as ‘head of the CPA’;<sup>22</sup> i.e. both the civil administrator and the military commander on the ground reported to General Franks who, in turn, reported to the US Secretary of Defense. US President Bush had determined that the Department of Defence (DoD) would lead the post-war efforts in Iraq and would have direct authority for the administration and rebuilding of the country.

In October 2002, the US Secretary of Defence, Donald Rumsfeld, had decided in favour of overall military command.<sup>23</sup> A document entitled ‘A Commitment to Post-War Iraq: Basic Principles’, published by the US Department of Defense on 12 March 2003, stated: ‘The immediate responsibility for administering post-war Iraq will fall upon the Commander of the U.S. Central Command, as the commander of the U.S. and coalition forces in the field.’<sup>24</sup> This was in line with the age-old strategy that military officers must have overall responsibility in all active theatres of operation. The civil administrator was subordinate to the military commander. This is shown by the fact that Garner reported to Franks through Lt. General David McKiernan, the commander of coalition land forces in Iraq.

The situation changed with the appointment by US President George W. Bush of Ambassador L. Paul Bremer III as ‘Presidential Envoy to Iraq’ and his appointment by the US Secretary of Defense as head of the CPA with the title of ‘Administrator’. A White House press release dated 6 May 2003 summarized Bremer’s position as Presidential Envoy as follows:

Ambassador Bremer is [...] is to oversee Coalition reconstruction efforts and the process by which the Iraqi people build the institutions and governing structures that is to guide their future. General Franks is to maintain command over Coalition military personnel in the theatre. Ambassador Bremer is to report to Secretary of Defense Rumsfeld and is to advise the President, through the Secretary, on policies designed to achieve American and Coalition goals for Iraq.<sup>25</sup>

As Administrator of the CPA, Ambassador Bremer was now responsible for the temporary governance of Iraq, and oversaw, directed and coordinated all executive,

---

<sup>20</sup> US Department of Defense, Organizational Diagram of the Department of Defense Office of Reconstruction and Humanitarian Assistance, 11 March 2003, reproduced in Talmon, n. 1 above, Doc. 144.

<sup>21</sup> UN Doc. S/2003/538, 8 May 2003, p. 1 (italics added).

<sup>22</sup> Compare the Prepared Statement, dated 15 May 2003, for the Committee on International Relations of the House of Representatives by US Under Secretary for Policy, Department of Defense, Douglas J. Feith

([http://www.defenselink.mil/policy/sections/public\\_statements/speeches/archive/former\\_usdp/feith/2003/may\\_15\\_03.html](http://www.defenselink.mil/policy/sections/public_statements/speeches/archive/former_usdp/feith/2003/may_15_03.html)).

<sup>23</sup> See Michael Gordon/Bernard Trainor, *COBRA II: The Inside Story of the Invasion and Occupation of Iraq*, 2006, p. 161.

<sup>24</sup> The document may be found in Talmon, n. 1 above, Doc. 202.

<sup>25</sup> <http://www.whitehouse.gov/news/releases/2003/05/20030506-5.html>.

legislative, and judicial functions necessary to carry out that responsibility, including humanitarian relief and reconstruction and assisting in the formation of an Iraqi interim administration. In a Memorandum to Ambassador Bremer, dated 13 May 2003, the US Secretary of Defense stated that the Commander, US Central Command, acting as Commander of Coalition Forces, was to support the CPA directly by deterring hostilities; maintaining Iraq's territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out US policy generally.<sup>26</sup> While the civil administrator was no longer subordinate to the military commander, the CPA remained dependent on the military for many of the resources needed to accomplish its mission.

With the appointment of Ambassador Bremer, the civilian wing was separated from the military wing of the occupation government, and from then on only the former continued to be known as 'CPA'.<sup>27</sup> This is shown by the fact that coalition forces in Iraq which were formerly part of the CPA were now to support it. The new CPA, however, was not identical to ORHA. Its remit was much wider and included all civilian US Government programmes and activities in Iraq.<sup>28</sup> The Office of Reconstruction and Humanitarian Affairs continued to exist as part of the CPA until 16 June 2003.<sup>29</sup> Technically speaking, Bremer did not succeed or replace Garner, but partly took the position of Franks.<sup>30</sup>

Since mid-May 2003, a distinction must be made between (a) the occupying powers and their coalition partners as such, (b) the coalition forces in the field, and (c) the civilian presence entrusted with governmental functions. Only the latter traded under the name of CPA.

### 3. Organization and Staffing

While on the military side there were four sectors of control or areas of operations,<sup>31</sup> on the civilian side there were fully integrated structures of government. There were thus no national zones of occupation government. Besides its main headquarters in the Green Zone in Baghdad, the CPA was organized in four regional offices: Baghdad Central, North, South Central and South East (later renamed 'CPA South'). The latter was identical in geographical scope to the British military area of operations,

<sup>26</sup> See also CPA Regulation No. 1 [The Coalition Provisional Authority] (CPA/REG/16 May 2003/01), published in *Al-Waqai Al-Iraqiya. Official Gazette of Iraq*, Vol. 44, No. 3977 (17 June 2003), pp. 4-5; reproduced in Talmon, n. 1, Doc. 1.

<sup>27</sup> See US President, *Report to Congress Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11)*, *Update Report on United States Strategy for Relief and Reconstruction in Iraq*, 14 October 2003, p. 28. See also Merritt C. J. in *Elias v. Gonzales*, 490 F.3d 444 at n. 1 (C.A.6, 2007) and *Youkhana v. Gonzales*, 460 F.3d 927 at 933 (C.A.7, 2006).

<sup>28</sup> See Letter from US President George W. Bush to Ambassador L. Paul Bremer, dated 9 May 2003, reproduced in Talmon, n. 1 above, Doc. 213.

<sup>29</sup> On 16 June 2003, US Deputy Secretary of Defense Wolfowitz issued a memorandum to Department of Defence officials, entitled 'Authority of the Administrator of the Coalition Provisional Authority and Supporting Relationships', by which ORHA was dissolved and all of its remaining functions, responsibilities and legal obligations were formally assumed by the CPA. So-called 'Public Service Announcements' and 'Fact Sheets' continued to be issued in the name of the ORHA until late May and early June 2003.

<sup>30</sup> Lt. Gen. (ret.) Garner continued to work in Iraq as Director of ORHA until 3 June 2003.

<sup>31</sup> The coalition forces were composed of Divisions, each with military responsibility for a particular zone of Iraq. The US Divisions controlled the North and Central zones and the two multi-national Divisions, one commanded by the UK and the other by Poland, were charged with the southern and south-central zone, respectively.

comprising the four southernmost governorates of Iraq. However, ‘CPA South’ with its regional headquarters in Basra was not the United Kingdom’s sector of the CPA. It was initially led by a senior Danish official with a British deputy.<sup>32</sup> The staff of CPA South came from numerous countries, including the United States, Australia, Spain, the Czech Republic, Korea, Romania, Japan and the United Kingdom.<sup>33</sup> By September 2003, the approximately 90 officials of CPA South included 27 British civilian staff members.<sup>34</sup> Only one of the governorate teams for the four provinces in CPA South was headed by a British co-ordinator; the remaining three were headed by US and Italian personnel.<sup>35</sup>

The CPA was staffed by an assortment of active US civilian and military employees, retired American officials, seconded civilian and military personnel from Australia, the Czech Republic, Denmark, Italy, Japan, Poland, Romania, Spain, the United Kingdom,<sup>36</sup> Ukraine and other coalition member countries, Iraqi expatriates from the Iraq Reconstruction and Development Council, and civilian contractors. For example, officials seconded by the British Government were placed at the disposal of the CPA and were acting on its behalf. The government in London paid their salaries, travel costs and other incidental expenses. The US Government funded the provision of food and other basic services to all CPA staff.<sup>37</sup> The CPA had direct contracts with eight private security companies (PSCs) which, in turn, had numerous contracts with other PSCs as subcontractors.<sup>38</sup> While the large majority of positions in the CPA were filled by American citizens, most of whom were also US government employees, an average of some 15 per cent of CPA personnel came from other coalition partners. As of 11 July 2003, the CPA had a total staff of 1147, of which 332 came from the US Department of Defense, 268 from the US military, 34 from the US Department of State and 36 from other US government agencies. In addition, there were 284 US contractors paid for by USAID, making a total of 954 US personnel and 193 from other coalition countries.<sup>39</sup> During a press briefing on 23 August 2003, Ambassador

---

<sup>32</sup> On 29 July 2003, the Danish and British Governments announced that British Ambassador Sir Hilary Synnott was appointed as new Regional Coordinator for the CPA Southern Region replacing Danish Ambassador Ole Wohlers Olsen who had resigned the day before; see CPA Southern Region, Press Release No. 11, 1 August 2003. Sir Hilary was replaced on 1 February 2004 by another British diplomat, Ambassador Patrick Nixon. On CPA South, see generally Hilary Synnott, State-building in Southern Iraq, *Survival* 47 (2005), 33-56.

<sup>33</sup> See Memorandum from the Foreign and Commonwealth Office in Response to Questions Put by the House of Commons Foreign Affairs Committee, 18 June 2003, para. 16, House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War against Terrorism*, Tenth Report of Session 2002-03, Report, together with formal minutes, oral and written evidence. Ordered by The House of Commons to be printed 15 July 2003 (HC (2002-03) 405, 31 July 2003), Ev. 69.

<sup>34</sup> HC Debs., vol. 410, col. 676W: 16 September 2003.

<sup>35</sup> *R (Al Skeini and others) v. Secretary of State for Defence*, House of Lords, Statement of Case on Behalf of the Respondent/Cross-Appellant, p. 102, para. 200.

<sup>36</sup> On the British involvement in the CPA, see HL Debs., vol. 650, col. 131: 24 Jun 2003; vol. 657: WA146: 10 February 2004; vol. 668, WA145: 25 January 2005; HC Debs., vol. 410, col. 676W: 16 September 2003; vol. 413, col. 39W: 10 November 2003; vol. 417, col. 915W: 4 February 2004; vol. 422, col. 63W: 7 June 2004; vol. 424, col. 1613W: 15 September 2004.

<sup>37</sup> Compare HC Debs., vol. 417, vol. 1304W: 10 February 2004 (Foreign Secretary Jack Straw). It was, however, stated that the seconded British officials remained answerable to HMG for what they did.

<sup>38</sup> See CPA Discussion Paper: Private Security Companies Operating in Iraq, April 2004, reproduced in Talmon, n. 1 above, Doc. 167.

<sup>39</sup> *Iraq: Status and Prospects for Reconstruction – Resources*, Hearing before the Committee on Foreign Relations, United States Senate, 108th Congress, 1st Session, 29 July 2003, p. 86. ORHA had started in mid-March 2003 with fewer than 200 staff.



Bremer claimed to have citizens of 25 different countries on his staff in the CPA.<sup>40</sup> However, of the 11 administrative departments of the CPA only one was headed by a non-US (past or present) official or private sector contractor.<sup>41</sup>

#### 4. A US Government Enterprise

Despite the involvement of other countries, the CPA was a US government enterprise through and through. During an interview with *The Guardian* in June 2007, Andrew Bearpark, the CPA's Director of Operations and the most senior British figure within the CPA hierarchy, said: 'Throughout its entire existence, the CPA was a US government department'.<sup>42</sup> This assessment is supported by the fact that, at all times, the CPA was headed by a US military or civilian government official who reported to and was subject to the orders of the US Secretary of Defense.<sup>43</sup> The CPA remained a Pentagon responsibility even when it was no longer in the CENTCOM chain of command, and was widely regarded as one of the 'administrative units of the Department of Defense'.<sup>44</sup> This is shown, *inter alia*, by the email addresses of CPA officials ending 'centcom.mil' and the fact that, initially, CPA operations were funded from Department of Defense (DoD) accounts.<sup>45</sup> Later, funds appropriated by the US Congress to the President under the heading 'Operating Expenses of the Coalition Provisional Authority' were apportioned to 'the CPA in Iraq (in its capacity as an entity of the United States Government)',<sup>46</sup> and were transferred to the Secretary of Defense.<sup>47</sup> The CPA also maintained a so-called 'reach-back office' in Washington within the Pentagon and, as an entity of the DoD, conveniently had its own Department of Defense Identity Code (DoDIC) for property accountability, which simplified the process of transferring property accountability from the US military to the CPA.<sup>48</sup> Candidates for positions in the CPA were screened by the DoD and the

<sup>40</sup> <http://www.cpa-iraq.org/pressconferences/Pressconference23AugwithQAs.html>. For a similar statement before the Senate Appropriations Committee on 22 September 2003: US Senate, *Fiscal Year 2004 Supplemental Request for Reconstruction of Iraq and Afghanistan*, Hearings before the Committee on Appropriations, 108<sup>th</sup> Congress, 1<sup>st</sup> Session, 22, 24, 25 September 2003, p. 22.

<sup>41</sup> See Organization Charts of the CPA of July and October 2003, reproduced in Talmon, n. 1 above, Doc. 156.

<sup>42</sup> 'US Authority Accused of Ignoring Allies in Iraq', *The Guardian*, 16 June 2007, p. 12. But see also the statement of the British Minister of State, Department of International Development, Hilary Benn, that the CPA is 'a coalition body and not an agency of the US Government'. (HC Debs., vol. 415, col. 1558: 17 December 2003).

<sup>43</sup> Compare *Sudnick v. Department of Defense*, -- F.Supp.2d --, 2007 WL 419619 (D.D.C., 2007), pp. 1-2.

<sup>44</sup> Compare statement by US President on H.R. 3289, 6 November 2003 (<http://www.whitehouse.gov/news/releases/2003/11/20031106-12.html>). On 20 January 2003, US President Bush had signed National Security Presidential Directive (NSPD) 23, 'Post-War Iraq Reconstruction', which had established ORHA under the authority of the DoD.

<sup>45</sup> See the statement of Joshua Bolton, Director, Office of Management and Budget, before the Senate Foreign Relations Committee, *Iraq: Status and Prospects for Reconstruction – Resources*, Hearing before the Committee on Foreign Relations, United States Senate, 108<sup>th</sup> Congress, 1<sup>st</sup> Session, 29 July 2003, p. 13.

<sup>46</sup> H.R. 3289–108<sup>th</sup> Congress (2003), Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, 117 Stat. 1209 at 1225.

<sup>47</sup> Memorandum of December 5, 2003 – Transfer of Funds Appropriated to the President under the heading Operating Expenses of the Coalition Provisional Authority, and Delegation of the Functions of the President under the heading Iraq Relief and Reconstruction Fund, in the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, 69 Federal Register 1645.

<sup>48</sup> Center for Law and Military Operations, n. 14 above, p. 179.

drafts of CPA legislation were submitted by Ambassador Bremer to the Pentagon before signing them. In recent litigation, the US government declared that the CPA was ‘an instrumentality of the United States for the purposes of the False Claims Act’.<sup>49</sup> Final confirmation of its status as a US government enterprise may be found in the fact that on 28 June 2004 the CPA transferred all but a few of its US government related responsibilities to the US Department of States and its headquarters building in Baghdad became the new US Embassy to Iraq.<sup>50</sup>

## 5. The British Role

In a written ministerial statement to the House of Commons on 16 July 2003, the British Secretary of State for Defence, Geoffrey Hoon, stated: ‘The UK is playing a major role, and has seconded experts to work in the Coalition Provisional Authority in Baghdad in a wide range of fields: political, financial, legal, security, health, education, roads, forensics, war crimes, prisons, culture and communications.’<sup>51</sup>

On other occasions, the Government spoke of the ‘leading role of the US and UK in the Coalition Provisional Authority’.<sup>52</sup> Such statements were, however, aimed mainly at a domestic audience. In reality, the United Kingdom was the junior partner in the coalition with little or no influence on the organization of or the day-to-day decision-making in the CPA. This was understandable, as the United States was providing the vast majority of the staff, money and resources. Compared with the United States’ contribution of some US\$980 million for the running of the CPA and some US\$18.6 billion for its reconstruction activities, the United Kingdom’s financial allocations to the CPA proved to be a *quantité négligable*.<sup>53</sup> While the British Government tried to give the impression that the administration and reconstruction of Iraq were a joint enterprise between the two countries, where differences of opinion were ‘resolved through discussion and compromise’,<sup>54</sup> it was the United States that was calling the shots. The following exchange between Ambassador Bremer and Senator Sarbanes during a hearing before the Committee on Foreign Relations of the US Senate, held on 24 September 2003, is revealing in this respect:

Senator Sarbanes: When the Coalition Provisional Authority makes a decision, I take it that is your decision; is that correct? [...]

Ambassador Bremer: No, it is not a one-man show. I have two very senior British diplomats, who work literally side by side with me as the—

<sup>49</sup> Supplemental Brief of the United States, 22 April 2005 (2005 WL 1129476) in *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 472 F.Supp.2d 787 (E.D.Va., 2007). But see the opinions of Ellis DJ in that case, *ibid.*, p. 791-792, and 444 F.Supp.2d 678 at 688-689 (E.D.Va, 2006) rejecting the view that the CPA was an ‘instrumentality of the United States’ and finding that the CPA may ‘be described as an international body formed by the implicit, multilateral consent of its Coalition partners’. This opinion must be treated with caution as the question of the CPA’s status arose in connection with the question whether it was subject to U.S. law.

<sup>50</sup> See National Security Presidential Directive 36 (NSPD- 36), ‘United States Government Operations in Iraq’, 11 May 2004; available at [www.fas.org/irp/offdocs/nspd/nspd051104.pdf](http://www.fas.org/irp/offdocs/nspd/nspd051104.pdf).

<sup>51</sup> HC Debs., vol. 409, col. 34WS: 16 July 2003. At the time of speaking, when the total number of CPA staff was some 1150, the UK had seconded some 70 officials to CPA offices in Baghdad, Basra and the north of Iraq.

<sup>52</sup> HL Debs., vol. 430, col. WA178: 12 February 2004 (Baroness Symons of Vernham Dean).

<sup>53</sup> Compare House of Commons Foreign Affairs Committee, *Foreign and Commonwealth Office Annual Report 2003-2004*, Eighth Report of Session 2003-04, 14 September 2004, Ev. 60.

<sup>54</sup> HL Debs., vol. 660, col. 156: 20 April 2004 (Baroness Symons of Vernham Dean). See also HC Debs., vol. 406, col. 613W: 9 June; col. 792W: 10 Jun 2003.

Senator Sarbanes: And if you and they disagree, what is the outcome? [...]

Ambassador Bremer: Well, I imagine there would be discussions between London and Washington?

Senator Sarbanes: I understand that. But assuming no consensus can be achieved, how is that decision made?

Ambassador Bremer: Well, in the end—

Senator Sarbanes [continuing]: Why do you not say you are the ultimate decision-maker?

Ambassador Bremer: In the end, I have, as you said, the authority.<sup>55</sup>

A couple of days earlier, Ambassador Bremer said in an interview: ‘Well for the time being the Coalition is under US command and that is the way it’s structured.’<sup>56</sup> The decision to appoint Ambassador Bremer as head of the CPA was taken unilaterally by the US Government. The British Government was ‘informed’ of the appointment, but was not ‘consulted’.<sup>57</sup> Bremer received his orders from Washington and was solely ‘responsible for all CPA decisions’.<sup>58</sup> The British Prime Minister’s Special Representative in Iraq,<sup>59</sup> who was also based in the Green Zone in Baghdad, was in regular contact with Ambassador Bremer.<sup>60</sup> He was, however, there in an ‘independent capacity’ with no formal role within the CPA’s hierarchy and no formal decision-making power.<sup>61</sup> Whenever Ambassador Bremer was absent from Iraq, his US deputy took charge and made decisions on his behalf.<sup>62</sup> The UK Special Representative’s main role was to contribute to and support the political process leading to the establishment of a representative Iraqi government under the terms of UN Security Council resolution 1483 (2003). He could present a British view and hope to have some influence, but he did not make any decisions. The situation is probably best summarized in an assessment of the CPA’s administration of Iraq by the US Center for Law and Military Operations: ‘Things were simply done by the US in a US manner and as they wished.’<sup>63</sup>

### III. International Responsibility of the Occupying Powers for the Acts of the Coalition Provisional Authority

<sup>55</sup> United States Senate, *Iraq: Next Steps – What Will an Iraq 5-Year Plan Look Like?*, Hearing before the Committee on Foreign Relations, 108<sup>th</sup> Congress, 1<sup>st</sup> Session, 24 September 2003, pp. 30-31.

<sup>56</sup> [http://www.cpa-iraq.org/transcripts/0826\\_bremerCoxTV.html](http://www.cpa-iraq.org/transcripts/0826_bremerCoxTV.html).

<sup>57</sup> HL Debs., vol. 430, col. WA178: 12 February 2004.

<sup>58</sup> HC Debs., vol. 421, col. 1632W: 26 May 2004 (UK Foreign Secretary Jack Straw).

<sup>59</sup> Ambassador John Sawers was succeeded on 11 September 2003 by Ambassador Sir Jeremy Greenstock as UK Special Representative.

<sup>60</sup> HC Debs., vol. 416, col. 41W: 5 January 2004 (Minister of States, Department for International Development, Hilary Benn). On the US side it was noted, however, that there ‘was a lack of communication between the coalition partners’. (Center for Law and Military Operations, n. 14 above, pp. 151-152).

<sup>61</sup> HC Debs., vol. 431, col. 1893W: 9 March 2005 (Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs Bill Rammell). However, from 23 to 30 December 2003, when both Ambassador Bremer and his deputy were absent from Iraq, the UK Special Representative looked after CPA affairs. There were neither policy decisions made about Iraq, nor any legislative acts signed during this period.

<sup>62</sup> US Ambassador Richard H. Jones served as Deputy Administrator of the CPA.

<sup>63</sup> Center for Law and Military Operations, n. 14 above, p. 152, n. 788.

The United States and the United Kingdom jointly occupied Iraq. In resolution 1483 (2003), the UN Security Council recognized the ‘responsibilities, and obligations under applicable international law’ of these two States ‘as occupying powers under unified command (“the Authority”)’.<sup>64</sup> The existence of the CPA – a body without a separate legal personality – did not divest the two countries of their legal obligations as occupying powers in Iraq. To the extent that the CPA exercised governmental authority, this authority derived from the occupying powers. This raises questions of ‘multiple State responsibility’, a subject that has been noted for its paucity of authority.<sup>65</sup> This section explores the extent to which each occupying power may be held responsible for the actions of the CPA.

## 1. Establishment of Responsibility

Article 3 of the 1907 Hague Convention IV provides that a belligerent party that violates the annexed Hague Regulations, which in section III deal with military authority over occupied territory, shall ‘be responsible for all acts committed by persons forming part of its armed forces’.<sup>66</sup> Of course, this does not mean that occupying powers are responsible only for the actions of ‘persons forming part of their armed forces’. The provision must be seen against the background of its adoption. At the beginning of the twentieth century, occupation government as a rule meant military government. Today, the responsibility of an occupying power is determined in accordance with Article 1 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility) which provide that ‘every internationally wrongful act of a State entails the international responsibility of that State’.<sup>67</sup> Thus each occupying power may be held responsible, if the conduct of the CPA is attributable to it under international law and if that conduct constitutes a breach of its international obligations.

### a. Relevant Conduct of the Coalition Provisional Authority

The first question to be answered is: what counts as conduct of the CPA? It is suggested that all actions and omissions of CPA officials acting in their official capacity, irrespective of nationality and status – i.e. whether they are military or civilian, US, UK or foreign government secondees,<sup>68</sup> consultants, or contractors –

<sup>64</sup> S/RES/1483 (2003) of 22 May 2003, preambular para. 13.

<sup>65</sup> See Brian D. Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (Oxford: Clarendon Press, 1988), p. 46. The situation has not changed since 1988; see Samantha Besson, *La pluralité d’Etats responsables. Vers une solidarité internationale?*, *Revue suisse de droit international et européen* 17 (2007), pp. 13-38 at pp. 15, 17, 24, 26 and 37 who speaks of ‘le sous-développement du régime de responsabilité plurale en droit international’.

<sup>66</sup> Convention Regarding the Laws and Customs of Land Warfare (IV), with annex of regulations, signed at The Hague, 18 October 1907, *AJIL Suppl.* 2 (1908), pp. 90-117. An identical provision may be found in Art. 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (Protocol I), 1125 UNTS 4.

<sup>67</sup> For the text of the ILC Articles on State Responsibility, see A/RES/56/83 (2001) of 12 December 2001, Annex.

<sup>68</sup> Seconded foreign government officials were placed at the disposal of the CPA or, more precisely, the occupying powers. Cf. Art. 6 ILC Articles on State Responsibility.

may be considered conduct of the CPA proper.<sup>69</sup> On the other hand, the conduct of people and organizations who only support the CPA with services, contractors who are implementing projects for the CPA, military personnel doing related jobs who are part of the coalition forces but not the CPA, and Iraqi government officials, is excluded.<sup>70</sup> The occupying powers cannot be held responsible for the conduct of these persons and organizations, unless they are empowered to exercise elements of occupation authority or are subject to the occupying powers' direction or control.<sup>71</sup> However, the occupying powers may incur responsibility in relation to external conduct for omissions on the part of CPA officials, such as a lack of proper supervision or control of private contractors.

With the separation of civil and military responsibilities in mid-May 2003, a distinction must also be made between the conduct of the CPA and the conduct of the coalition forces. Coalition partners drew a distinction between military personnel assigned to the CPA and those working only 'under the auspices of the CPA'.<sup>72</sup> For example, members of the Royal Australian Air Force providing air traffic control at Baghdad International Airport<sup>73</sup> and military advisers training the New Iraqi Army were not considered to be part of the CPA but were simply working under its auspices, and so remained the responsibility of the respective coalition partner. Similarly, Abu Ghraib prison and other internment and detention facilities throughout Iraq did not fall within the purview of the CPA. The CPA exercised authority only over criminal justice system prisoners, not over security detainees and prisoners of war. The latter were the responsibility of the occupying power or the coalition partner whose military forces had been detaining them.<sup>74</sup> Consequently, in its submission to the UN Commissioner for Human Rights, the CPA was able to state:

In accordance with Article 29 of the Fourth Geneva Convention and Article 12 of the Third Geneva Convention, and in line with the view of the ICRC, US and UK military forces retain legal responsibility for those prisoners of war and detainees in US and UK custody respectively. The US and UK will therefore respond separately on the issue of treatment of detainees within their custody.<sup>75</sup>

Coalition Provisional Authority officials, however, took infrastructure and other decisions which led to prisoners not being processed into the criminal justice system

---

<sup>69</sup> Compare Art. 4 ILC Articles on State Responsibility and commentary thereto, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, pp. 84-92.

<sup>70</sup> Compare HC Debs., vol. 410, col. 676W: 16 September 2003 (Bill Rammell, Under-Secretary of State, FCO).

<sup>71</sup> On the responsibility of the occupying power for the internationally wrongful acts committed by the organs of the occupied State in areas in which the latter were subject to the direction or control of the occupying power, see ILC Yb. 1979, II/1, p. 15, para. 20.

<sup>72</sup> Commonwealth of Australia, Official Committee Hansard, Senate, Foreign Affairs, Defence and Trade Legislation Committee Estimates (Budget Estimates Supplementary Hearings), 6 November 2003, p. 54.

<sup>73</sup> CPA Press Release No. 9, 1 July 2003.

<sup>74</sup> This becomes clear from an Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees between the Forces of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and Australia, entered into on 23 March 2003. The Agreement is reproduced in Talmon, n. 1 above, Doc. 204.

<sup>75</sup> Written Submission from the CPA to the UN High Commissioner for Human Rights, 28 May 2004, reproduced in Talmon, n. 1 above, Doc. 168. See also Human Rights Council, Opinions adopted by the Working Group on Arbitrary Detention, A/HRC/4/40/Add.1, 2 February 2007, p. 31, para. 25; p. 39, para. 29; p. 114, para. 6.

and thus having to stay longer than necessary in detention facilities operated by the coalition forces, where they were exposed to abuse. Such CPA conduct, if attributable, may give rise to responsibility on the part of the non-detaining occupying power also.

**b. The Coalition Provisional Authority as Common Organ of the Occupying Powers**

One essential requirement of the international responsibility of the occupying powers is that the conduct of the CPA is attributable to them.<sup>76</sup> According to Article 4, paragraph 1, of the ILC Articles on State Responsibility, which is reflective of a well-established rule of customary international law,<sup>77</sup> ‘the conduct of any State organ shall be considered an act of that State under international law’. The term ‘State organ’ is intended in the most general sense to include all individuals or collective entities, however classified, which make up the organization of the State and act on its behalf.<sup>78</sup> Although the US Government has been very cautious in domestic legal proceedings about claiming the CPA as an organ of State,<sup>79</sup> there can be little doubt that as a US government enterprise it qualifies as an organ of the United States for purposes of State responsibility.

The United Kingdom has stated on several occasions that it shared responsibility for the actions of the CPA.<sup>80</sup> However, it is more difficult to attribute the actions or omissions of the CPA to the United Kingdom, in view of the UK’s minor role. In particular, the CPA cannot be regarded as a US State organ ‘placed at the disposal’ of the United Kingdom in the sense of Article 6 of the ILC Articles on State Responsibility. While the CPA may – also – have been acting in the exercise of elements of British governmental authority it did not act under the ‘exclusive direction and control’ of the United Kingdom but rather on instructions from the US Government.<sup>81</sup> Furthermore, any attribution on the basis of Article 6 of the ILC Articles would mean that the conduct of the CPA could be attributed to the United Kingdom alone.

The conduct of the CPA may be attributed to both the United States and the United Kingdom if it qualifies as a ‘common organ’ of the two States.<sup>82</sup> This term is usually used interchangeably with the term ‘joint organ’ to describe a body that is an organ of two or more States simultaneously. It must be distinguished from the term ‘collective organ’, normally used to describe the organ of an international legal person. The case of a common organ is not expressly provided for in chapter II of the ILC Articles on State Responsibility on the ‘attribution of conduct to a State’, but the

<sup>76</sup> Compare Art. 2 (a) ILC Articles of State Responsibility.

<sup>77</sup> See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 385.

<sup>78</sup> See the Commentary on Art. 4, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, p. 84, para. 1; pp. 85-86, para. 6.

<sup>79</sup> See *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F.Supp.2d 617 (E.D.Va., 2007), Brief of the United States in Response to the Court’s Invitation of December 21, 2004, 1 April 2005 (2005 WL 871352) and Supplemental Brief of the United States, 22 April 2005 (2005 WL 1129476).

<sup>80</sup> See, e.g., HL Debs., vol. 664, col. WA108: 7 September 2004; vol. 668, col. WA131: 24 January 2005.

<sup>81</sup> See the Commentary on Art. 6, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, p. 95, para. 2.

<sup>82</sup> On the concept of ‘common organ’, see Tomaso Perassi, *Lezioni di diritto internazionale*, Part I, 1957, pp. 144-151 (‘gli organi comuni a più stati’).

solution is implicit in it.<sup>83</sup> According to Article 4, paragraph 1, the conduct of a common organ can be considered an act of each of the States whose organ it is.<sup>84</sup> In the case of a common organ, a single conduct is attributed concurrently to both States. In the commentary on one of its earlier draft Articles on State Responsibility, the ILC wrote:

[T]he conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts.<sup>85</sup>

The attribution of conduct of a common organ is therefore not a case of a State participating in the internationally wrongful act of another State. Rather, both States commit the internationally wrongful act.

It is helpful to examine some past examples of common organs in order to determine their characteristics and to decide whether the CPA qualifies as a common organ of the occupying powers. States have regularly (but not exclusively)<sup>86</sup> made use of common organs for the joint administration of (foreign) territory, both in peacetime and during armed conflict.

(i) The Tangier Statute of 1923, initially concluded between France, Great Britain and Spain, provided for the joint administration of the City of Tangier while recognizing the sovereignty of the Sultan of Morocco.<sup>87</sup> Tangier thus constituted a *coimperium*, i.e. a territory where two or more States – the *coimperii* – jointly exercise authority (but not sovereignty).<sup>88</sup> The territory was administered through a Control Commission made up of the consuls of the signatory powers of the Statute which was considered the common organ of those powers. In a legal opinion on international responsibility for injuries caused in the Tangier zone, dated 30 April 1952, the Swiss Federal Political Department held that: ‘Le Comité de contrôle se composant des représentants des puissances participant à l’administration de la zone de Tanger [...], on doit en tirer la conclusion que ce sont ces puissances qui exercent

<sup>83</sup> See Seventh Report on State Responsibility by Mr Roberto Ago, Special Rapporteur, ILC Yb. 1978, II/1, p. 54, para. 58. See also ILC Yb. 1999, II/2, p. 71, para. 266 (concluding remarks by the Special Rapporteur, Mr James Crawford, on draft Art. 27).

<sup>84</sup> Compare Second Report on State Responsibility by Mr James Crawford, Special Rapporteur, Addendum, UN Doc. A/CN.4/498/Add.1, 1 April 1999, 3, para. 159.

<sup>85</sup> Commentary on draft article 27, adopted by the ILC at its session of 8 May to 28 July 1978: ILC Yb. 1978, II/2, p. 99, para. 2. See also *Turkey – Restrictions on Imports of Textiles and Clothing Products*, Report of the Panel, WT/DS34/R, 31 May 1999 [adopted as modified by the Appellate Body report on 19 November 1999], para. 9.43.

<sup>86</sup> For example, institutions created by the agreement establishing the EC-Turkey customs union were regarded as ‘common organs’ of the two parties (*Turkey – Restrictions on Imports of Textiles and Clothing Products*, Report of the Panel, WT/DS34/R, 31 May 1999 [adopted as modified by the Appellate Body report on 19 November 1999], para. 8.3). In the *Eurotunnel Arbitration* the tribunal held that the Intergovernmental Commission (IGC) established by the Treaty of Canterbury constituted a ‘joint organ’ of the United Kingdom and France and that both countries would be responsible for a breach of an agreement by the IGC (Partial Award of 30 January 2007, paras. 179, 187, 317; available at <http://www.pca-cpa.org/>).

<sup>87</sup> Convention regarding the organization of the Tangier zone, signed at Paris on 18 December 1923 (28 LNTS 541).

<sup>88</sup> On the concept of co-imperium generally, see Alain Coret, *Le condominium* (1960), pp. 70-72; Vincent P. Bantz, ‘The International Legal Status of Condominia’, *Florida JIL* 12 (1998), pp. 77-152 at p. 102.

conjointement le pouvoir effectif à Tanger. [...] Le Comité de contrôle est ainsi un *organe commun* aux puissances cessionnaires qui sont responsables de ses actes.<sup>89</sup>

(ii) There is no general agreement on the question of whether a *condominium*, i.e. a territory where two or more States – the *condominii* – jointly exercise sovereignty, has an international legal personality distinct from that of its member States. Authors who consider, for example, that the Anglo-French *condominium* of the New Hebrides<sup>90</sup> does not have an international legal personality treat the condominiumal organs as common organs, the internationally wrongful acts of which are the direct responsibility of France and the United Kingdom.<sup>91</sup>

(iii) The Trusteeship Agreement for the Territory of Nauru, approved by the United Nations General Assembly on 1 November 1947, provided in Article 2 that the ‘Governments of Australia, New Zealand and the United Kingdom (hereinafter called “the Administering Authority”’) are hereby designated as the joint Authority which will exercise the administration of the Territory’. The Agreement added in Article 4:

The Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this purpose, in pursuance of an Agreement made by the Governments of Australia, New Zealand and the United Kingdom, the Government of Australia will, *on behalf of the Administering Authority* and except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom, continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory.<sup>92</sup>

Australia always appointed the Administrator, and as a consequence was in charge of the day-to-day administration of the territory. Administrative decisions were subject to confirmation or rejection by the Governor-General of Australia, and were communicated to the other governments for information only.<sup>93</sup> In the *Nauru* case, Australia argued before the International Court of Justice (ICJ) that its special role in the administration of the territory did ‘not detract from the fact that all acts were done on behalf of all three Governments’.<sup>94</sup> The ICJ, noting that the ‘Administering Authority’ for Nauru did not have an international legal personality distinct from the three States mentioned in the Trusteeship Agreement, seems to have accepted that the Authority constituted the ‘common organ’ of these States and that Australia was acting on its behalf.<sup>95</sup>

<sup>89</sup> Responsabilité internationale pour des dommages causés dans la zone de Tanger, *Annuaire suisse de droit international*, 10 (1953), pp. 238-249 at pp. 244, 247 (italics added).

<sup>90</sup> On 30 July 1980, the New Hebrides became the independent State of Vanuatu.

<sup>91</sup> D. P. O’Connell, ‘The Condominium of the New Hebrides’, *BYBIL* 43 (1968-69), pp. 71-145 at p. 82. See also *ibid.*, pp. 78 and 83-84. See further Bantz, n. 88 above, p. 148 and Coret, n. 88 above, pp. 311-312.

<sup>92</sup> See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, ICJ Reports 1992, p. 240 at p. 257, para. 45 (italics added).

<sup>93</sup> *Ibid.*, p. 257, para. 43, and p. 258, para. 46.

<sup>94</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, Preliminary Objections of the Government of Australia, December 1990, p. 136, para. 340. See also *ibid.*, p. 131, para. 322.

<sup>95</sup> See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, ICJ Reports 1992, p. 270 at p. 284 (sep. op. Shahabuddeen) who expressly uses the term ‘common organ’. See also the dissenting opinion of Judge Schwebel who held: ‘In view of the essential fact that [...] Australia always acted as a member of a joint Administering Authority composed of three States, and always acted on behalf of its fellow members of that joint Administering Authority as well as its own behalf, it



(iv) In July 1943, the United Kingdom and the United States jointly began to occupy Italy and established an ‘Allied Military Government of Occupied Territory’ (AMGOT) there. Acting in the name of the two governments, US General Dwight D. Eisenhower, Supreme Commander of the Allied Forces in the Mediterranean Theatre of Operations,<sup>96</sup> appointed British General Harold Alexander as head of AMGOT. The latter was invested with the actual exercise of the authority which the laws of war vested in the occupying powers. AMGOT was a completely fused or integrated military government composed of British and American officers in equal proportions in every function and place.<sup>97</sup> It was assumed that the two governments would have joint legal responsibility for the actions of AMGOT.<sup>98</sup>

(v) At the end of the Second World War, the Allies established two joint occupation authorities in Germany. The area of Greater Berlin was governed by an Inter-Allied Governing Authority known by its Russian name of *Kommandatura*, which consisted of four commandants appointed by their respective commanders-in-chief who were ‘to direct jointly the administration of the Greater Berlin Area’.<sup>99</sup> At the national level, the commanders-in-chief acted jointly as Allied Control Council in matters affecting Germany as a whole. The Council was ‘exercising its authority in behalf of the Four Allied Powers’, from whom its authority was derived.<sup>100</sup> A hallmark of these common organs was the equal representation at all stages of the four Allied Powers and the requirement that decisions were to be unanimous.

(vi) On 2 September 1945, US, British and Commonwealth forces occupied Japan. US President Truman appointed as Supreme Commander for the Allied Forces US General Douglas MacArthur, who was recognized ‘as the sole executive authority for the Allied Powers in Japan’.<sup>101</sup> Although he was supposed to consult and advise an Allied Council for Japan, his decisions on matters of the occupation and control of Japan were final.<sup>102</sup> In a suit brought against the United States by a Hong Kong corporation to recover damages for the use of its vessel by the Allied Powers during the occupation, the United States Court of Federal Claims held:

---

follows that its acts engaged or may have engaged not only its responsibility – if responsibility be engaged at all – but those of its “Partner Governments”.’ (ibid., p. 329 at p. 342).

<sup>96</sup> The Supreme Commander himself may be regarded as a common organ of the two States. Military alliances or ‘coalitions of the willing’ are arrangements between two or more States whereby they agree to cooperate militarily. The alliance or coalition as a rule has no legal personality of its own. The organs of cooperation, such as the ‘Supreme Commander of the Allied Forces’, are common organs of the members of the military alliance.

<sup>97</sup> See H. A. Smith, ‘The Government of Occupied Territory’, *BYBIL* 21 (1944), pp. 151-155 at p. 152; Lord Rennell of Rodd, ‘Allied Military Government in Occupied Territory’, *International Affairs* 20/3 (1944), pp. 307-316 at p. 310. See also Charles Harris, *Allied Military Administration of Italy, 1943-1945* (1957).

<sup>98</sup> AFHQ Appreciation and Outline Plan for Military Government of Sicily, 24 Mar 43, reproduced in Harry L. Coles & Albert K. Weinberg, *Civil Affairs: Soldiers Become Governors* (1992), p. 162.

<sup>99</sup> See para. 5 of the Protocol on the Zones of Occupation in Germany and the Administration of Greater Berlin unanimously adopted by the European Advisory Commission on 12 September 1944 (Cmd. 1552, p. 28). See also R. Y. Jennings, ‘Government in Commission’, *BYBIL* 23 (1946), pp. 112-141 at p. 115.

<sup>100</sup> *Flick v. Johnson*, 174 F.2d 983 at 986 (C.A.D.C. 1949). See also Wolfgang Friedman, *The Allied Government of Germany* (1947), p. 67 and Jennings, n. 99 above, p. 140.

<sup>101</sup> Communiqué on the Moscow Conference of the Foreign Ministers of the Soviet Union, the United Kingdom and the United States, held at Moscow, 16-26 December 1945, signed on 27 December 1945, Report, Part II.B.5 (20 UNTS 272 at 282).

<sup>102</sup> Ibid.

The occupation of Japan was a joint venture, participated in by the United States of America, the United Kingdom, China, and Russia; and whatever benefit the occupying powers derived from the use of plaintiff's vessel in the laying and repairing of submarine cables was derived by all of them in common and not by any one more than another. [...].

The Allied Powers, of course, was not a body politic. It was an association of sovereign states. Any action taken by the Supreme Commander for the Allied Powers was taken on behalf of the association, of course; but it was also taken on behalf of each one of the Allied Powers. Any action taken by him was taken as the agent of the United States of America, as the agent of Great Britain, and as the agent of China and of Russia. Whatever use there may have been of plaintiff's vessel by the Allied Powers, it was a use by all of them. The Supreme Commander was acting as the agent for each of them.<sup>103</sup>

While the Court ultimately found that the United States was not liable for the taking of the vessel,<sup>104</sup> it treated General MacArthur and the Allied occupation authorities in Japan as a common organ of the Allied Powers.

Taking into account these examples, three requirements of a 'common organ' may be identified.

(1) The body in question must not possess a separate international legal personality and must not qualify as a collective organ of an international organization. The occupying powers have made it clear that the CPA 'is not an entity which is legally distinct from the United Kingdom and the United States for the purposes of international law'.<sup>105</sup> On the contrary, it was established 'as the executive body' of the occupying powers in Iraq.<sup>106</sup>

(2) A common organ of two or more States is a State organ of each of them. State organs, by definition, exercise elements of the governmental authority of their State. This requires that each State in question is competent to exercise the authority exercised by the common organ.<sup>107</sup> British Foreign Secretary Jack Straw explained that the CPA 'was established to exercise the specific authorities, responsibilities and obligations under international law of the occupying powers'.<sup>108</sup> In resolution 1483 (2003), the Security Council recognized that these authorities, responsibilities and obligations lay with both the United States and the United Kingdom 'as occupying powers under unified command'.<sup>109</sup>

(3) There are various ways to create a common organ. States may jointly set up a new integrated body composed of officials from both. The number of officials

<sup>103</sup> *Anglo Chinese Shipping Co. v. U. S.*, 127 F.Supp. 553 at 554, 556 (Ct.Cl. 1955). See also *Standard-Vacuum Oil Co. v. U. S.*, 153 F.Supp. 465 at 466 (Ct.Cl. 1957); *Koki Hirota v. General of the Army MacArthur*, 338 U.S. 197 at 198, 203 (1948).

<sup>104</sup> But see the dissenting opinion of Whitaker J. in *Standard-Vacuum Oil Co. v. U. S.*, 153 F.Supp. 465 at 468 (Ct.Cl. 1957): 'The occupation of Japan was a joint enterprise of the United States, Great Britain, Russia and other Powers [...]. That each of them was engaged in a joint venture with the others affords no escape from liability.'

<sup>105</sup> Supplementary Memorandum Submitted by the Foreign and Commonwealth Office to the House of Commons Foreign Affairs Committee, 5 April 2004, n. 5 above, Ev 35; Brief of the United States in Response to the Court's Invitation of December 21, 2004, 1 April 2005, n. 79 above.

<sup>106</sup> See the Written Submission from the CPA to the UN High Commissioner for Human Rights, 28 May 2004, reproduced in Talmon, n. 1 above, Doc. 168.

<sup>107</sup> See Alfred Verdross, *Staatsgebiet, Staatengemeinschaftsgebiet und Staatengebiet*, *Zeitschrift für Internationales Recht* 37 (1927), pp. 293-305 at p. 303.

<sup>108</sup> HC Debs., vol. 417, col. 1304W: 10 February 2004.

<sup>109</sup> S/RES/1483 (2003) of 22 May 2003, preambular para. 13.

from each side and their decision-making power may vary depending on the individual case. As States can always authorize another State to exercise some of their powers and to act on their behalf, States may also by agreement designate an existing State organ of one of them as their common organ,<sup>110</sup> or they may entrust one of them with the establishment of a new State organ that will serve as a common organ of both. In this case, the other State may assist the entrusted State by placing some of its officials at the disposal of the existing or newly established organ.<sup>111</sup> Adapting Georges Scelle's theory to the present situation, one may speak of a horizontal *dedoublement fonctionnel*, i.e. a State organ playing a functional dual role as organ of its own and of another State.<sup>112</sup> It is not necessary for the State organ to act on the joint instructions of its own and the other State, for each State to exercise a measure of control over the common organ,<sup>113</sup> or for the other State to have assented to a particular action by the foreign State organ. On the contrary, the State must retain (at least some) control over the actions of its organ in order for it to qualify as a common organ of both States.<sup>114</sup>

Employing the organ of another State as a common organ is, in some ways, like writing a blank cheque and potentially exposes the State to increased international responsibility. It may be compared with the situation in Article 11 of the ILC Articles on State Responsibility where a State generally acknowledges and adopts the conduct of a foreign State organ as its own; the only difference being that this is done *ex ante facto*. In the case of Iraq, it seems that the United Kingdom wrote the United States a blank cheque for the latter to set up a new organ, the CPA, which was to act as the common organ of both occupying powers.<sup>115</sup> In this sense, one may speak of an agency relationship between the United States and the United Kingdom. In the day-to-day administration of occupied Iraq, the CPA as a State organ of the United States acted on behalf of its own State as well as on behalf of the United Kingdom. Consequently, the CPA's conduct may be attributed to both of them.

### c. Breach of an International Obligation of the Occupying Powers

Conduct of the CPA which is attributable to the occupying powers must constitute a breach of their international obligations. As the obligations of the occupying powers may not be the same, the question of breach of obligation must be determined separately for each occupying power. Unlike the United States, the United Kingdom is bound, for example, by the European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Second Optional

<sup>110</sup> Compare Josef L. Kunz, *Die Staatenverbindung* (1929), pp. 395, 400. See also the Second Report on State Responsibility by Mr James Crawford, Special Rapporteur, UN Doc. A/CN.4/498/Add.1, 1 April 1999, p. 2 ('one State [...] acting as an organ or agent of another State').

<sup>111</sup> Compare Art. 6 ILC Articles on State Responsibility.

<sup>112</sup> Compare Georges Scelle, *Précis de droit des gens*, vol. I (1932), pp. 43, 54-56, 217. Scelle understood the concept in a vertical way, i.e. State organs acting both on behalf of the State and the international community.

<sup>113</sup> Compare *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, CR 91/20, 19 November 1991, pp. 70-71, para. 43. James Crawford appearing for Nauru submitted that 'normally each State would exercise a measure of control over a common organ' (italics added).

<sup>114</sup> In case the other State exercised exclusive direction or control over the organ Art. 6 ILC of the Articles on State Responsibility would apply. Cf. Second Report on State Responsibility by Mr James Crawford, Special Rapporteur, Addendum, UN Doc. A/CN.4/498/Add.1, 1 April 1999, p. 3, n. 355.

<sup>115</sup> Compare Supplemental Brief of the United States, 22 April 2005, n. 49 above ('For some purposes, the CPA may also have been an instrumentality of a coalition of both the United States and the United Kingdom').

Protocol to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, all of which may apply in occupied territory.<sup>116</sup> In addition, the United Kingdom is a party to Additional Protocol I to the Geneva Conventions, while the United States is not. As under Protocol I the United Kingdom has a broader set of obligations than the United States in relation to the definition and categorization of prisoners of war, on 23 March 2003 it concluded an arrangement with the United States which contained mutual assurances on the treatment of all transferred persons and confirmed that such persons were entitled to the full protection of the third Geneva Convention and the first Additional Protocol.<sup>117</sup> In the case of the same obligation binding both occupying powers, it must also be determined whether this is a joint obligation of both or an individual obligation of each.<sup>118</sup>

It is beyond the scope of this paper to examine individual breaches of the occupying powers' international obligations.<sup>119</sup> Instead, this section outlines some of the obligations incumbent on the United States and the United Kingdom in Iraq and their possibility for breach. As occupying powers, the two States were each individually subject to the rules of international humanitarian law, and in particular the Hague Regulations Concerning the Laws and Customs of Land Warfare<sup>120</sup> and the fourth Geneva Convention.<sup>121</sup> This was confirmed by the British Foreign Secretary, who said in a statement before the House of Commons: 'The United Kingdom and the United States fully accept our responsibilities under the fourth Geneva Convention and the Hague regulations.'<sup>122</sup> In *Armed Activities on the Territory of the Congo*, the ICJ held that the obligation under Article 43 of the Hague Regulations 'comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party'.<sup>123</sup> The occupying powers may thus be held responsible for any violation of their obligations by the CPA and for 'any lack of vigilance [on the part of the CPA] in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory'.<sup>124</sup> The CPA was well aware that the occupying powers were under an obligation to supervise the day-to-day operations of private contractors and

<sup>116</sup> The application of the universal human rights instruments in occupied territory was confirmed by the ICJ in its advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004, p. 136, paras. 106, 111-113. On the (very limited) application of the ECHR to British forces in occupied Iraq, see *Al-Skeini and others v. Secretary of State for Defence*, [2007] UKHL 26, paras. 56, 61-84, 91, 97, 105-132. The last word on this question has, however, not been spoken yet. The court in Strasbourg is the ultimate authority on this question.

<sup>117</sup> Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees between the Forces of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and Australia, entered into on 23 March 2003. The Agreement is reproduced in Talmon, n. 1 above, Doc. 204.

<sup>118</sup> Compare *Eurotunnel Arbitration*, Partial Award of 30 January 2007, para. 177.

<sup>119</sup> For a list of acts and omissions of the occupying powers giving rise to State responsibility, see David Scheffer, *Beyond Occupation Law*, *AJIL* 97 (2003), pp. 842-860 at pp. 855-856.

<sup>120</sup> Hague Regulations Concerning the Laws and Customs of Land Warfare, Annex to the Convention Regarding the Laws and Customs of Land Warfare, signed at The Hague, 18 October 1907, *AJIL Suppl.* 2 (1908), pp. 97-117.

<sup>121</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, with Annexes, done at Geneva, 12 August 1949, 75 UNTS 287.

<sup>122</sup> HC Debs., vol. 405, col. 22: 12 May 2003.

<sup>123</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, ICJ Rep. 2005, para. 178.

<sup>124</sup> Compare *ibid.*, para. 179.

of Iraqi government officials in order to secure compliance with international human rights law. In the National Policy Guidelines drawn up by the CPA Ministry of Justice it was stated:

One of the most sensitive issues that the CPA will have to address is the management of prisons. As I stated at the beginning of this memorandum, the Coalition will have ultimate responsibility for prison conditions and for the treatment of prisoners, even if correctional facilities are staffed with Iraqi officers. As the occupying powers, the US and the UK will have an obligation to maintain these facilities at a level of internationally acceptable standards. The CPA, therefore, will have little choice but to be actively involved in operations of prisons to a degree that may not be true of courts or police.<sup>125</sup>

This was especially true as the CPA had removed almost the entire management of the Iraqi prison system on the grounds of its Baath party membership.<sup>126</sup> In *Armed Activities on the Territory of the Congo*, the ICJ further held that the occupant's obligation under Article 43 of the Hague Regulations 'to take appropriate measures to prevent the looting, plundering and exploitation of natural resources' extended to private persons in the occupied territory and not only to members of its own forces and officials.<sup>127</sup> It is argued that the same obligation exists in the case of the 'cultural resources' of the occupied territory,<sup>128</sup> which raises the question of the occupying powers' responsibility for the looting of the Iraqi National Museum in Baghdad and other archaeological and religious sites throughout the country. The obligation under Article 43 of the Hague Regulations to 'ensure, as far as possible, public order and safety' also includes the obligation to maintain appropriate protection over the nuclear material at Iraq's nuclear research centre at Tuwaitha.<sup>129</sup> As Iraq no longer had a functioning government to act on its behalf, the occupying powers found themselves in a fiduciary position. Fiduciary duties of the occupant are recognized, for example, in Article 55 of the Hague Regulations.<sup>130</sup> At the beginning of the occupation, Iraq or its State owned enterprises were engaged in over 70 lawsuits worldwide, mostly as defendant. The occupying powers were under an obligation to seek delays to allow a future Iraqi government to make its own legal decisions, take urgent procedural steps, conclude settlement agreements to avert execution of judgments against Iraqi State property abroad and, availability of Iraqi funds permitting, pay for the provision of legal services. In light of its obligations, the CPA made available some US\$4.5

---

<sup>125</sup> CPA, Ministry of Justice National Policy Guidance, 23 June 2003, Appendix III, reproduced in Talmon, n. 1 above, Doc. 149.

<sup>126</sup> See CPA Order No. 1, De Baathification of Iraqi Society (CPA/ORD/16 May 2003/01), n. 9 above.

<sup>127</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, ICJ Rep. 2005, para. 248. See also *ibid.*, para. 250.

<sup>128</sup> See the EU Presidency's Statement on Iraq at the Informal European Council in Athens, 16 April 2003: 'At this stage the coalition has the responsibility to ensure a secure environment, including [...] the protection of the cultural heritage and museums.' (<http://www.consilium.europa.eu/>).

<sup>129</sup> Following media reports of looting of nuclear and radioactive material from the Tuwaitah nuclear research centre, IAEA Director General El Baradei wrote to the US Government asking it to ensure proper protection of the material located there. See IAEA Press Release 2003/04, 11 April 2003 and 2003/03, 22 May 2003.

<sup>130</sup> On fiduciary duties of the occupant, see Max Rheinstein, 'The Legal Status of Occupied Germany', *Michigan LR* 47 (1948), pp. 23-40 at pp. 29-30.

million for outside legal fees<sup>131</sup> and instructed counsel to take certain actions on behalf of Iraq.<sup>132</sup>

Resolutions of the Security Council may be another source of the occupying powers' obligations. On 16 May 2003, the CPA established the Development Fund for Iraq (DFI) to hold the proceeds of all Iraqi oil sales, as well as Iraqi assets frozen abroad and funds transferred from the United Nations' oil for food programme. Six days later, the Security Council, acting under Chapter VII of the UN Charter, adopted resolution 1483 in which it noted the establishment of the DFI and that the funds in the DFI were to be disbursed 'at the direction of the Authority, in consultation with the Iraqi interim administration'.<sup>133</sup> The Council underlined that the DFI was to

be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq.<sup>134</sup>

Further, the Council decided that all export sales of Iraqi oil following the adoption of the resolution were to be made 'consistent with prevailing international market best practices'.<sup>135</sup> The CPA acknowledged some of these obligations in its Memorandum No. 4 where it says: 'As steward for the Iraqi people, the CPA will manage and spend Iraqi funds, which belong to the Iraqi people, for their benefit. [...] they shall be managed in a transparent manner that fully comports with the CPA's obligations under international law, including Resolution 1483.'<sup>136</sup> That resolution 1483 imposed additional obligations on the occupying powers was also made clear by the French representative explaining the French vote on that resolution in the Security Council who stated that these broad authorities [attributed to the occupying powers by the resolution] entail responsibilities vis-à-vis [...] the international community, because it has recognized the existence of the rights and obligations of the Authority and addressed specific requests to it.'<sup>137</sup> In resolution 1511, the Security Council itself referred to the 'responsibilities, authorities, and obligations under applicable international law recognized *and set forth* in resolution 1483 (2003)'.<sup>138</sup> In a brief in response to the Court's invitation in the *Custer Battles* case the U.S. Government stated: 'International law, as well as UNSCR 1483, imposed particular rights and responsibilities that the Geneva and Hague Conventions do not address. One of these

---

<sup>131</sup> See United States Department of Defense, Office of General Counsel, Acquisition and Fiscal Accountability: Between Iraq and a Hard Place, Fiscal Panel, 2004 Contract Law Symposium, The Judge Advocate General's Center and School, 9 December 2004 (<https://www.jagcnet.army.mil/>).

<sup>132</sup> Compare *Kuwait Airways Corporation v. Iraqi Airways Company*, [2003] EWCA Civ 1294, paras. 3, 7 (CA).

<sup>133</sup> S/RES/1483 (2003) of 22 May 2003, paras. 12, 13.

<sup>134</sup> *Ibid.*, para. 14. See also S/RES/1511 (2003) of 16 October 2003, para. 23.

<sup>135</sup> *Ibid.*, para. 20.

<sup>136</sup> CPA Memorandum No. 4, Contract and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq (CPA/MEM/19 August 2003/04), sec. 1. See also CPA Regulation No. 2, Development Fund for Iraq (CPA/REG/10 June 2003/02), preambular para. 5 and sec. 1; published in *Al-Waqai Al-Iraqiya. Official Gazette of Iraq*, Vol. 44, No. 3979 (no date), pp. 70-82 and Vol. 44, No. 3978 (17 August 2003), pp. 3-7; both reproduced in Talmon, n. 1, Doc. 116 and 2, respectively.

<sup>137</sup> UN Doc. S//PV.4761, 22 May 2003, p. 4. See also **Error! Main Document Only.** UN Doc. S/PV.4791, 22 July 2003, p. 25 (Pakistan).

<sup>138</sup> S/RES/1511 (2003) of 16 October 2003, para. 1 (italics added).

was responsibility for the management of this unique creation, the DFI.<sup>139</sup> The occupying powers were thus under an obligation to use the DFI funds in a transparent manner, in line with international accounting standards, and only for purposes benefiting the Iraqi people. Between May 2003 and June 2004, the CPA controlled US\$23.3 billion in Iraqi funds and spent or disbursed US\$19.6 billion, including nearly US\$12 billion in cash.<sup>140</sup> Reports indicate that a large proportion of that money was wasted, stolen or frittered away. In an Audit Report of January 2005, the US Special Inspector General for Iraq Reconstruction writes:

The CPA provided less than adequate controls for approximately \$ 8.8 billion in DFI funds provided to Iraqi ministries through the national budget process. Specifically, the CPA did not establish or implement sufficient managerial, financial, and contractual controls to ensure DFI funds were used in a transparent manner. Consequently, there was no assurance that the funds were used for the purposes mandated by Resolution 1483. [...] we believe the CPA management of Iraq's national budget process and oversight of Iraqi funds was burdened by severe inefficiencies and poor management.<sup>141</sup>

Auditors found hundreds of irregularities, non-existent contracts, non-existent projects and non-existent contractors. In one case, CPA officials authorized payment for about 74,000 guards' salaries but only a fraction of these could later be validated.<sup>142</sup> Several criminal prosecutions have been brought in the meantime against private contractors and members of the CPA for large-scale procurement fraud.<sup>143</sup> Some have described events in Iraq as 'a financial scandal that in terms of sheer scale must rank as one of the greatest in history'.<sup>144</sup> The CPA's mishandling of the DFI may thus, in due course, give rise to claims for compensation by Iraq against the occupying powers. The fact that British officials were not authorized signatories over the DFI account and were not involved in the auditing of the CPA accounts<sup>145</sup> does not absolve the United Kingdom from its international responsibility.<sup>146</sup>

## 2. Questions of Multiple State Responsibility

<sup>139</sup> Brief of the United States in Response to the Court's Invitation of December 21, 2004, 1 April 2005, n. 79 above.

<sup>140</sup> See US House of Representatives, *Cash Transfers to the Coalition Provisional Authority*, Memorandum to Members of the Committee on Oversight and Government Reform, 110<sup>th</sup> Congress, 6 February 2007, pp. 5, 9.

<sup>141</sup> Office of the Special Inspector General for Iraq Reconstruction, *Oversight of Funds Provided to Iraqi Ministries through the National Budget Process*, Audit Report No. 05-004, 30 January 2005, pp. i, ii and p. 5.

<sup>142</sup> *Ibid.*, p. 7.

<sup>143</sup> Compare Statement of Deputy Assistant Attorney General Barry M. Sabin before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Concerning War Profiteering and Other Contractor Crimes Committed Overseas, 19 June 2007, pp. 4-5, available at <http://judiciary.house.gov/>.

<sup>144</sup> Callum Macrae and Ali Fadhil, G2: 'Iraq was awash in cash. We played football with bricks of \$100 bills', *Guardian*, 20 March 2006, Features Pages, p. 22. See also Joy Gordon, 'Iraq: Follow the Money', *Le Monde diplomatique*, April 2007.

<sup>145</sup> See HC Debs., vol. 430, col. 1202W: 4 February 2004 (Denis MacShane, Minister for Europe, FCO).

<sup>146</sup> The UK Secretary of State for International Development, Baroness Amos, said: 'Under UNSCR 1483, the occupying powers shared joint responsibility for the actions of the Coalition Provisional Authority (CPA), including management of the Development Fund for Iraq (DFI).' (HL Debs., vol. 664, col. WA108: 7 September 2004).

In cases of parallel attribution of a single course of conduct of a common organ to two or more States, all States will, if the conduct constitutes a breach of their international obligations, concurrently have committed separate, although identical, internationally wrongful acts.<sup>147</sup> The plurality of responsible States raises intricate questions. In the literature there is considerable confusion as these questions are discussed in terms of ‘joint’, ‘joint and several’ or ‘solidary’ responsibility. The substantive questions of the extent of each State’s (full or partial) responsibility and whether the State held responsible has a right of recourse against the other State(s) are regularly mixed up with the procedural questions of whether responsibility can be invoked separately and, more importantly, whether claims against one State only are admissible. Each of these questions will be discussed in turn.

#### a. Invocation of Responsibility of Each Occupying Power

Where there is a plurality of responsible States in respect of the same internationally wrongful act, an injured State can invoke the responsibility of each one of them in relation to that act. There is ample authority for this proposition. Judge Azevedo held in the *Corfu Channel* case that the ‘victim retains the right to submit a claim against one only of the responsible parties, *in solidum*, in accordance with the choice which is always left to the discretion of the victim’<sup>148</sup> and Judge Shahabuddeen stated in the *Nauru* case that ‘where States act through a common organ, each State is separately answerable for the wrongful act of the common organ’.<sup>149</sup> Referring to Judge Shahabuddeen’s statement, the WTO Panel in *Turkey-Textiles* concluded that Turkey alone could be held responsible for measures taken by the Turkey-EC customs union.<sup>150</sup> The ILC also favoured a system of separate responsibility, even in relation to common organs.<sup>151</sup> The general principle of separate responsibility in international law is now reflected in Article 47, paragraph 1, of the ILC Articles on State Responsibility.<sup>152</sup> An injured State such as Iraq would thus be free to hold either the United States or the United Kingdom, or both of them, to account for the way the DFI was administered on their behalf by the CPA.

#### b. Extent of Responsibility of the Individual Occupying Power

That responsibility can be invoked against each occupying power separately does not say anything about the extent of that responsibility, i.e. whether each occupying power can be held to account for the whole or only for part of the damage. In its legal

<sup>147</sup> Compare ILC Yb. 1978, II/2. p. 99, para. 2.

<sup>148</sup> *Corfu Channel*, ICJ Rep. 1949, p. 78 at p. 92 (diss. op. Azevedo). See also the Memorial submitted by the Government of the United States of America, 2 December 1958, ICJ Pleadings, *Aerial Incident of 27 July 1955 (USA v. Bulgaria)*, p. 167 at p. 229, para. 3.

<sup>149</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, ICJ Reports 1992, p. 270 at p. 284 (sep. op. Shahabuddeen). See also the Memorial of the Republic of Nauru, April 1990, Vol. 1, paras. 623-630.

<sup>150</sup> *Turkey – Restrictions on Imports of Textiles and Clothing Products*, Report of the Panel, WT/DS34/R, 31 May 1999 [adopted as modified by the Appellate Body report on 19 November 1999], para. 9.42.

<sup>151</sup> ILC Yb. 1978, II/2. p. 99, para. 2. See also *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, CR 91/20, 19 November 1991, pp. 70-71, para. 43 (James Crawford).

<sup>152</sup> See also the Commentary on Art. 47, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, p. 314, paras. 1, 3; p. 317, para. 6.



opinion on the international responsibility for injuries caused in the Tangier zone, the Swiss Federal Political Department was of the opinion that:

Chacune des puissances en question n'est cependant pas responsable entièrement pour les actes de l'organe commun qu'est le Comité de contrôle. Le représentant qu'elle y délègue n'est en effet qu'un organe partiel. Il nous semble donc juste d'admettre que chaque des puissances membres du Conseil de contrôle est responsable pour une partie seulement du dommage.<sup>153</sup>

In the *Nauru* case, Australia also contended that 'it would not be appropriate to require Australia to bear more than a proportionate share of the supposed injury'.<sup>154</sup> Nauru, on the other hand, argued that Australia was responsible for the entirety of the damage. The ICJ did not have to decide this question; having decided that it had jurisdiction and that the case was admissible, Australia agreed to pay by instalments an amount corresponding to the full amount of Nauru's claim and the case was subsequently withdrawn.<sup>155</sup> The problem with any apportionment of responsibility between the occupying powers is that it must not necessarily be apportioned in equal parts and that, even if it is, the other occupying power may claim special circumstances.<sup>156</sup> Any agreement between the occupying powers on that question, for example on the basis of decision-making authority or control over the CPA, would be *res inter alios actus* and thus would not be binding on the injured State. Furthermore, there is the procedural problem for an international court or tribunal to determine the share of the responsibility falling upon one of the occupying powers without the other being present before the court. As there is no power of compulsory joinder of parties in international law,<sup>157</sup> it would be impossible for the court to determine the individual share of responsibility of the occupying power.<sup>158</sup>

It could be argued that each occupant is responsible for the whole damage as the occupying powers share 'joint (or solidary) responsibility' for the conduct of the CPA. If States are jointly responsible, they are each responsible for the full amount of the damage. Ian Brownlie writes that 'in principle, joint responsibility would flow

<sup>153</sup> Responsabilité internationale pour des dommages causés dans la zone de Tanger, *Annuaire suisse de droit international*, 10 (1953), pp. 238-249 at pp. 247-248.

<sup>154</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Counter-Memorial of the Government of Australia, 29 March 1993, p. 216, para. 560. The Court left the question open, see ICJ Rep. 1992, p. 240 at p. 262, para. 56. But see also, *ibid.*, p. 326 at p. 328 (diss. op. Ago).

<sup>155</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, ICJ Rep. 1993, p. 322. See also the Settlement Agreement of 10 August 1993 (1770 UNTS 379).

<sup>156</sup> In *Ilaşcu and Others v. Moldova and Russia*, Application No. 48787/99, the European Court of Human Rights apportioned the compensation payable by Russia and Moldova between the two States in a ratio of 66.6 to 33.3 in respect of pecuniary and non-pecuniary damage arising from the violation of Arts. 3 and 5 ECHR and in a ratio of 70 to 30 in respect of non-pecuniary damage sustained on account of a breach of Art. 34 ECHR. In neither case did the Court give any reasons for arriving at these figures, although one may guess that the duration of the violations may have played a role. At the time of the judgment, Russia had violated the rights of the applicants for some 6 years, while Moldova had violated them only for some 3 years. See (2005) 40 EHRR 46, para. 489 and paras. 20, 21 of the operative provisions of the judgment.

<sup>157</sup> See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, *Application to Intervene*, ICJ Rep. 1990, p. 92 at p. 135, para. 99; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, *Jurisdiction and Admissibility*, ICJ Rep. 1984, p. 392 at p. 431, para. 88.

<sup>158</sup> See *Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, ICJ Rep. 1954, p. 19, at p. 32.

from the joint occupation, at least as a presumption'.<sup>159</sup> In the *Eurotunnel Arbitration* the tribunal noted that the question of whether there is solidary responsibility depends on the circumstances and on the international obligations of each of the States concerned.<sup>160</sup> The tribunal continued to examine whether the States had intended to assume solidary responsibility.<sup>161</sup> In the case of the United States and the United Kingdom, such an intention may be inferred from their joint letter to the President of the Security Council, dated 8 May 2003, in which they informed the international community that, 'acting under existing command and control arrangements through the Commander of Coalition Forces, [they] have created the Coalition Provisional Authority', and that they were 'working through the Coalition Provisional Authority'.<sup>162</sup> That the two States assumed joint responsibility is also confirmed by British Government statements which speak of 'shared joint responsibility for the actions of the Coalition Provisional Authority'.<sup>163</sup>

The doctrine of joint responsibility, however, is not required to explain the full responsibility of each occupying power. As has been shown above, both the United States and the United Kingdom are concurrently responsible for the internationally wrongful acts of the CPA. Article 31 of the ILC Articles on State Responsibility provides that the 'responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act'. In its commentary on this provision the ILC makes it clear that State practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes. The responsibility of a State is not affected vis-à-vis the injured State by the consideration that another State is concurrently responsible.<sup>164</sup> This is also expressly spelled out in the commentary on Article 47, where the ILC states that in the case of a plurality of responsible States 'responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act'.<sup>165</sup> The only limitation Article 47 imposes is that the injured State must not recover, by way of compensation, more than the damage it has suffered. Each occupant is thus responsible for all the damage caused by the CPA.

### c. Recourse against the Other Occupying Power

Where two or more States commit the same internationally wrongful act and one of them is held responsible for the entire damage, the question arises whether that State has a right of recourse against the other States. Article 47, paragraph 2 (b), of the ILC Articles on State Responsibility does not address the question of contribution among several States which are responsible for the same internationally wrongful act; it merely provides that the general principle of separate responsibility 'is without prejudice to any right of recourse against the other responsible States'. This raises the question of the legal basis of such a right.

<sup>159</sup> Ian Brownlie, *Systems of the Law of Nations, State Responsibility: Part I* (1983), p. 192. See also Robert Jennings/Arthur Watts (eds.), *Oppenheim's International Law* (9<sup>th</sup> edn., 1992), p. 501.

<sup>160</sup> *Eurotunnel Arbitration*, Partial Award of 30 January 2007, para. 174.

<sup>161</sup> *Ibid.*, para. 175.

<sup>162</sup> UN Doc. S/2003/538, 8 May 2003, p. 1; reproduced in Talmon, above n. 1, Doc. 212.

<sup>163</sup> See, e.g., HL Debs., vol. 664, col. WA108: 7 September 2004; vol. 668, col. WA131: 24 January 2005.

<sup>164</sup> See the Commentary on Art. 31, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, pp. 229-230, para. 12.

<sup>165</sup> *Ibid.*, p. 314, para. 1.

There is no treaty governing the rights of recourse between several responsible occupying powers and no evidence of the existence in customary international law of a general right of recourse against other responsible States.<sup>166</sup> It has, however, been suggested on the basis of a study of comparative tort law that ‘the principle of joint-and-several responsibility [...] can properly be regarded as a “general principle of law” within the meaning of Article 38, paragraph 1 (c)’, of the ICJ Statute.<sup>167</sup> This principle allows the injured claimant to pursue one of several tortfeasors and to receive from him payment in full. That tortfeasor can then pursue the other tortfeasors liable for the same damage for a contribution. The ILC sounds a word of caution with regard to such analogies. In its commentary on Article 47 it notes that ‘it is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as ‘joint’, ‘joint and several’ and ‘solidary’ responsibility derive from different legal traditions and analogies must be applied with care.<sup>168</sup> The ILC also states, however, that Article 47, paragraph 1, neither recognizes a general rule of joint and several responsibility, nor does it exclude such a possibility.<sup>169</sup> There are no decisions of international or national courts which confirm the existence in international law of the general principle of joint and several responsibility. This silence strongly suggests that, in the absence of a special treaty regime,<sup>170</sup> that principle and the right of recourse are not part of international law. However, even if they were, there is the additional problem that there are no clear rules in international law for the apportionment of compensation and for contribution or indemnification between jointly and severally responsible States.<sup>171</sup> In its Memorial submitted in the case concerning the *Aerial Incident of 27 July 1955* the United States, after claiming that an aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, continued: ‘The relationship between the joint tortfeasors themselves is a separate problem. Whether a joint tortfeasor who has paid may have recourse for indemnity or contribution against the others *frequently* depends on the relative degree of culpability involved.’<sup>172</sup> The degree of culpability is just one way of

<sup>166</sup> See Brownlie, n. 159 above, p. 189; Besson, n. 65 above, p. 29.

<sup>167</sup> *Oil Platforms (Islamic Republic of Iran v. USA)*, ICJ Rep. 2003, p. 324 at p. 358, para. 74 (sep. op. Simma). See also *Aerial Incident of 27 July 1955 (USA v. Bulgaria)*, Memorial submitted by the Government of the United States of America, 2 December 1958, ICJ Pleadings 1958, p. 167 at p. 229, para. 3 and pp. 230-233 and Annex 63. On the content of municipal law rules, see further also John E. Noyes/Brian D. Smith, *State Responsibility and the Principle of Joint and Several Liability*, *Yale JIL* 13 (1988), pp. 225-267 at pp. 251-258. For comparative tort law approach, see also Besson, n. 65 above, pp. 34-36.

<sup>168</sup> See Commentary on Art. 47, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, p. 314, para. 3. See also the Third Report on State Responsibility by Mr James Crawford, Special Rapporteur, Addendum, UN Doc. A/CN.4/507/Add.2, 10 July 2000, p. 26, para. 275. Cf. also Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> edn., 2003), p. 440, who points out that ‘municipal analogies are unhelpful’.

<sup>169</sup> See Commentary on Art. 47, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, p. 317, para. 6.

<sup>170</sup> On treaty based joint and several responsibility, see e.g. Sompong Sucharitkul, *Liability and Responsibility of the State of Registration or the Flag State in Respect of Sea-Going Vessels, Aircraft and Spacecraft Registered by National Registration Authorities*, *American Journal of Comparative Law* 54 (2006), pp. 409-442 at pp. 440-442.

<sup>171</sup> Compare Commentary on Art. 47, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, p. 317, para. 5. See also Besson, n. 65 above, p. 37; Noyes/Smith, n. 167 above, p. 255, n. 144, and pp. 256, 263-264.

<sup>172</sup> *Aerial Incident of 27 July 1955 (USA v. Bulgaria)*, Memorial submitted by the Government of the United States of America, 2 December 1958, ICJ Pleadings 1958, p. 167 at p. 230, para. 4 (italics added). The ICJ did not have to decide the question of joint and several responsibility as the United

apportioning compensation for the damage caused; relative causation, decision-making authority in or control over a common organ or the nationality of the acting official of a common organ may be others.<sup>173</sup> There may also be situations where the extent of fault of each State cannot be clearly established. In this case, should the burden of compensation be apportioned equally between them? In the absence of a special treaty regime international law has no answers to these questions.<sup>174</sup>

However, there is no need to identify the situation of the occupying powers in Iraq with ‘joint and several responsibility’. A right of indemnification may be established on the basis of the law of agency. The existence of agency relationships under international law is well recognized.<sup>175</sup> As has been shown above, the CPA was a US State organ that acted on behalf of both the United States and the United Kingdom.<sup>176</sup> Thus there existed an agency relationship between the United States and the United Kingdom: the United States was acting as an agent of the United Kingdom and, at the same time, on its own behalf. The agency relationship works both ways. Where the agent has acted without the authority of the principal or the agency relationship is limited in any other way, but the principal is nevertheless bound because the agent had apparent authority, the agent is liable to indemnify the principal for any resulting loss. In the letter of 8 May 2003 to the President of the Security Council, the United Kingdom stated that, together with others, it had created and was working through the CPA, thereby implying that it had given the (US State organ) CPA general authority to act on its behalf. However, the United Kingdom may have limited that authority in its internal relationship with the United States, for example, to acts in conformity with its obligations under international law. In the case that the internationally wrongful act is a result of the CPA acting *ultra vires*, the United States is under an obligation to indemnify the United Kingdom for any payments it made to an injured State. Where the CPA was acting *intra vires*, the United States must pay the United Kingdom half the compensation paid to an injured State as the CPA was also acting on behalf of the United States. On the other hand, if the agent has acted within the scope of the actual authority given, the principal must indemnify the agent for any payments made as a result of the agency relationship. Where the CPA acted within the broad policy guidelines agreed between the United States and the United Kingdom, the latter is under an obligation to reimburse the United States for compensation payments made to an injured State. The right to reimbursement is, however, limited to a fifty per cent share of the compensation payment as the CPA was also acting on behalf of the United States.

#### **d. Admissibility of Claims against One Occupying Power Only**

---

States advised that it desired to discontinue the proceedings; see *Aerial Incident of 27 July 1955 (USA v. Bulgaria)*, ICJ Rep. 1960, p. 146.

<sup>173</sup> Compare sec. 6 of CPA Order No. 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors (CPA/ORD/26 June 2003/17), published in *Al-Waqai Al-Iraqiya. Official Gazette of Iraq*, Vol. 44, No. 3979 (no date), pp. 1-4; reproduced in Talmon, n. 1, Doc. 29.1.

<sup>174</sup> See Art. IV(2) of the Convention on the International Liability for Damage caused by Space Objects of 29 March 1972 (961 UNTS 187). See also Art. V(2) which provides for indemnification between States which are jointly and severally liable.

<sup>175</sup> See Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005), p. 33 and the numerous references given there. See also Brownlie, n. 168 above, pp. 439, 643.

<sup>176</sup> See above sec. II.1.b.

The fact that responsibility may be invoked against each occupying power separately does not mean that each occupying power can also be sued separately.<sup>177</sup> The ICJ held in the *Monetary Gold* case that where ‘the vital issue to be settled [in a case] concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue’.<sup>178</sup> The *Monetary Gold* principle or ‘indispensable third party rule’ is a procedural barrier to the admissibility of a claim before an international court or tribunal. It arises because such judicial bodies cannot determine the responsibility of a State not party to the proceedings. To do so would run counter to the well-established principle of international law that jurisdiction over a State at the international level can be exercised only with its consent.<sup>179</sup> However, as the ICJ explained in the *Nauru* case, the determination of the responsibility of the third State must constitute ‘the very subject-matter of the judgment to be rendered’ or, in other words, must be ‘a prerequisite for the determination of the responsibility’ of the State before the Court. The link between any necessary finding regarding the third State’s responsibility and the decision on the responsibility of the State present before the Court must not be ‘purely temporal but also logical’. It is not sufficient that a decision regarding the existence or the content of the responsibility of the State before the Court might well have implications for the legal situation of the third State.<sup>180</sup> The situation of the two occupying powers is similar to that of the three States forming the Administering Authority in the *Nauru* case where the ICJ held: ‘The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States.’<sup>181</sup> Each occupying power had obligations under international law with regard to the administration of Iraq, a breach of which can be determined without previously determining the responsibility of the other occupying power. The two occupying powers are thus not necessary parties and can be sued separately for the internationally wrongful acts of the CPA.

Another admissibility issue arose in the context of the European Convention on Human Rights (ECHR). In the case of *Saddam Hussein v. Albania and Others*, the European Court of Human Rights declared an application by Saddam Hussein against the members of the Iraq Coalition that are parties to the ECHR inadmissible as the applicant had not established that he fell within the ‘jurisdiction’ of the respondent States, including the United Kingdom, as required by Article 1 ECHR.<sup>182</sup> Jurisdiction could not be established on the sole basis that the respondent States ‘allegedly formed part (at varying unspecified levels) of a coalition with the US [a non-party to the ECHR], when the impugned actions were carried out by the US, when security in the

<sup>177</sup> This is overlooked by Besson, n. 65 above, p. 32, who fails to note that Art. 47, para. 1, refers to the ‘invocation’ of responsibility only.

<sup>178</sup> *Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, ICJ Rep. 1954, p. 19 at p. 33.

<sup>179</sup> *Ibid.*, p. 32. See also *East Timor (Portugal v. Australia)*, ICJ Rep. 1995, p. 90, at p. 105, para. 34.

<sup>180</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections*, ICJ Rep. 1992, p. 240 at p. 261, para. 55. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Rep. 2005, paras. 203-204; *East Timor (Portugal v. Australia)*, ICJ Rep. 1995, p. 90, at p. 105, para. 35.

<sup>181</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections*, ICJ Rep. 1992, p. 240 at pp. 258-259, para. 48.

<sup>182</sup> *Hussein v. Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine, United Kingdom*, Application No.23276/04 (Saddam Hussein; jurisdiction), 14 March 2006, (2006) 42 EHRR 16 at p. 223.

zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US.<sup>183</sup> Saddam Hussein was captured and detained as a prisoner of war by US troops. The coalition military forces which were not part of the CPA retained legal responsibility for their prisoners of war and detainees.<sup>184</sup> The case might have been decided differently, at least with regard to the United Kingdom, if Saddam Hussein had been in the custody of the CPA, the acts of which can be attributed to the United Kingdom. This situation must be distinguished from the situation in *Hess v. United Kingdom*.<sup>185</sup> This case concerned the question of whether Rudolf Hess, Adolf Hitler's deputy as leader of the Nazi party, who was imprisoned at Spandau Allied Prison was 'within the jurisdiction' of the United Kingdom. The European Commission of Human Rights found that, under a 1945 agreement, the United Kingdom acted 'only as a partner in the joint responsibility which it shares with the three other Powers' in the administration and supervision of Spandau prison. As this joint authority could not be divided into four separate jurisdictions, the Commission declared the application inadmissible.<sup>186</sup> The Commission, however, also indicated that the United Kingdom could be held responsible for entering into such an agreement establishing joint authority if it was to enter into such an agreement after the entry into force of the ECHR.<sup>187</sup> The parties to the ECHR cannot escape their Convention responsibilities by transferring powers to international organizations or by creating joint authorities against which Convention rights or an equivalent standard of protection cannot be secured.<sup>188</sup> It would be incompatible with the object and purpose of the ECHR to absolve the United Kingdom completely from its Convention responsibility in the area of CPA activities. Otherwise, the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its preemptory character and undermining the practical and effective nature of its safeguards.<sup>189</sup>

#### **IV. International Responsibility of Other Actors in Connection with the Acts of the Coalition Provisional Authority**

##### **1. Aid or Assistance by the Coalition Partners**

In their joint letter of 8 May 2003 to the President of the Security Council, the United States and the United Kingdom wrote that they 'and Coalition partners' had created the CPA to exercise powers of government temporarily in Iraq.<sup>190</sup> The two States considered all members of the coalition as part of the CPA. This is also clear from a draft resolution submitted by the two States on 9 May 2003 which spoke of 'recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states [i.e. the United States and the United Kingdom] and

---

<sup>183</sup> Ibid., p. 225.

<sup>184</sup> See sec. III.1.a.

<sup>185</sup> *Hess v. United Kingdom*, Application No.6231/73, Decision of 28 May 1975, 2 DR 72.

<sup>186</sup> Ibid., p. 74.

<sup>187</sup> Ibid., p. 74.

<sup>188</sup> See *Matthews v. United Kingdom*, Application No. 24833/94, Judgment of 18 February 1999, ECHR 1999-I, paras. 32-35; *Bosphorus Hava Yollari Turizm v. Ireland*, Application No. 45036/98, Judgment of 30 June 2005, ECHR 2005-I, paras. 152-158.

<sup>189</sup> Compare *Bosphorus Hava Yollari Turizm v. Ireland*, Application No. 45036/98, Judgment of 30 June 2005, ECHR 2005-I, para. 154.

<sup>190</sup> UN Doc. S/2003/538, 8 May 2003, p. 1; reproduced in Talmon, above n. 1, Doc. 212.

others working now or in future with them under unified command as the occupying power (“the authority”).<sup>191</sup> However, the Security Council in resolution 1483 distinguished between the United Kingdom and the United States ‘as occupying powers under unified command (“the Authority”)’ on the one hand and ‘other States that are not occupying powers [that] are working now or in the future may work under the Authority’ on the other.<sup>192</sup> Coalition partners such as Australia were thus ‘not legally an occupying power’<sup>193</sup> and the CPA was not their State organ. The coalition partners seconded government officials and military personnel to the CPA, hired private contractors and made them available to the CPA and funded the activities of, and under the auspices of, the CPA. Australia, for example, ‘provided advisers in some key sectors to assist the CPA in the performance of its duties’.<sup>194</sup> In November 2003, some 18-odd experts, paid for by the Australian Government, were working on short-term missions in the CPA. The seconded government officials qualify as State organs ‘placed at the disposal’ of the occupying powers in the sense of Article 6 of the ILC Articles on State Responsibility. They were acting with the consent, under the authority of and for the purposes of the occupying powers. They were operating under the exclusive direction and control of the CPA Administrator, rather than on instructions from their own government.<sup>195</sup> In cases where the seconded officials were exercising elements of occupation authority, their conduct is attributable to the occupying powers. The coalition partners thus cannot be held responsible for the wrongful acts committed by their personnel as members of the CPA. They may, however, be held responsible, in accordance with Article 16 of the ILC Articles on State Responsibility, for seconding personnel to the CPA if they were thereby aiding or assisting the occupying powers in the commission of an internationally wrongful act by the latter. The assisting State is not responsible for the wrongful conduct of the assisted State (which cannot be attributed to it) but for its own conduct in assisting the wrongful act. The ILC has made it clear that no particular kind of aid or assistance is necessary in order for this responsibility to arise. In particular, there is no requirement that the aid or assistance should have been ‘essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act’.<sup>196</sup> In its commentary on an earlier draft of Article 16 the ILC stated:

It is obvious, too, that aid or assistance in an act of aggression may also take other forms, such as the provision of land, sea or air transport, or even *the placing at the disposal* of the State that is preparing to commit aggression of *military or other organs* for use for that purpose. Furthermore, it is by no means only in the event of an act of aggression by a State that the possibility of assistance by another State may arise.<sup>197</sup>

<sup>191</sup> [http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/middle\\_east/3012847.stm](http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/middle_east/3012847.stm) (web site no longer available).

<sup>192</sup> S/RES/1483 (2003) of 22 May 2003, preambular paras. 12, 13. The distinction between the United States and the United Kingdom on the one hand and the coalition partners on the other is reminiscent of the ‘Three Great Allies’ and the other Allied Powers during the Second World War.

<sup>193</sup> Commonwealth of Australia, Official Committee Hansard, Senate, Foreign Affairs, Defence and Trade Legislation Committee Estimates, (Budget Estimates Supplementary Hearings), 6 November 2003, p. 52.

<sup>194</sup> *Ibid.*, p. 52.

<sup>195</sup> Compare Commentary on Art. 6, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, p. 95, para. 2.

<sup>196</sup> Commentary on Art. 16, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, p. 156, para. 5.

<sup>197</sup> ILC Yb. 1978, II/2, p. 102, para. 13 (commentary on draft Art. 27; italics added).

Article 16, which is reflective of customary international law,<sup>198</sup> stipulates a threefold requirement for the responsibility of the assisting State. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.<sup>199</sup>

It seems somewhat unlikely that coalition partners specially seconded officials with the view that they commit or assist the commission in an internationally wrongful act. It is more likely that they learnt about such acts during their officials' secondment. Seconded personnel regularly reported back home by email on the activities of the CPA. For example, seconded financial experts may have reported the squandering of DFI funds, or interpreters may have described scenes of torture in CPA-run prison facilities. Where seconded officials reported breaches of the occupying powers' (and their own State's) international obligations in which they had been involved or to which their work had contributed and where their home government did not withdraw them or instruct them to abstain from any further action, it must be assumed that the coalition partner continued to second personnel with a view to facilitating the commission of an internationally wrongful act. The more coalition partners knew about the internationally wrongful acts of the CPA in which their seconded officials were involved, the more likely it is that their support of the CPA can be interpreted as aiding or assisting in the commission of internationally wrongful acts by the occupying powers. This raises the question of whether, if there were clear indications of wrongdoing by the CPA, coalition partners were under an obligation to make further enquiries with the occupying powers on the employment of their seconded officials. International law might develop, *de lege ferenda*, a due diligence standard in this context, or otherwise responsibility for aiding or assisting might remain a very narrow and exceptional basis of responsibility.<sup>200</sup>

By assisting the occupying powers to commit an internationally wrongful act, coalition partners should not necessarily be held to indemnify the injured State for all the consequences of that act, only those which result from its own conduct. Where the assistance, i.e. the involvement of the seconded official, has been only an incidental factor in the commission of the primary act, and has contributed only to a minor degree, if at all, to the injury suffered, the assisting State's responsibility would be limited.<sup>201</sup> Where, on the other hand, the secondment of the official was a *sine qua non* for the commission of the internationally wrongful act, the coalition partner may share equal responsibility with the occupying powers.

Claims against the coalition partners for aiding or assisting the occupying powers in the commission of an internationally wrongful act by the CPA face the obstacle of the *Monetary Gold* principle.<sup>202</sup> The determination of the responsibility of the coalition partners under Article 16 of the ILC Articles on State Responsibility for

<sup>198</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep. 2007, para. 420.

<sup>199</sup> Commentary on Art. 16, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, p. 156, para. 3.

<sup>200</sup> Compare Vaughan Lowe, Responsibility for the Conduct of Other States, *Japanese Journal of International Law* 2002, pp. 1-15 at p. 10.

<sup>201</sup> Compare Commentary on Art. 16, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, p. 159, para. 10.

<sup>202</sup> See sec. III.2.d.



aiding or assisting the occupying powers logically requires the prior determination of the commission of an internationally wrongful act by the occupying powers.

## 2. Delegation of Powers by the United Nations

In its commentary on an earlier draft of the Articles on State Responsibility the ILC wrote in 1978:

it would be a mistake to draw hasty conclusions from the fact that there are but few examples of international organizations being called to account at the international level for acts committed by their organs [...] it must not be forgotten that, by their very nature, international organizations normally behave in such a manner as not to commit internationally wrongful acts. Nevertheless, there have already been some specific cases in international practice in which the act of one of its organs has been attributed to an international organization as a source of international responsibility of the organization.<sup>203</sup>

The question may thus legitimately be asked whether the United Nations incurred any responsibility in connection with the acts of the CPA in Iraq. The fact that no judicial machinery exists to hold the United Nations responsible should not be allowed to obscure the fact that the United Nations remains responsible for its internationally wrongful acts. There is at least the theoretical possibility that the General Assembly may request an advisory opinion from the ICJ on the legality of the acts of the Security Council. There may also be room for other indirect remedial opportunities.<sup>204</sup> In order for the international responsibility of the United Nations to be engaged, there must be an internationally wrongful act of the organization, namely (a) a certain conduct which is (b) attributable to the United Nations under international law, and which (c) constitutes a breach of its international obligations.<sup>205</sup>

### a. Relevant Conduct of United Nations Organs

As has been seen above, the CPA provided less than adequate controls for some US\$8.8 billion in the Development Fund for Iraq (DFI) and there are strong indications that a large part of that money was wasted, stolen or fritted away.<sup>206</sup> Most of the money in the DFI had been made available – directly or indirectly – to the occupying powers by the United Nations. During the existence of the CPA, a total of US\$20.706 billion was transferred into the DFI. US\$8.1 billion alone were transferred by the United Nations from the ‘United Nations Iraq Account’, which had been established in 1996 for the administration of the UN-run Oil-for-Food Programme and

---

<sup>203</sup> ILC Yb. 1978, II, p. 87, para. 3 (commentary on draft Art. 13 on ‘Conduct of Organs of an International Organization’).

<sup>204</sup> See International Law Association, *Accountability of International Organisations*, Final Report, International Law Association, *Report of the Seventy-first Conference* (2004), pp. 164-234 at pp. 230-232; Toshiya Ueki, *Responsibility of International Organizations and the Role of the International Court of Justice*, in Nisuke Ando et al. (eds.), *Liber Amicorum Judge Shigeru Oda*, vol. I (2002), pp. 237-249 at pp. 244-246.

<sup>205</sup> See Art. 3 of the ILC Draft Articles on the Responsibility of International Organizations and the commentary thereto, Report of the International Law Commission, GAOR, 58<sup>th</sup> Session, Supplement No. 10 (A/58/10), 2003, p. 45 and p. 47, para. 5. See also International Law Association, n. 204 above, p. 199.

<sup>206</sup> See sec. III.1.c.

which held unencumbered funds from Iraqi oil sales under the programme.<sup>207</sup> A further US\$11.42 billion came from Iraqi oil proceeds, US\$120 million from UN non-Oil-for-Food funds, and US\$1.2 billion from Iraqi assets seized abroad and donations from around the world.<sup>208</sup>

The conduct of the United Nations may consist of ‘an action or omission’.<sup>209</sup> Several actions of the Security Council are of relevance here. In resolution 1483, the Council, acting under Chapter VII of the UN Charter, requested the Secretary-General to terminate the Oil-for-Food Programme and to transfer responsibility for the administration of any remaining activity under the programme to the CPA,<sup>210</sup> decided that the Secretary-General should transfer at the earliest possible time all surplus funds in the escrow accounts established under the Oil-for-Food Programme to the DFI;<sup>211</sup> decided to terminate the functions related to the observation and monitoring activities undertaken by the Secretary-General under the Oil-for-Food Programme;<sup>212</sup> decided that all proceeds from export sales of petroleum, petroleum products, and natural gas from Iraq should be deposited into the DFI;<sup>213</sup> and decided that all Member States should freeze without delay Iraqi State funds in their territory and transfer them to the DFI.<sup>214</sup> As the funds in the DFI were to be disbursed ‘at the direction of’ the CPA,<sup>215</sup> the Security Council, in fact, turned over to the occupying powers some US\$20 billion of Iraqi State funds to which they would not otherwise have had access. In a brief submitted by the United States in the *Custer Battles* case, it was stated that the ‘funds in the DFI have always been Iraqi funds’.<sup>216</sup> Without the authorization granted by the Security Council under Chapter VII, the occupying powers and, consequently, the CPA would not under international law have had the competence to dispose of these Iraqi State funds. Under international humanitarian law, the occupying powers were only allowed to take possession of cash, funds and other Iraqi State property located within the occupied territory.<sup>217</sup>

The Hague Regulations also imposed limitations on the occupying powers’ competence to produce and export Iraqi oil and to expand the sales proceeds.<sup>218</sup> Such limitations, of course, do not exist for the Security Council when exercising its Chapter VII powers. By authorizing the occupying powers to dispose of the Iraqi State funds in the DFI, the Security Council, in effect, delegated some of its Chapter

<sup>207</sup> On the Oil-for-Food Programme, see <http://www.un.org/Depts/oip/background/index.html>.

<sup>208</sup> See *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F.Supp.2d 617 at 627, n. 36 (E.D.Va., 2005).

<sup>209</sup> See Art. 3, para. 2, of the ILC Articles on the Responsibility of International Organizations.

<sup>210</sup> S/RES/1483 (2003) of 22 May 2003, para. 16.

<sup>211</sup> *Ibid.*, para. 17.

<sup>212</sup> *Ibid.*, para. 18.

<sup>213</sup> *Ibid.*, para. 20.

<sup>214</sup> *Ibid.*, para. 23. See also S/RES/1511 (2003) of 16 October 2003, para. 24.

<sup>215</sup> *Ibid.*, para. 13.

<sup>216</sup> Brief of the United States in Response to the Court’s Invitation of December 21, 2004, 1 April 2005, n. 79 above.

<sup>217</sup> See Art. 53 Hague Regulations which is located in the section on ‘Military Authority over the Territory of the Hostile State’.

<sup>218</sup> See Art. 55 Hague Regulations. See also the remarks of John B. Bellinger, III, Legal Adviser, U.S. Department of State, at the International Conference in San Remo, 9 September 2005, who spoke of the ‘limitations contained in the Hague Regulations related to the right of an occupying power to produce and use natural resources, and to expand their sales proceeds’ and the use of oil proceeds ‘to fund long-term economic reconstruction projects to benefit Iraq (an activity that would at least arguably be outside the scope of authorities provided by the Hague Regulations).’ (<http://www.us-mission.ch/Press2005/0909BellingerIHLSanRemo-2.htm>).

VII powers to the occupying powers.<sup>219</sup> This was made clear by Pakistan's representative to the Security Council who said after the adoption of resolution 1483: 'Pakistan, like several other members of the Security Council, has agreed, due to the exigencies of the circumstances, *to the delegation of certain powers by the Security Council to the occupying Powers*, represented by the Authority.'<sup>220</sup>

Besides the action of turning over Iraqi State funds to the occupying powers and freeing them of the constraints of international humanitarian law, there may also be a relevant omission on the part of the Security Council in that it did not exercise proper control over the disbursement of turned-over Iraqi State funds by the CPA.

## b. Questions of Attribution

The question of attribution of the conduct of the Security Council and the Secretary-General can be disposed of quickly. Both are principal organs of the United Nations<sup>221</sup> and as such their conduct is attributable to the United Nations as an act of its organs, both under customary international law and under the ILC Draft Articles on the Responsibility of International Organizations.<sup>222</sup>

One may ask whether the CPA's conduct in the area of delegated powers may be attributed to the United Nations. The CPA was not a subsidiary organ of the Security Council in the sense of Article 29 of the UN Charter; the Council in resolution 1483 did not establish the CPA for the performance of its functions but only took note of its creation by the occupying powers. In situations where the Security Council, acting under Chapter VII of the Charter, adopts a resolution delegating some of its powers one may argue, by analogy with Article 5 of the ILC Articles on State Responsibility, that the State has been empowered by the law of the United Nations to exercise elements of the organization's authority and, for that reason, its conduct shall be considered an act of the United Nations, provided the State is acting in its capacity as a delegatee in the particular instance. The justification given for Article 5 similarly applies in the context of international organizations. An organization should not be able to evade its international responsibility solely because it has delegated the exercise of some elements of its authority to a person or entity separate from its own machinery proper.<sup>223</sup> There is, however, one major difference between the two situations. While both concern a delegation of powers, in the present case the delegatees are not public or private bodies but other subjects of international law. This brings the situation within the scope of Article 6 of the ILC Articles on State Responsibility, which deals with the exercise of elements of the governmental authority of a State by the organs of another State. In this case, attribution requires that the foreign State organ placed at the disposal of the State is acting under its

<sup>219</sup> Compare David Scheffer, *Beyond Occupation Law*, *AJIL* 97 (2003), pp. 842-860 at pp. 845-846. See also the statement of the representative of Pakistan in the Security Council: '**Error! Main Document Only.**The administration of Iraq's economic and natural resources is a trust that was given to the Coalition Provisional Authority under resolution 1483 (2003) as a temporary measure due to the exigencies of the situation.' (**Error! Main Document Only.**UN Doc. S/PV.4791, 22 July 2003, p. 25).

<sup>220</sup> UN Doc. S/PV.4761, 2 May 2003, p. 11 (emphasis added). See also the statement of the French delegate, *ibid.*, p. 4.

<sup>221</sup> See Art. 7, para. 1, UN Charter.

<sup>222</sup> See Art. 4 of the ILC Draft Articles on the Responsibility of International Organizations and the commentary thereto, Report of the International Law Commission, GAOR, 59<sup>th</sup> Session, Supplement No. 10 (A/59/10), 2004, p. 103 and pp. 104, 106.

<sup>223</sup> Compare ILC Yb. 1974, II/1, pp. 281-282.

‘exclusive direction and control’.<sup>224</sup> The CPA, however, was not under the direction and control of the United Nations but under the control of the United States. The conduct of the CPA thus cannot be attributed to the United Nations. In addition, it has been suggested that there is no responsibility of the international organization when the States concerned have acted *ultra vires* the delegation or authorization or breach conditions attached to it.<sup>225</sup> The Security Council had made it clear to the occupying powers that the DFI was to be administered in a transparent manner and that the funds were to be used only for purposes benefiting the people of Iraq.<sup>226</sup> Any squandering of DFI funds by the CPA would thus have been *ultra vires* and could not have engaged the United Nations’ responsibility.

### c. Breach of an International Obligation of the United Nations

There is a breach of an international obligation by the United Nations when one of its acts is not in conformity with what is required of it by that obligation, regardless of its origin and character.<sup>227</sup> As a subject of international law, the United Nations is bound by any obligation incumbent upon it under customary international law, under the UN Charter, under international agreements to which it is a party or under a general principle of law applicable within the international legal order.<sup>228</sup>

It may be argued that the United Nations was under an obligation to use the Iraqi State funds at its disposal in a transparent manner and only for purposes benefiting the people of Iraq. Such an obligation may be based either on a unilateral commitment to that effect by the United Nations, an agreement between the United Nations and Iraq, or the general principle of law that a trustee is under an obligation to act in the best interest of the beneficiary.

It is generally recognized that a unilateral declaration by an international organization may give rise to an international legal obligation toward third parties. The requirements of clear intention, publicity and authority to make a declaration must be met in order for the organization to be bound by a declaration of its organ. Where all these elements have been fulfilled, conduct that is inconsistent with the content of the declaration may entail the responsibility of the organization.<sup>229</sup> On 14 April 1995, the Security Council adopted resolution 986 establishing the Oil-for-Food Programme which provided Iraq with an opportunity to sell petroleum and petroleum products to finance the purchase of humanitarian goods. The proceeds from these sales were to be paid into an escrow account held by the United Nations from which

<sup>224</sup> See the Commentary on Art. 6, Report of the International Law Commission, GAOR, 56<sup>th</sup> Session, Supplement No. 10 (A/56/10), 2001, p. 95, para. 2.

<sup>225</sup> Dan Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of its Chapter VII Powers* (1999), p. 165. See also International Law Association, n. 204 above, p. 205.

<sup>226</sup> See S/RES/1483 (2003) of 22 May 2003, para. 14, and S/RES/1511 (2003) of 16 October 2003, paras. 23, 24.

<sup>227</sup> See Art. 8, para. 1, of the Draft Articles on the Responsibility of International Organizations, proposed by the Special Rapporteur, Mr Giorgio Gaja, Report of the International Law Commission, GAOR, 60<sup>th</sup> Session, Supplement No. 10 (A/60/10), 2005, p. 87.

<sup>228</sup> Compare *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Rep. 1980, p. 73 at pp. 89-90, para. 37; *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949, p. 174 at p. 179. For the various international obligations incumbent upon the UN that may be breached, see Ueki, n. 204 above, pp. 237-242.

<sup>229</sup> See Moshe Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (1995), p. 38. See also Michel Virally, 'Unilateral Acts of International Organizations', in: Mohammed Bedjaoui (ed.), *International Law: Achievements and Practice* (1991), pp. 241-263.

payment for exports to Iraq was to be made after the Secretary-General had verified that the exported goods concerned had arrived in Iraq. The confirmation procedure was to make sure that the money was used only to provide for the humanitarian needs of the Iraqi people. Acting under Chapter VII, the Council expressly decided that ‘the funds in the escrow account shall be used to meet the humanitarian needs of the Iraqi population’.<sup>230</sup> The Council also requested the Secretary-General to appoint independent and certified public accountants to audit the escrow account, and to keep the Government of Iraq fully informed.<sup>231</sup> That the Iraqi money was to be used in a ‘transparent manner’ and only for ‘purposes benefiting the people of Iraq’ was also ‘underlined’ by the Council in resolution 1483.<sup>232</sup> The question is whether the Security Council intended to create an obligation binding on itself when adopting resolution 986. According to Article 25 of the UN Charter, the decisions of the Security Council are binding only on the ‘members of the United Nations’. It is suggested, however, that as long as the Council does not formally revoke a resolution it is estopped from contravening its own resolutions and must be considered bound by them.

It may also be argued that the content of resolution 986 later became part of an agreement between the United Nations and Iraq. Although established on 14 April 1995, the implementation of the Oil-for-Food Programme started only in December 1996, after the signing on 20 May 1996 of the ‘Memorandum of Understanding between the Secretariat of the United Nations and the Government of Iraq on the implementation of Security Council resolution 986 (1995)’.<sup>233</sup> The MOU provided, in addition, that the escrow account to be known as the ‘United Nations Iraq Account’ was to be ‘administered in accordance with the relevant Financial Regulations and Rules of the United Nations’.<sup>234</sup> The United Nations thus assumed either unilaterally in resolution 986 or by agreement with Iraq the obligation to use the money received under the Oil-for-Food Programme in a transparent manner and for the benefit of the Iraqi people.

This obligation also results from the United Nations’ position as a trustee of Iraqi State funds. The concept of trusteeship and trust funds is well known in international law.<sup>235</sup> A trustee is the legal owner of all the trust’s property. The beneficiary, at law, has no legal title to the trust; however, trustees are bound to suppress their own interests and to act in the best interest of the beneficiary. In this way, the beneficiary obtains the use of property without being its technical owner. In the context of the Oil-for-Food Programme, the United Nations was acting as a trustee of Iraq, as can already be seen from the name of the escrow account. The United Nations held legal title to the ‘United Nations Iraq Account’ which is also evidenced

<sup>230</sup> S/RES/986 (1995) of 14 April 1995, para. 8. See also *ibid.*, preambular para. 3.

<sup>231</sup> *Ibid.*, para. 7.

<sup>232</sup> S/RES/1483 (2003) of 22 May 2003, para. 14. See also the statement of the French delegate upon the adoption of resolution 1483: ‘The resolution recalls that these resource, which belong to the Iraqi people, should be used exclusively for their benefit and in the greatest possible transparency.’ (UN Doc. S/PV.4761, 22 May 2003, p. 4).

<sup>233</sup> See Letter dated 20 May 1996 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1996/356, 20 May 1996, pp. 2-14.

<sup>234</sup> *Ibid.*, p. 3, para. 12. For the latest version of the Financial Regulations and Rules of the United Nations, see UN Doc. ST/SGB/2003/7, 9 May 2003.

<sup>235</sup> Compare Arts. 75-85 UN Charter. There are numerous trust funds administered by the United Nations and its specialized agencies. See, e.g. the Trans European Railway Trust Fund, the Trust Fund for the purposes of Art. 76 UNCLOS.

by the fact that it enjoyed the privileges and immunities of the United Nations.<sup>236</sup> The money in the ‘United Nations Iraq Account’ was generated by the sale of Iraqi petroleum and petroleum products and was to be used ‘to meet the humanitarian needs of the Iraqi population’; the Secretary-General was to select a major international bank and establish there the escrow account ‘after consultations with the Government of Iraq’ and was ‘to keep the Government of Iraq fully informed’ of the establishment of the account. The reports on the audit of the financial statements relating to the account were to be forwarded to the Iraqi Government.<sup>237</sup>

The United Nations could not avoid its obligation to use these funds in a transparent manner and only for purposes benefiting the people of Iraq simply by turning over the Iraqi State funds in the United Nations Iraq Account to the occupying powers. Ian Brownlie has correctly pointed out that this ‘approach of public international law is not *ad hoc* but stems directly from the normal concepts of accountability and effectiveness’.<sup>238</sup> It seems as if the Security Council members were also aware that the United Nations could not legally absolve itself from its obligations. Following the adoption of resolution 1483, the representative of Mexico declared that the ‘Security Council [...] will have to make sure that the commitment of transparency is met’.<sup>239</sup> The French delegate considered the International Advisory and Monitoring Board, established under the resolution, as a ‘guarantor’ that the proceeds from oil sales would be used ‘exclusively for their [the Iraqi people’s] benefit and in the greatest possible transparency’.<sup>240</sup>

The United Nations may also have violated its obligations by the Security Council delegating Chapter VII powers to the occupying powers without supervising the exercise of these powers. In the *Nauru* case, Judge Oda indicated that the United Nations was responsible for supervising the behaviour of the Administering Authority to which the United Nations had delegated the administration of Nauru.<sup>241</sup> Dan Sarooshi has shown in his seminal study on *The Delegation by the UN Security Council of its Chapter VII Powers* that ‘the Security Council is under an obligation to ensure that it can exercise effective authority and control over the way in which its delegated powers are being exercised’.<sup>242</sup> The aim of supervision by the Council is, *inter alia*, to ensure that the delegated powers are being exercised in an appropriate manner, that is, in line with the United Nations’ obligations and for the attainment of the Council’s stated objectives.<sup>243</sup> This means that the Council must impose a

<sup>236</sup> See S/RES/986 (1995) of 14 April 1995, para. 15. This is to be contrasted with the petroleum and petroleum products for which, ‘while under Iraqi title’, different immunity provisions had to be made; see *ibid.*, para. 14.

<sup>237</sup> See S/RES/986 (1995) of 14 April 1995, paras. 1(b), 6, 7, 8, and paragraph 12 of the MOU between the UN Secretariat and the Government of Iraq, UN Doc. S/1996/356, 20 May 1996, pp. 2-14 at p. 3.

<sup>238</sup> Ian Brownlie, *State Responsibility: The Problem of Delegation*, in: Konrad Ginther/Gerhard Hafner/W. Lang/H. Neuhold/L. Sucharipa-Behrmann (eds.), *Völkerrecht zwischen normativem Anspruch und politischer Realität. Festschrift für Karl Zemanek zum 65. Geburtstag* (1994), pp. 299-306 at pp. 300-301.

<sup>239</sup> UN Doc. S/PV.4761, 22 May 2003, p. 7.

<sup>240</sup> *Ibid.*, p. 4. The British representative stated: ‘An International Advisory and Monitoring Board, coupled with independent auditing, will help guarantee that Iraq’s resources are once again used exclusively to benefit its people.’ (*ibid.*, p. 5).

<sup>241</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, ICJ Rep. 1992, p. 303 at p. 305, para. 6 (diss. op. Oda).

<sup>242</sup> Sarooshi, n. 225 above, p. 164 and p. 41. See also International Law Association, n. 204 above, p. 180.

<sup>243</sup> Compare, *ibid.*, p. 160.

reporting requirement on States exercising delegated Chapter VII powers,<sup>244</sup> conduct a continuous review and supervision of the exercise of the delegated powers,<sup>245</sup> and, if need be, modify or countermand the delegation.<sup>246</sup>

The United Nations failed on all these accounts. It did not exercise effective control over the disbursement of Iraqi State funds by the CPA.<sup>247</sup> The Security Council did not impose any specific reporting requirements on the occupying powers with regard to the use of Iraqi State funds but merely ‘encouraged’ the United States and the United Kingdom ‘to inform the Council at regular intervals of their efforts’ under resolution 1483.<sup>248</sup> On the contrary, the Council terminated the existing observation and monitoring activities undertaken by the Secretary-General under the Oil-for-Food Programme, including the monitoring of the export of petroleum and petroleum products from Iraq.<sup>249</sup> The International Advisory and Monitoring Board (IAMB), which was established under resolution 1483 but was not a United Nations organ, had no powers of oversight over the DFI. Its role was limited to ‘approving’ the independent public accountants who were to audit the DFI.<sup>250</sup> The auditors themselves were ‘nominated and appointed by the Administrator of the CPA’.<sup>251</sup> The Security Council did not set any time limit for the setting up of the IAMB or for the appointment of the auditors or, indeed, for any audit to be carried out. It merely ‘looked forward to the early meeting’ of the IAMB.<sup>252</sup> There was no reporting requirement from the IAMB to the Security Council. Rather the Secretary-General was to report on the work of the IAMB.<sup>253</sup> It took the CPA and the members of the IAMB until 21 October 2003 simply to agree on the terms of reference of the Board because of differences over the role of the CPA and audit powers of the IAMB.<sup>254</sup> While the IAMB on several occasions raised concerns with the CPA over its control and use of Iraqi assets and requested further information especially with regard to the use of non-competitive bidding procedures, the CPA avoided auditing for a long time by stonewalling the Board.<sup>255</sup> The IAMB was never able to fulfil its role as ‘guarantor’ as envisaged by the French delegate in the Security Council.<sup>256</sup> The CPA signed the contract with the external auditors of the DFI only on 5 April 2004, and the first audit report on the CPA’s management of the DFI from 22 May to 31 December 2003 was released on 15 July 2004, that is 17 days after the dissolution of the CPA.<sup>257</sup>

<sup>244</sup> See *ibid.*, p. 239 and pp. 155, 160-163. On the reporting requirement in cases of authorization, see also Frank Berman, *The Authorization Model: Resolution 678 and Its Effects*, in: David M. Malone (ed.), *The UN Security Council. From the Cold War to the 21<sup>st</sup> Century* (2004), 153-165 at 159-160.

<sup>245</sup> *Ibid.*, p. 160.

<sup>246</sup> International Law Association, n. 204 above, p. 204.

<sup>247</sup> The statement of the US representative in the Security Council following the adoption of resolution 1483 is revealing: ‘The resolution establishes [...] United Nation *participation in monitoring* the sale of Iraqi oil resources and expenditures of oil proceeds.’ (UN Doc. S/PV.4761, 22 May 2003, p. 3 (emphasis added)).

<sup>248</sup> See S/RES/1483 (2003) of 22 May 2003, para. 24.

<sup>249</sup> *Ibid.*, para. 18.

<sup>250</sup> *Ibid.*, para. 12.

<sup>251</sup> See sec. 3.A. of the Terms of Reference for the International Advisory and Monitoring Board, dated 21 October 2003, reproduced in Talmon, n. 1 above, Doc. 218.

<sup>252</sup> See S/RES/1483 (2003) of 22 May 2003, para. 12.

<sup>253</sup> *Ibid.*, para. 24.

<sup>254</sup> In resolution 1511 (2003) of 16 October 2003, para. 23, the Security Council emphasized that the IAMB ‘should be established as a priority’.

<sup>255</sup> See IAMB Press Releases, 15 July 2004, 22 June 2004, 25 May 2004, 23 April 2004 and 24 March 2004; all available at <http://www.iamb.info/pressrel.htm>.

<sup>256</sup> UN Doc. S/PV.4761, 22 May 2003, p. 4.

<sup>257</sup> See HC Debs., vol. 664, col. WA108: 7 September 2004.

Thus, by the time the first partial audit report was available to the Security Council, the CPA had already spent US\$19.6 billion of Iraqi State funds, including nearly US\$12 billion in cash, without any external oversight or control.

By effectively handing over some US\$20 billion in Iraqi State funds to the occupying powers, to which they would not otherwise have had access, without establishing an effective operative oversight mandate ensuring that the funds were disbursed by the CPA under conditions of transparency and only for the purpose of benefiting the people of Iraq, the United Nations breached its international obligations.

### **3. Aid or Assistance by the United Nations**

The United Nations might also have incurred international responsibility if it aided or assisted the occupying powers in the commission of an internationally wrongful act by the latter, if it did so with the knowledge of the circumstances of the internationally wrongful act and the act would have been internationally wrongful if committed by the United Nations.<sup>258</sup> If, as suggested above, the occupying powers committed an internationally wrongful act by misappropriating Iraqi State funds (if not for any other reason than because they violated the express terms of resolution 1483),<sup>259</sup> it could be argued that the United Nations assisted in the commission of this act by continuously transferring Iraqi State funds to the DFI. The last payment to the CPA from the United Nations Iraq Account was made by the Secretary-General on 19 April 2004.<sup>260</sup> The IAMB first publicly intimated concerns over the control and use of Iraqi State assets by the CPA in its Press Release of 24 March 2003.<sup>261</sup> One would thus have to prove that the United Nations, either through the Security Council or the Secretary-General, had knowledge of the misappropriation of Iraqi State funds. There is no doubt that such conduct by organs of the United Nations itself would have constituted an internationally wrongful act of the organization.

## **V. Conclusion**

The international responsibility for the CPA's acts in Iraq is an example not just of a plurality of responsible States but also a plurality of responsible international actors and, indeed, a plurality of responsibility.

The CPA was a US State organ which was also acting as an organ of the United Kingdom. The United States was thus in fact acting as an agent of the United Kingdom in Iraq. As a common organ of the two occupying powers, the CPA's conduct is attributable to both of them. If that conduct constituted a breach of their international obligations, both would concurrently have committed separate, although

<sup>258</sup> See Art. 12 of the Draft Articles on the Responsibility of International Organizations proposed by the Special Rapporteur, Mr Giorgio Gaja, Report of the International Law Commission, GAOR, 60<sup>th</sup> Session, Supplement No. 10 (A/60/10), 2005, p. 97.

<sup>259</sup> See sec. III.1.c.

<sup>260</sup> Transfers of US\$1 billion each were made on 28 May, 31 October and 18 November 2003 from the United Nations Iraq escrow account. Another US\$2.6 billion was transferred on 31 December 2003, a further US\$2 billion on 31 March and US\$0.5 billion on 19 April 2004.

<sup>261</sup> See IAMB Press Release, 24 March 2004, noting that 'the IAMB had sought clarification on a number of issues of concern to the IAMB', including the absence of metering for crude oil extraction and sales and the use of non-competitive bidding procedures for some contracts funded from the DFI (<http://www.iamb.info/pr/pr032404.htm>).



identical, internationally wrongful acts. The case of the two occupying powers is one of separate, not joint or joint and several, responsibility. An injured State can invoke responsibility and bring claims against each occupying power independently. Each occupying power is under an obligation to make full reparation for the injury caused by the CPA. A right of indemnification may be established on the basis of the law of agency; there is no need to identify the situation of the occupying powers in Iraq with joint and several responsibility.

The coalition partners are not responsible for the internationally wrongful acts of the CPA. They may, however, be held responsible for aiding or assisting the occupying powers in their commission of an internationally wrongful act by seconding personnel to the CPA. The extent of reparation due from the coalition partners should be related to the level of involvement of their seconded officials in the commission of the internationally wrongful act by the occupying powers. Claims against the coalition partners require the prior determination of the commission of an internationally wrongful act by the occupying powers and may thus be barred by the *Monetary Gold* principle.

The United Nations may have incurred responsibility in connection with the CPA's mismanagement of the Development Fund for Iraq by making available to the occupying powers Iraqi State funds not otherwise at their disposal. Turning over Iraqi State funds to the CPA, and delegating Chapter VII powers to the United States and the United Kingdom without exercising effective authority and control to ensure that the funds were used in a transparent manner and only for purposes benefiting the people of Iraq, may fulfil the requirements of the United Nations committing an internationally wrongful act and, at the same time, aiding or assisting in the commission of an internationally wrongful act by the occupying powers. No rules dealing with such a situation exist in the ILC Articles on State Responsibility (or the draft articles on the Responsibility of International Organizations).<sup>262</sup> The Articles deal with a plurality of responsible and injured States,<sup>263</sup> but not with a plurality of responsibility, meaning that the same conduct fulfils the requirements of committing an internationally wrongful act and, at the same time, aiding or assisting another in the commission of its internationally wrongful act. The situation is reminiscent of the 'ideal concurrence of offences' principle in (international) criminal law which refers to the situation whereby a single act or factual situation violates more than one criminalization or, probably more pertinent here, the principle of 'concurrent liability' in tort and contract. The injured State may choose to bring a claim for either or both internationally wrongful acts. However, the quantum of compensation is limited to the actual damage suffered and does not increase because there are two causes of action.<sup>264</sup> As the assisting actor usually (but not necessarily)<sup>265</sup> will play merely a supporting role and, consequently, will not be under an obligation to make full reparation, the injured State is most likely to focus on the commission of the internationally wrongful act by that actor.

The occupying powers and the United Nations may concurrently be held responsible for their own internationally wrongful acts. The United Nations may thus

---

<sup>262</sup> Art. 19 ILC Articles on State Responsibility leaves open the responsibility of the assisting State being held responsible on any other basis.

<sup>263</sup> See Arts. 46, 47 ILC Articles on State Responsibility.

<sup>264</sup> Compare Art. 47, para. 2 (a), ILC Articles on State Responsibility.

<sup>265</sup> It is suggested that where the aid or assistance given is a *sine qua non* for the commission of the internationally wrongful act by another actor, the aiding actor may share equal responsibility with acting actor.

be responsible for making Iraqi State funds available to the occupying powers, even if these funds were mismanaged by the occupying powers on their own account. Where the internationally wrongful act of the United Nations consists of the delegation of power, and the occupying powers commit their internationally wrongful acts under that delegation, the United Nations' responsibility is not only 'subsidiary' or 'secondary' in the sense that it is only responsible in the event that the occupying powers as primary wrongdoers fail to make full reparation.<sup>266</sup> On the contrary, in accordance with the principle of separate responsibility, both the United Nations and the occupying powers are under an obligation to make full reparation. The principle against double recovery, however, also applies in the case of a plurality of responsible actors consisting of States and international organizations. The United Nations may have recourse for indemnity against the occupying powers, on the basis of the agency relationship between the organization and the occupying powers which was established by the delegation of Chapter VII powers.<sup>267</sup>

---

<sup>266</sup> But see International Law Association, n. 204 above, p. 204 ('secondary responsibility of the IO for any illegal act committed under the delegation or authorization').

<sup>267</sup> Cf. Brownlie, n. 168 above, p. 659.