# THE RIGHTS AND RESPONSIBILITIES OF OCCUPYING POWERS

## Second Statement by Sir Michael Wood

1. At the hearing on 26 January 2010, the Chairman of the Inquiry suggested that I might prepare a note about the rights and responsibilities of Occupying Powers, and United Nations Security Council resolution 1483(2003) of 22 May 2003. There was no time to go into these issues at the hearing itself[1].

2. Since that request, Lord Goldsmith has given oral evidence touching on the law in this area[2]. I agree with what he said on the substance of the law in this field.

3. The law of occupation (often known as 'belligerent occupation') is detailed: see, for example, Chapter 11 of the *Manual of the Law of Armed Conflict* published by the UK Ministry of Defence in 2004. In the case of the occupation of Iraq, the law of occupation was supplemented by resolutions of the United Nations Security Council.

4. So far as I am aware, prior to 2003, the most recent occasions on which the United Kingdom had been an Occupying Power (at least fro any length of time) arose out of the Second World War. This was the case, in particular, between 18 September 1944, when Allied troops first occupied German territory, and 5 June 1945, when the Four Powers jointly assumed 'supreme authority with respect to Germany'. The territory of the German *Reich* came progressively under belligerent occupation as the Allied forces advanced in 1944-1945[3].

5. In legal terms, it would not have been possible in the case of Iraq to follow the precedent of the June 1945 Four-Power assumption of

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[1] Transcript of evidence, 26 January 2010, morning, p. 68, lines 12-13.
[2] Transcript of evidence, 27 January 2010, afternoon, p. 225, line 9 - p. 230, line 23.
[3] See Bathurst and Simpson, *Germany and the North Atlantic Community*, pp. 3-17. The United Kingdom was not an Occupying Power in either Kosovo (from 1999 on) or Afghanistan (from 2001 on). In these cases, British forces were present in the territory of a foreign State pursuant to a United Nations Security Council mandate.

'supreme authority' (even if it had been politically desirable). That had taken place in a very different legal context. It predated the entry into force of the Charter of the United Nations on 24 October 1945. By virtue of the 'enemy States clauses'[4], the Charter did not affect the position of the Four Powers in Germany or in other enemy States.

**Occupation law and SCR 1843: basic principles**

6. I described briefly the basic principles of occupation law and the effect of SCR 1483 in my Statement of 15 January 2010[5]. For convenience, I reproduce this (without change) at paragraphs 7 to 11 below.

7. From the commencement of the occupation until the adoption of SCR 1483 on 22 May 2003, the UK and USA had the duties and responsibilities of belligerent occupants (Occupying Powers). Thereafter they also had additional authorities granted by the Security Council.

8. As Occupying Powers, the UK and USA were bound by the rules of international law on belligerent occupation, which are set out in the 1907 Hague Regulations (articles 42 to 56) and the Fourth Geneva Convention of 1949 (articles 27 to 34 and 47 to 78) (GCIV) [6].

9. The rules are complex, but the following indicates in general terms the limitations on the authority of an Occupying Power:

    - Article 43 of the Hague Regulations provides that the Occupying Power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety ['*l'ordre et la vie publics*'], while respecting, unless absolutely prevented, the laws in force in the country'. While some changes to the legislative and administrative structure may be

[4] UN Charter, Article 53 (in part), and Article 107.
[5] At paragraphs 25 to 29.
[6] See, inter alia, the Manual of the Law of Armed Conflict, published by the UK Ministry of Defence in 2004. A draft of the Manual was available within Whitehall in 2003.

permissible if they are necessary for public order and safety, more wide-reaching reforms of governmental and administrative structures are not lawful. That includes the imposition of major economic reforms.

- GCIV prohibits, subject to limited exceptions, any alteration in the status of public officials.

- GCIV requires that the penal laws of the occupied territory must remain in force except where they constitute a threat to security or an obstacle to the application of GCIV. In addition, again with limited exceptions, the courts in the occupied territory must be allowed to continue to operate.

10. There is a close relationship between SCR 1483 and the law of occupation. In their joint letter of 8 May 2003 to the President of the Security Council[7], the USA and UK said that they "will strictly abide by their obligations under international law". The Security Council noted this letter in SCR 1483, and recognised "the specific authorities, responsibilities, and obligations under applicable international law" of the USA and the UK "as occupying powers under unified command (the "Authority")".

11. SCR 1483 conferred a clear mandate on the Coalition working with the Special Representative of the Secretary-General (SRSG) to facilitate a process leading to the establishment by the people of Iraq, first, of an Iraqi interim administration and, subsequently, of an internationally recognised representative government. It clarified the scope of activity of the Occupying Powers and authorized them to undertake actions for the reform and reconstruction of Iraq going beyond what was permitted under the Hague Regulations and GCIV. It endorsed the view that the activities mentioned in the letter of 8 May 2003 might lawfully be carried out under the law of occupation. Subsequent SCRs added to these authorities. In some cases, these actions were to be carried out in coordination with the SRSG or in consultation with the interim Iraqi administration (IIA).

[7] UN document S/2003/538.

**The process of giving legal advice in this area**

12. As I said at the hearing on 26 January 2010, the close cooperation between Ministry of Defence lawyers, FCO lawyers and the Attorney General worked well in relation to this matter[8].

13. Whether a state is an Occupying Power is essentially a question of fact. Territory is considered occupied when it is actually placed under the authority of the hostile army[9]. The legality of the original use of force has no bearing on the application of the law of occupation.

14. In exercise of its powers under Chapter VII of the Charter of the United Nations, the Security Council may confer greater rights and responsibilities upon Occupying Powers than they have under general international law. The Security Council may allow, or even require, the Occupying Powers to act in a manner that may, in the absence of an SCR, be contrary to the Hague Regulations and GCIV.

15. In the case of Iraq, the occupation was established as Coalition forces established control over Iraqi territory, and lasted from shortly after the military intervention until 28 June 2004. From 22 May 2003, the authorities contained in SCR 1483 were added to those under the law of occupation (see paragraphs 10 and 11 above[10]).

16. The United Kingdom and the United States were regarded as the Occupying Powers, while other countries (e.g., Norway) which provided troops after the military action were not regarded as Occupying Powers[11].

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[8] Transcript of evidence, 26 January 2010, morning, p. 68, lines 16-24
[9] Hague Regulations, article 42.
[10] See also Second Report from the Foreign Affairs Committee, Response of the Secretary of State for Foreign and Commonwealth Affairs, Session 2003-2004, Cm 6162, p. 8 (recommendation 19).
[11] See the thirteenth and fourteenth preambular paragraphs of SCR 1483.

17. Within the FCO, legal advice on the rights and responsibilities of Occupying Powers, and on SCR 1483 and subsequent SCRs, was fully integrated into the development of policy for the post-conflict phase. A senior FCO lawyer set out in writing at the end of January 2003 the limited authorities of an Occupying Power, and explained the need for an SCR if the policy was to go beyond these limits. By late March, there was a team of three or four FCO lawyers working on different aspects of the post-conflict situation. A lawyer would regularly attend the daily meetings of the FCO emergency unit. The lawyers were constantly giving advice orally as well as in writing. The lawyers concerned kept me fully informed of developments day-by-day, and often discussed matters with me in advance of advising.

18. In addition, in the early months of the occupation there was useful coordination with the American and Australian lawyers, in Washington and Canberra respectively, through perhaps ten or so tripartite video conferences.

19. In March 2003, the Attorney General was formally consulted on the basic principles of the law of occupation, and thereafter there was frequent correspondence between the FCO (and sometimes other government departments, such as HM Treasury) and the Legal Secretariat to the Law Officers, with the Attorney advising on various aspects of the occupation.

20. Among the legal issues that arose were the limits on the powers of an Occupying Power to change the administrative structures and the laws of the occupied territory; the interpretation of SCR 1483 and the relationship between it and the law of occupation; the question of issuing new currency; a draft Coalition Provisional Authority (CPA) law on foreign investment; and a draft CPA law on Iraqi Ownership Transformation (privatization). I have summarised the basic approach taken in the legal advice at paragraphs 7 to 11 above.

Michael Wood

28 January 2010